

**An Essay on the Role of Government for ODR:  
Theoretical Considerations about the Future of ODR**

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The common view about the Internet is that we must keep government out of it, that government would kill the Internet through regulation. There is a strong belief that the Internet could do without government, that self-regulation by private players could do without any form of state regulation. This is a global view about the Internet. It has a tendency to cover all activities that take place on the Internet. Because of the compression of time and space through technology, traditional regulatory models based on state sovereignty are deemed unsuitable and are rejected. Just because an activity takes place on the Internet—so the thinking goes—it must be left to self-regulation and government must be left out, government intervention would do no good to this activity.

Online dispute resolution (ODR) is an activity that takes place on the Internet and, consistently, this attitude towards government has a tendency to cover ODR as well. Most of the time, this view is implicit or even unconscious. This view about ODR is fundamentally consistent with the background of the ODR movement: ODR has grown out of two main social fields, the Internet and alternative dispute resolution (ADR).<sup>1</sup> Both fields share one thing: their resistance to government.

My aim in this paper is to challenge this view about ODR. My belief is that there are things about ODR that only government can do, or at least that government can do much better. Some of these things that only government can do well may be keys to a real takeoff of ODR, at least from a theoretical point of view. I know that most things I will discuss are essentially theoretical considerations and that their implementation may be quite difficult. But global restructuring—and I believe ODR needs global restructuring to take off on a large scale—starts with theories.

## I. BRINGING PARTIES TO ODR

### ***Making ODR mandatory***

Even if parties are aware of ODR and are interested to use it, the business will often be reluctant to participate. Many ODR providers declare that the lack of claimant is a problem, but that the greater problem is that respondents

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<sup>1</sup> See E. Katsh and J. Rifkin, *Online Dispute Resolution. Resolving Conflicts in Cyberspace* (Jossey-Bass, San Francisco, 2001), p. 19 ('ODR is a response to the dispute and other activities that are appearing online, and it is also a user of resources becoming available in cyberspace. Its nature, therefore will reflect various qualities and features of the online environment. ODR is not totally new in a second way. ODR has roots in the ADR movement that has been growing for the last 25 years. ODR has qualities acquired from the online environment, but it also has traits acquired from ADR'). See also C. Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass, San Francisco, 2002), p. 13 ('ODR grows directly out of the history of offline ADR . . . In its earliest incarnations, ODR procedures were simply unchanged ADR procedures conducted online').

don't want to be brought to ODR, they often don't even reply. There are many reasons that allow businesses to ignore online complaints, and most have to do with the lack of a clearly established customer community that could collectively react to a shameful business practice such as ignoring a complaint (such collectivity could oblige traders to participate in a dispute resolution process by the recourse to social norms or market forces).<sup>2</sup> But that is difficult to change. Online communities are slowly emerging, but it will take time and it is not certain that they will one day reach a sufficient cohesion to be a collective threat to businesses.

Then, how do you get respondents to participate? Trustmarks are a fine idea. If the respondent doesn't participate, she is threatened by a removal of the trustmark, in the hope that absence of trustmark may reduce confidence in the web trader. There are currently too many trustmarks and public awareness of them is too low, but that will change and one day they will be a powerful economic means of control.<sup>3</sup> But there could be an even more effective solution. To make participation in an ODR process legally mandatory.

You can show people that ODR is a much better dispute resolution process than litigating in a non-cyber court. You can get government to sponsor research to show the world that ODR is trustworthy, useful, efficient and that many people in many situations would be better off using ODR instead of litigating in a non-cyber court. You can do that and hope that ODR agreements become standard and are inserted in a large number of contracts. That is what most people recommend: get government to help establish a widely deployed consent-based jurisdiction for ODR (i.e. based on a dispute resolution agreement). But when this fails, one could think of a complementary solution: making ODR mandatory in some cases where an ODR agreement cannot be obtained. Just as mediation (or call it conciliation) has been made mandatory in divorce cases in many courts, one could think of a similar solution for ODR. Of course, you can hardly compel parties to submit to a private dispute resolution process. In principle, you need a dispute resolution agreement for that. The state, however, compels parties to submit to the national judicial system, i.e. to courts. Now consider that courts do not only provide litigation, but also mediation and even non-binding arbitration—at least in the US.

This is of course only a complementary solution to convincing parties of the reasons to use ODR. It is better to get people to participate voluntarily rather than requiring them to participate. Most people would be quite reluctant to be compelled to participate in an ODR process. But why, actually? Probably because they don't trust it. People don't trust ODR in the same sense and for the

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<sup>2</sup> On 'collective punishment' by a seller's customers community and its absence in e-commerce, see R. Pichler, 'Trust and Reliance—Enforcement and Compliance: Enhancing Consumer Confidence in the Electronic Marketplace', Stanford Law School <[www.stanford.edu/library/special/rufus\\_thesis.pdf](http://www.stanford.edu/library/special/rufus_thesis.pdf)>, 2000, p. 115 ('When not only the defrauded individual consumer refrains from repeat transactions with a merchant, but all or at least a large group of consumers boycott that merchant, the threat of the sanction will be considerably more powerful. As a consequence of such a coordinated approach, a merchant who cheats one consumer risks to deprive itself from future revenues of potential dealings with all consumers. This mechanism is known as collective punishment').

<sup>3</sup> On trustmarks generally, see Joint Research Center of the European Commission, 'E-Commerce and Consumer Protection. A Survey of Codes of Practice and Certification Processes', report by Guido Nannariello, Institute for the Protection and Security of the Citizen, Cybersecurity Sector, EUR 19932 EN, 2001. On the value of trustmarks for web merchants, see B. Brun, 'Nature et impacts juridiques de la certification dans le commerce électronique sur Internet' (2001) 7 *Lex Electronica* <[www.lex-electronica.org/articles/v7-1/brun.htm](http://www.lex-electronica.org/articles/v7-1/brun.htm)>. On trustmarks as a means of control, see for instance T. Schultz, 'Online Arbitration: Binding or Non-Binding', [2002–November issue], *ADROnline Monthly* <[www.ombuds.org/center/adr2002-11-schultz.html](http://www.ombuds.org/center/adr2002-11-schultz.html)>.

same reasons than they don't trust e-commerce in general. It's not so much that people are afraid of one particular risk (security of their personal information, for instance) or that they don't see the advantages of e-commerce and ODR. It's rather that the absence of the usual physical environment is lacking, which takes away most social clues you usually use to assess the trustworthiness of a person or an activity. Cyberspace still gives this impression, to most people, that it is not controlled.<sup>4</sup> This brings me to my second point, which is about providing an architecture of trust for ODR.

The current talk in the field of ODR about the role of governments is mainly about regulation. And within the scope of regulation, it is mainly about defining principles that should govern ODR—it should be transparent, impartial, speedy, accessible, and fair. But defining principles is only one half of regulation. The other half is enforcement. We don't really need more principles governing ODR. We rather need more enforcement of the existing principles. Enforcing these principles entails control over ODR providers.

Control is a basic element of an architecture of trust.<sup>5</sup> If there is no control of the enforcement of principles governing ODR, then these principles can barely induce trust—trust requires a regulation 'with teeth'. Providing an architecture of trust for ODR thus entails to exert control over ODR providers. My claim is that governments are the most adapted actors in the field of ODR to exert such control.

There are at least three tools that allow exerting such control. Governments can accredit ODR providers that abide by recognized principles. In addition to that, governments can establish national clearinghouses to convey complaints to accredited providers. Finally, governments can also intervene after the dispute resolution process, by providing online appeals.

### **Accreditation**

People contemplating to institute an ODR process need information structures to make informed choices about whether to institute such process and which ODR provider they should choose. The lack of such information structures is deemed to be one of the largest current problems in the field of ODR.<sup>6</sup> This is, again, a problem of trust. If you have no information about a process that may affect your rights, you are unlikely to trust it.

This has two implications. First, if ODR is to take off on a large scale, someone will have to provide such an information structure. Second, to control such an information structure is to control a resource that is highly valuable to

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<sup>4</sup> On trust in e-commerce and other electronically mediated activities, see R. Pichler, 'Trust and Reliance—Enforcement and Compliance', n. 2 above and L. Thompson and J. Nadler, 'Negotiating via Information Technology: Theory and Application' (2002) 58 *Journal of Social Issues* 109, pp. 119–120 (using the concept of the 'sinister attribution bias' in electronically mediated communication: in the absence of physical clues about the people you are communicating with, you have a tendency to assume harmful intentions). The fact that the electronic medium poses problems of trust doesn't mean, however, that it also poses problems as such for dispute resolution: once you are used to communicating electronically, the electronic medium seems able to allow very rich communications, see L.J. Gibbons, R.M. Kennedy, and J.M. Gibbs, 'Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message' (2002) 32 *NML Rev* 27, pp. 48–51.

<sup>5</sup> See L. Lessig, *Code and other Laws of Cyberspace* (Basic Books, New York, 1999), p. 40.

<sup>6</sup> ABA Task Force on E-Commerce and ADR, *Addressing Disputes in Cyberspace*, Final Report and Recommendations <[www.law.washington.edu/ABA-eADR/documentation/2002.09.05\\_doc.html](http://www.law.washington.edu/ABA-eADR/documentation/2002.09.05_doc.html)>, p. 27 ('one of the largest problems is the absence of many structures pursuant to which consumers and businesspersons can obtain the information necessary to make informed choices about e-commerce and ODR').

ODR providers.<sup>7</sup> Information about ODR providers is likely to be a determinant factor as to whether an ODR provider gets cases or not. If this information can be controlled, then it's possible to control the amount of cases that a specific ODR provider will get.

An information structure about ODR providers can be a control lever of ODR providers. If you, ODR provider, don't do what I, controller of the information structure, say, then I no longer provide information about you and you will lose cases and thus lose money or reputation or whatever makes you want to have cases.

Using an information structure as a control lever requires people seeking information to trust the information structure. If you don't trust it, you won't rely on it to take decisions, and the information is thus no longer a valuable resource for the ODR provider. The provider of information that you are most likely to trust, especially if you are a consumer who knows nothing about dispute resolution (which is the case of most ODR claimants), is a government.

A typical form of such an information structure is an accreditation system—a system where providers of ODR are certified by an independent entity on the basis of predefined and public criteria. Such a criteria could for instance be the respect of principles governing ODR. The information about the certification can be displayed centrally, through a directory, or in a decentralized manner, through trustmarks.

An accreditation system induces trust because it provides an assessment of the providers that can be set back against a framework that the customer of ODR services can trust.

### **Clearing houses**

Government can go one step further in its control of ODR providers by establishing clearinghouses. Clearinghouses are basically a form of 'accreditation plus'.

A clearinghouse works as a go-between for claimants and providers of ODR. It can be a go-between in different ways and there are different forms of clearing houses. I consider one that does three things. It first provides information about accredited ODR providers. Then it helps the claimant choose its most appropriate provider. Finally, it provides filing forms and assistance to fill in the forms.<sup>8</sup>

The first step, accreditation, we have just seen. It provides a control lever because it is a means of resource control, the resource being information.

At the second step, which is about choosing an ODR provider, the clearinghouse provides advice concerning the suitability of an ODR provider for a specific dispute. This necessarily involves an additional assessment of the provider. Assessing a provider and recommending to have recourse to it or not is a form of control. It's a diffuse sort of control, but it is control.

At the third step, where the clearinghouse provides assistance in filing, it channels some of the ODR provider's work by defining the contents of the

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<sup>7</sup> On the control of a valuable resource as a source of private regulation, H.H. Perritt, 'Towards a Hybrid Regulatory Scheme for the Internet', [2001] U Chi Legal F 215, p. 237, and, more closely related to ODR, T. Schultz, 'Online dispute resolution (ODR): résolution des litiges et ius numericum', (2002) 48 *Revue Interdisciplinaire d'Études Juridiques* 153, p. 196.

<sup>8</sup> See for instance M. Philippe, 'Where is everyone going with online dispute resolution (ODR)?' [2002] *International Business Law Journal* 167, p. 184.

dispute and the claimant's findings. The clearinghouse's role is a light form of legal counsel, and a counsel's work is in part to control the work of the dispute resolver.

### ***Online appeals***

Accreditation and clearing houses are forms of control that intervene before the dispute resolution process. Parties are either simply not informed of the existence of an ODR provider, or they are advised (explicitly or implicitly) not to use one of them, or they are assisted in a way that should limit the room for maneuver of the dispute resolution provider.

But the control of ODR providers can also take place after the process, in appeal. But such appeal should take place online.

ODR decisions can often not be reviewed in court, for exactly the same reason that made them an unrealistic access to justice in the first place. They are too far away, they generate too much cost, and they are too slow. Offline appeals are often not feasible. But there should be appeals, even if it is only on limited grounds like for arbitration awards.

An online appeal could solve these problems. An appeal could be instituted in a cybercourt or in another ODR process that is tightly controlled by government. ODR should be given a second chance—it still is a cheap and fast way of resolving disputes. A second 'layer' of online proceedings would allow a review of the decision without losing the benefits of ODR.<sup>9</sup> It would provide an accessible opportunity to review erroneous decisions without the expenses and delays generated by offline proceedings.

The most radical form of an architecture of trust is for government to solve the disputes itself, through cybercourts. In the next part, I will show why cybercourts have a high trust potential, in addition to many other advantages.

## **II. PROVIDING ODR: CYBERCOURTS**

Cybercourts are simply court proceedings that use exclusively (or almost exclusively) electronic communication means. They should be, and often are, considered to be part of the ODR movement, for two reasons. First, because the ODR movement emerged because of the clash between the ubiquity of the Internet and the territoriality of traditional, offline dispute resolution mechanisms. The term ODR is thus opposed to offline dispute resolution mechanisms, not to courts. Online ADR is only one part of ODR. Second, courts do not only provide litigation. As I said before, there also is court-based mediation and non-binding arbitration.

Now if we accept that court can be part of the ODR movement if they provide dispute resolution online, we can think about the advantages that are specific to courts. Courts have features that private dispute resolution systems don't have. Many of these features induce trust in a way that private forms of ODR don't. My aim in the balance of this paper is to show how court-based ODR

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<sup>9</sup> Ibid, p. 188 ('Decisions of third parties [in non-binding arbitration] are of [a particular nature] and are not awards. They may be accepted or contested by consumers. What happens in this latter situation and what remedy can be offered in order not to lose the benefits of the out-of-court settlement?' The author then advocates an online appellate body); L.R. Helfer and G.B. Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy' (2001) 43 Wm and Mary L Rev 141, p. 251.

could avoid some of the problems that many current ODR systems are faced with.

### ***Independent source of funding***

ODR providers obviously have to secure some source of funding. But the funding model must not create or indicate vested interests, and at the same time the process must remain affordable to the parties.

There are basically three funding models for ODR providers: user fees (bilateral or unilateral), membership fees, and external sources of funding.<sup>10</sup>

In the bilateral user fees model, it is both parties that finance the ODR provider, usually on equal grounds. The trouble with this model is that for small and medium-sized disputes, the costs must often be set too high in comparison with the amounts at issue to provide sufficient revenue for the ODR provider.

In the unilateral user fees model and the membership fees model, it is only one party that finances the ODR provider, either by paying directly for the dispute resolution service or by paying for a membership that comprises ODR procedures. The trouble with this model is that it raises problems of independence. If one party pays exclusively or much more than the other party for a dispute resolution, a real or at least a perceived bias inevitably appears. It is a form of business affiliation that should be avoided, because it lessens trust, and maybe also quality of justice.<sup>11</sup>

The best model with regard to independence is the external funding model. In this model, it is an independent, third party source that finances the ODR provider. It typically is a research grant or a government fund from the national judicial system.

Research grants are by definition limited in time and can therefore not be used as a lasting solution. The only third-party business model for small and medium-sized disputes that presents a lasting solution is thus a fund of the judicial system.

The most obvious way to use such a judicial fund is to extend the services offered by courts. A cybercourt presents a perfect funding model with regard to both independence and financial viability. The judicial system could of course also finance a private dispute resolution provider, but it is doubtful

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<sup>10</sup> SmartSettle has plans to implement two other forms of user fees: based on neutral site access or on value delivered rather than on size of settlement. For a more detailed and complete description of funding models, see M. Conley Tyler and D. Bretherton, 'Research into Online Alternative Dispute Resolution: Exploration Report Prepared for the Department of Justice Victoria', International Conflict Resolution Centre, University of Melbourne <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)>, 21 March 2003, pp. 25–26 ('Online ADR sites make use of a number of funding mechanisms including: grant funding; government funding; user fees for one or both parties; membership fees; advertising revenue; subsidy from other services. User fees can take a number of forms including: a filing fee; an hourly rate for mediators', arbitrators' and evaluators' time; an administration fee or online "room" rental; a standard service fee, usually for a set number of hours; a percentage of settlement reached; a per round bidding fee (automated negotiation only)').

<sup>11</sup> For examples of business affiliations that may raise concerns, see L.M. Ponte, 'Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?' (2001) 3 Tul J Tech & Intell Prop 55, p. 67 ('Recently, Insurance Services Office, Inc., which provided consulting and technical services to insurance brokers and companies, purchased a sixteen percent or \$ 4 million share of the NAM Corporation, which operates clickNsettle.com and provides mediation and arbitration services. Clearly, this purchase may raise concerns about the objectivity and impartiality of NAM Corporation in handling insurance disputes. Also, the Robert Plan Corporation, an auto insurance service underwriter, selected Cybersettle.com as its exclusive ODR provider and expects to submit at least 15,000 claims through Cybersettle.com in the next twelve months').

whether a government could easily be convinced to outsource justice. Usually, the judicial system and private dispute resolution providers are rather in competition.

***Judging as a public service, rationality in dispute resolution and symbolic capital***

Courts are a public service. Private ADR is not. This has a consequence on how their rationality in dispute resolution is perceived by potential parties and the perception of this rationality has a consequence on trust in dispute resolvers. People often attribute a different rationality to judges and private dispute resolution panels.

As courts are a public service, judges have a democratic accountability. They represent the State as their judiciary power and are therefore accountable to the people. Publicity and reasons for judgment are the primary mechanisms by which they account to the parties and to the public for the decisions they render. The rationality that is attributed to judges is then engaging in and providing a public service. In this rationality, there is no obvious a priori reason for partiality. In addition, when you know that a judgment is likely to be scrutinized and discussed by a large number of persons because it is public, then you believe that the decision-maker will be more careful than when you know that nobody save the parties will see. This democratic accountability and the publicity it implies induce trust.

Private dispute resolution is often seen as a business, both by those providing it and by those receiving it.<sup>12</sup> Private dispute resolvers often need the fees of dispute resolution services for a livelihood and to get these fees they must be appointed. They become stakeholders of the dispute resolution process. You would expect, then, that private dispute resolvers have an economic rationality in dispute resolution, that they do what is necessary to be appointed again and thus to secure income. A behavior that would be perfectly rational from an economic point of view would then be to favor those who are likely to appoint the dispute resolver, that is the repeat players. This is a reason for partiality. That does not induce trust.

Judges often appear more impartial, at least to people who are not used to dispute resolution, for instance consumers—and consumers are the quantitatively most important claimants. That induces trust.

In addition, over time judges have acquired a high overall social esteem, a legitimacy that makes them credible dispute resolution providers. The public judicial system is not more ancient than private dispute resolution,<sup>13</sup> but judges—and not private dispute resolvers—have acquired a particular position in society, based on an institutionalized recognition on standing out, on distinction from others. They form an institution that has a certain reputation, a prestige in the sense that judges are conferred status and respect in the context of dispute

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<sup>12</sup> Report of Special Committee on Professionalism of National Academy of Arbitrators (1987) Daily Lab Rep (BNA) 106, pp. E1, E4 ('There are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the profession . . . We recognize that arbitrators are no less ambitious than other professionals; we recognize that many of us are dependent on arbitration fees for a livelihood. But self-serving instincts must always be subordinated to the need to uphold the integrity and honor of the profession'), quoted by A.S. Rau, 'Integrity of Private Judging' (1999) 14 *Arbitration International* 115.

<sup>13</sup> See for instance, on arbitration, T. Clay, *L'arbitre* (Dalloz, Paris, 2001), pp. 1–10.

resolution. Judges, in other words, have a very high symbolic capital in the field of dispute resolution: they are very much trusted to solve a dispute.<sup>14</sup>

Judges are 'notables of law' as only the grand arbitrators and mediators are. But these grand arbitrators and mediators are not those who will solve small and medium-sized disputes—which are mainly those that are submitted to ODR.

It is true that judges and cybercourts may have less expertise in the resolution of online disputes, because they handle many different types of disputes and because courts can not evolve as quickly as private dispute resolution can. But then this is simply a tradeoff between impartiality and expertise. And maybe ODR needs impartiality (or at least how impartiality is perceived) more than expertise, because it induces more trust and because most disputes that are currently handled by (essentially C2C and B2C e-commerce transactions) are not very complex anyway—non- or late delivery; defects; price increase; supplementary charges, for instance are legally very simple matters.

### ***Enforceability of negotiation and mediation outcomes***

Negotiation and mediation agreements, like contracts and court judgments, are not always complied with. When that happens the question arises as to what the parties can do to have someone coerce the opposing parties to comply with the agreement. Enforceability of dispute resolution agreements may be critical to obtaining participation in the process and an agreement. The parties often want to know that the dispute resolution process is capable of producing an outcome that is final and effective.<sup>15</sup>

The normal way to enforce an agreement is to go to a court to obtain a judgment and a writ of execution—rights to judicial enforcement remedies require a judgment, because a negotiated or mediated settlement agreement is enforceable in the same manner as any other contract.<sup>16</sup>

The trouble with physically attending court to obtain a judgment is obviously that you lose the main advantage of ODR, which is to avoid problems of distance by communicating online.

Cybercourts can have two roles here. They can facilitate the enforcement of agreements and they can provide agreements that are more easily enforceable.

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<sup>14</sup> P. Bourdieu, 'Epilogue: On the Possibility of a Field of World Sociology' in P. Bourdieu and J. Coleman (eds), *Social Theory for a Changing Society* (Westview Press, Boulder, Colo., 1991), p. 72: ('the weight of different agents depends on their symbolic capital, i.e. on the *recognition*, institutionalized or not, that they receive from a group'). The concept has been used in the famous study of international commercial arbitration by Dezalay and Garth, where they showed how the social recognition of an arbitrator (i.e. his or her symbolic capital) is one of the crucial factors for his or her being selected as an arbitrator. In other words, they showed how symbolic capital is a condition for the parties to consent to have their dispute handled by a given person or institution. See Y. Dezalay and B.G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, Chicago and London, 1996).

<sup>15</sup> See A.S. Rau, E.F. Sherman and S.R. Pepper, *Mediation and Other Non-Binding ADR Processes* (2<sup>nd</sup> edn, Foundation Press, New York, 2002), pp. 188–189 (reviewing arguments for and against focusing on the enforceability of mediation outcomes. They provide, in sum, that in labor, commercial, and public-law disputes, focusing on the enforceability of mediation outcomes is beneficial and even important, while it is rather detrimental in ongoing relationships, as in a family or in a church where failure of compliance calls for a return to mediation rather than court action. ODR disputes are rather a category of the first type, where ongoing relationships are the odd case).

<sup>16</sup> *Ibid.*, p. 193 for US law. For EU law, see the European Court of Justice case Solo Kleinmotoren GmbH v. Emilio Boch (C-414/92, 2 June 1994).

Facilitating the enforcement can be done by providing online court proceedings that produce the required judgment—by doing this you don't lose the advantage of the ubiquity of online services. In other words government would provide for cybercourts.

Providing agreements that are more easily enforceable can be done, at least in Europe, by providing court-based mediation. Court-based mediation produces judicial settlement agreements, and such agreements are more easily enforceable than extra-judicial agreements. Most European countries and many states in the US consider judicial settlement agreements as 'consent judgments', which are themselves an enforceable instrument.<sup>17</sup> In Europe, judicial settlements can easily be recognized and enforced abroad, under Article 58 Brussels I Regulation and Article 51 Lugano Convention.<sup>18</sup> Actually, they are not enforceable as a normal judgment under these provisions,<sup>19</sup> but as an authentic instrument. But both enforcement procedures are very similar.

### ***Envisioning an online judicial system***

Sometimes parties start a dispute resolution process simply because they both believe they would be better off without a dispute rather than with a dispute. Some people resolve disputes as they would get their car fixed: the only thing that matters is to have it done quickly and cheaply. They simply want to minimize the loss caused by the dispute and go back to normal business. But to do that you need a highly unemotional and rational approach, an approach that I don't think is common outside professional traders. When you are a normal customer and are delivered a product late, with a price increase and with a defect, and when you then email the company that sent you the product and they simply ignore you or tell you some nonsense as a reason for what happened, you have a high chance (and a good reason) to be infuriated. In such situation, you don't simply want the dispute to disappear, you also want someone to be blamed and shamed, be it only to reassure you that what *you* did was right. What you want, in such situation, is an important part of what we call justice.<sup>20</sup>

An important reason why we need ODR is then that it constitutes an access to justice, sometimes the only access to justice that is reasonably available to the parties. From an economic point of view, having recourse to offline dispute resolution processes is often too expensive in comparison with the disputed amounts. ODR is also there, then, to provide an access to justice. Justice is not only about dispute resolution, it is also about being delivered a

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<sup>17</sup> See for instance the French supreme court decision of 12 June 1991 (Cassation civile, 2<sup>nd</sup> court) and comments Durieux in [1992] *Droits* 320. See also para. 601 A.15(9) Iowa Code Ann. 'agreements reached in civil rights mediation shall be issued as consent judgments which are enforceable by contempt'.

<sup>18</sup> Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation). The Brussels I Regulation applies between the Member States of the European Union with the exception of Denmark. The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988 applies between the Member States of the European Union on the one hand and Iceland, Norway, Poland and Switzerland on the other hand. Both provide the same provision, which states that 'a settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments'.

<sup>19</sup> According to the European Court of Justice in *Solo Kleinmotoren*, a judgment can only 'emanate from a judicial body of a contracting State, *deciding on its own authority*'.

<sup>20</sup> Determining who was right and wrong in a dispute is a way to fully reintegrate both parties in society, to rebuild a social link between the parties and society, see for instance A. Garapon, *Bien juger : essai sur le rituel judiciaire* (O. Jacob, Paris, 1997).

statement about whether you were right or wrong to do what you did, a statement that declares who is right and who is wrong.

ODR may be more than just a tool that solves disputes. It may also be a way to provide justice. An informal, fast, 24-hours on mechanism is a fantastical business tool to do away with disputes. Think of blind bidding, for instance. It's wonderfully cheap, it can be very fast, it's easy to understand, and it has a good 50 per cent settlement rate.<sup>21</sup> It's a great tool. But sometimes parties want more than that. They want someone who says who is the bad guy and who is the good guy. Consumers often want someone to say that the business that swindled them was wrong. They want someone to cover the business with social opprobrium. And they want someone with authority to do that.

An access to justice implies an access to some sort of judicial system. And a judicial system must have the power to cover someone with social opprobrium to fulfill its function entirely.

A mediator doesn't have this power. An arbitrator is a little better placed for that, but not quite good enough. The only dispute resolver that really has this power is a judge, because she represents the state, which itself represents civil society. Covering someone with social opprobrium is only possible for someone who can speak for civil society. And that judges can best.

You may think that offline this is not a problem, that many people prefer mediation and arbitration to the judicial system, and therefore why worry about all that online. But offline is different. Offline people have an access to some judicial system. They have a complete access to justice even if they don't use it. They know it's there. But not online. If there's no access to a cybercourt, there often is no reasonable access to any judicial system. It's a question of availability, of having the choice to do it. Even if only a very small number of people and cases really need that, a decision in such a case may have an influence on all other people and cases.

## CONCLUSION

Governments have an important role to play in ODR. They can raise awareness about it and induce trust in it. They can provide an architecture of trust that the private sector can't provide through self-regulation.

My point in this paper was not to diminish in any way the vital importance of private ODR. We could obviously not do without private initiatives in the field of ODR. SquareTrade, for instance, provides a fantastical tool that has solved so many disputes—it has a quarter of a million cases—that it has become a central landmark in the field of ODR.

My point was to think about what could be done by governments that could not be done by the private sector. Government and private actors do not have the same functions and capabilities. Government can do things that private actors can't do, and vice versa. They are complementary.

Just as self-regulation needs state regulation to survive because it needs contract law, just as the Internet needs government to remain an open architecture because only governments can keep monopolies out and non-commercial values in, ODR needs government to become a widely used system because it needs an architecture of trust that has elements that only government can really provide.

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<sup>21</sup> On settlement rates of ODR processes, see M. Conley Tyler and D. Bretherton, 'Research into Online Alternative Dispute Resolution: Exploration Report', n. 10 above, p. 23.