

## **Emergence of distinctive patterns in the mediation of cyberborne disputes: changes, challenges and chances.**

An analysis of the effectiveness of Online Dispute Resolution and its challenges and opportunities for the future positioning of Conflict Management Systems.

Thesis submitted to "Het Amsterdams ADR Instituut", University of Amsterdam, in partial fulfillment of the degree of Master Advanced Mediation Practice.

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*"Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works.*

*Anything that's invented between when you're 15 and 35 is new and exciting and revolutionary and you can probably get a career in it.*

*Anything invented after you're 35 is against the natural order of things."*

*Douglas Adams (2003), "The Salmon of Doubt".  
London: PAN, page 95*

## **Preface**

I am indebted to all the authors and experts who have given [academic] attention to Online Dispute Resolution (ODR) and whose work has been of indispensable value to make me more knowledgeable on the subject and as such greatly facilitated the compilation of this thesis.

I am particularly thankful to Colin Rule for his unswerving support and, most of all, for his commendable dedication to the further development of ODR as a field, and to Arno Lodder for being the “driving force” behind Online Dispute Resolution in the Netherlands.

Many other people made important contributions to this thesis. Martin Euwema brought depth of academic thought to my effort. My “intervision” team members Anja, Dick and Gerard all proved very helpful and supportive.

Special thanks to my brother and dad. My brother Gert-Jan for his courage and confidence to partner with me in the challenging new venture JURIPAX and for his indispensable advice on ICT-aspects. My dad for keeping me focused and for the fantastic and tedious job he did on editing the thesis and “upgrading” my (non-native) English.

Finally, a big hug to my husband and children Koen and Anne-Britt for “giving me a break” all the time whilst compiling this paper and allowing me to pursue my ODR-“hobby”.

May-Britt Kollenhof Bruning  
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## Table of Contents

<b>1. Abstract.....</b>	<b>6</b>
<b>2. Definitions and Methodology.....</b>	<b>7</b>
<b>3. The eBay experience.....</b>	<b>8</b>
3.1. The story of eBay.....	8
3.2. Self-regulation versus formal legislation.....	9
3.3. What is self-regulation in the context of eBay ?.....	10
3.3.1. eBay's community values and policies ["prescription"].....	10
3.3.2. eBay's Online Dispute Resolution System ["adjudication"].....	11
3.3.3. ebay's redress mechanisms ["enforcement"].....	14
A) Redress through the Reputation Management and Feedback System ..	14
B) Redress through law enforcement.....	16
C) Other venues for redress.....	16
3.4. How an eBay ODR procedure works.....	17
3.5. Preservation of Neutrality.....	20
<b>4. The current State of ODR.....</b>	<b>22</b>
4.1. The growth of the internet.....	22
4.2. History of ODR.....	23
4.3. Current State of ODR.....	24
4.4. Experience with ODR.....	24
4.5. Lack of (formal) regulation for ODR.....	26
<b>5. Technology as the fourth party.....</b>	<b>26</b>

5.1.	Technology underlying on-line communications.....	27
5.2.	Why would the technological medium be seen as the fourth party? .....	28
5.2.1.	“Technology-assisted mediation”; .....	28
5.2.2.	“Assisted negotiation” or “technology-assisted negotiation” .....	28
5.3.	Examples of ICT-Technology and -Applications .....	29
5.3.1.	Grievance and (legal) complaints handling.....	29
5.3.2.	Dispute handling (mediation).....	31
A)	Intake, direct negotiation and pre-mediation.....	31
B)	Starting the mediation .....	32
C)	Exploration .....	32
D)	Negotiation.....	32
E)	Settlement and closing.....	32
F)	Suitability for on- and off-line proceedings .....	33
5.4.	Conclusion.....	33
<b>6.</b>	<b>Assessment of Needs and Acceptance of ODR .....</b>	<b>34</b>
<b>7.</b>	<b>ODR proceedings and the role of the third party .....</b>	<b>39</b>
7.1.	Fairness and trustworthiness of the process .....	40
7.2.	Attentive reading and delayed response.....	41
7.3.	Establishing and maintaining an equal level playing field .....	42
7.4.	Re-assuring participants of the fairness and “neutrality” of the services ....	42
7.5.	Transparency .....	43
7.6.	Other challenges for on-line mediators.....	43
7.7.	Fragments of mediation communication.....	44

<b>8. The ODR provider as the fifth party</b> .....	<b>48</b>
<b>9. Conclusions and recommendations</b> .....	<b>50</b>
<b>10. References</b> .....	<b>53</b>
10.1. Literature used and cited.....	53
10.2. Additional websites and -services assessed .....	59
<b>11. Appendices</b> .....	<b>60</b>
11.1. Glossary of Terms.....	60
11.2. Screenshots of ODR platform.....	62

## 1. Abstract

After having served as an on-line neutral in hundreds of cyber-borne cases for eBay (world's largest on-line auctioneer), I gradually came to comprehend and appreciate the benefits and potential of Online Dispute Resolution<sup>1</sup> to the full.

With the increasing number of people using the Internet and the growing Internet trade it is likely that the amount of disputes that arise from these transactions will keep pace with these developments, probably even disproportionately so.

As e-commerce and ODR systems operate mainly virtually, an all-out effort will be made to explore the challenges that exist due to lack of face-to-face contact and present a survey of the current state of on-line alternative dispute resolution in e-commerce through an analysis of the conflict management system as applied by eBay. The eBay system, that is based on self-regulation with hardly or no intervention by the traditional legal system, will be analyzed and advantages and drawbacks will be highlighted.

In this thesis, it will be contended that self-regulation in cyberspace should be given preference over judicial intervention as long as it satisfies the demands of users and effectively bars fraud. At the same time, the challenges that self-regulated ODR mechanisms face in cyberspace will be addressed, especially those that aim at establishing and preserving trust through neutrality on the one hand, and so as to bar fraud on the other.

It is, moreover, asserted in this thesis that ODR should be defined as another appropriate instrument in the spectrum of Conflict Resolution instruments with its own features, dynamics and restrictions, without any intention, on the writer's part, to be in any way condescending about traditional face-to-face proceedings. There are a lot of methods to solve disputes out-of-court. As with all forms of Conflict Resolution tools, it is the specific circumstances and the needs at a specific moment in time that determine what should be the most effective dispute resolution instrument to be applied.

To support my argument, I will explore how on-line mediation processes compare to off-line proceedings and demonstrate how in specific circumstances, on-line proceed-

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<sup>1</sup> The term Online Dispute Resolution (acronym ODR) is used to denote ADR-procedures, assisted by Communication and Information Technology (hereafter referred to as CIT), in particular the Internet.

ings can be as effective as, if not more effective than, those in off-line settings. In this context, I will also address the role and responsibilities of the various parties in ODR.

Finally, it is beyond any doubt that ODR is still a novelty which has not managed to attract popular attention yet, particularly not in Europe. The information that is provided in this paper is meant to give the reader a better understanding of the emerging field of Online Dispute Resolution. An analysis will be made of the various forms of ODR, the experience that has been gained so far and how the application of ODR-technology in complaints handling procedures and on-line conflicts management systems can help to prevent conflicts and, should these be unavoidable, how to handle them effectively.

The thesis furthermore aims at promoting additional development and research in this dynamic area of ODR. To this end, I will address a number of topics, of a legal, financial and sociological nature, that create barriers for the future of ODR as a sector and that, therefore, need further systematic research.

## **2. Definitions and Methodology**

An outline of terminology used in this thesis is included in the glossary in Appendix 11.1.

This thesis was drafted using the following methodology:

- Comprehensive literature review of research on on-line ADR. The vast majority of resources that were reviewed was found in (scientific) publications, articles and reports all originating from the Internet. Three leading books on ODR written by Katsch and Rifkin (2001), Rule (2002) and Märker & Trènel (2003) as well as the library of ODR.info at <http://www.odr.info> (the primary source for news about the world of Online Dispute Resolution) also served as extremely useful sources of information;
- At the same time on-line ADR sites were searched and detailed information was collected;
- Review of Proceedings of Annual Forums on Online Dispute Resolution held in the years 2002-2006 and Review of Proceedings of international ODR-Workshops held in the years 2002-2005;
- Review of eBay's operations and an analysis of its present Conflict Management System. The eBay system was chosen as it is a representative example of an effective extra-judiciary mechanism that is based on autonomous growth with hardly or no involvement by government-agencies or the judiciary

system. At the same time it provided sufficient and quite convincing quantitative and qualitative results;

- Personal experience gathered as an on-line mediator and an analysis of 520 cases;
- Experience gained during the establishment and development of an ODR-based mediation-business;
- Contributions by prominent ODR researchers and experts.

### **3. The eBay experience**

The main aim of this chapter is to provide information on eBay's history and operations and explore eBay's Conflict Management System.

Firstly, it will be explained how eBay's community is primarily governed by its own "legal system" and how, within this self-regulated and self-imposed system, ODR can be effectively applied.

Secondly, an analysis will be given of the trust-building and ODR mechanisms that have been implemented by eBay to promote a "safe" market place and build consumer confidence. An example of an ODR procedure in a typical eBay dispute will be provided to illustrate how eBay's Conflict Management System works.

Finally, eBay's endeavors to maintain neutrality and bar fraud, this within the bounds of its economic possibilities and its legal concerns, will be addressed.

#### **3.1. The story of eBay**

eBay is an on-line auction site, located at <http://www.ebay.com>, and describes itself as "the world's largest personal on-line trading community that helps people trade practically anything on earth".

Founded in 1995 by Pierre Omidyar to sell, of all things, his partner's Pez candy dispensers, eBay generates most of its revenues through listing-fees and commissions paid by sellers and presently deals with an approximate one billion transactions (mainly through on-line auctions) per year. The number of eBay-users reached 200 million in August 2006. Apart from the eBay.com "flagship" in the USA, it has local sites for Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Korea, the Netherlands, New Zealand, Singapore, Spain, Sweden, Switzerland and the UK. It has a local presence in Latin America, Taiwan and in China ["Caslon Analytics note on eBay and Paypal", 2006].

Most eBay products are sold respectively bought by individuals or small businesses. A seller pays a listing fee to put an item up for an auction by listing a picture, description and opening bid in the appropriate eBay category. Interested buyers may find the item by using a search engine. A buyer who wishes to purchase an item enters her/his bid electronically on the eBay site. Each auction runs for a fixed time period, normally several days. At the conclusion of the auction, the highest bidder is awarded the right to purchase the item. The bidder and seller will then proceed, if needed, to an exchange of e-mail addresses and other relevant contact information and complete the transaction on their own without further assistance from eBay. The buyer settles with the seller, who is then charged a commission by eBay (Calkins, 2001).

In order to be able to buy or sell on eBay, a user must first register with eBay through a web-based process and provide some personal information. Newly-registered users choose a unique username and password.

### 3.2. Self-regulation versus formal legislation

E-commerce presents special challenges to safeguard trust and to bar fraud. Especially in the context of cyberspace, it is undeniable that transactions, whether personal or commercial, are affected by a mutual lack of trust.

For traditional transactions (i.e. for those outside the realm of cyberspace) the presence of the following points of reference is a pre-requisite to establish confidence between buyer and seller: (1) **tangible features**; (2) **social context & reputation** and (3) **predictable remedies** (Schultz, 2004, page 79).

This means that in the case of a “face-to-face” transaction, the product can, first of all, be seen and touched. In short, it can be thoroughly inspected (**“tangible features”**).

Secondly, people tend to make some sort of assessment of the risks involved in the transaction based on the reputation of the transaction partner and the social context in which the transaction takes place (**“social context & reputation”**).

Thirdly, the decision to close the transaction is made, if the required confidence is there. Hornle (2005) and Pichler (2000), quite convincingly, argue that this confidence is based on the expectation that the other side will fulfill his/her duty and obligations or will, at least, agree to having recourse to a third party that can offer a remedy when things go wrong (**“predictable remedies”**).

Cyber-communication does create challenges, in the form of specific problems, due to lack of these points of reference.

The communications of parties on-line may be easily misinterpreted and parties and products are not as easily visible and identifiable. More importantly, if on-line transactions go “off-course”, there is not [always] the option to take the issue to court.

E-commerce has been largely unregulated by formal laws. Parties involved in on-line disputes are often faced with the absence of clear legal standards and, in international transactions, with the uncertainty as to which jurisdiction applies. eBay has creatively resolved this dilemma by coming up with a self-regulatory model that includes on-line venues which offer remedies for transactions that go awry.

### **3.3. What is self-regulation in the context of eBay ?**

Thomas Schultz (2005), quite credibly, describes eBay’s “guarded wall” principle. He argues that there is such thing as “eBay law”, in the sense of a self-imposed, legal system specific to eBay, because eBay’s cyber community meets the necessary characteristics that embody eBay’s “jurisdiction” **to prescribe, adjudicate, and enforce:**

These three “mechanisms”, as institutionalized by eBay, will be analyzed in detail below:

- **Prescription**

eBay is primarily governed by a set of norms or rules specific to this community: the eBay community values and policies;

- **Adjudication**

The violation of these norms or rules may be submitted to Dispute Resolution Systems specific to this community: eBay’s Online Dispute Resolution mechanisms;

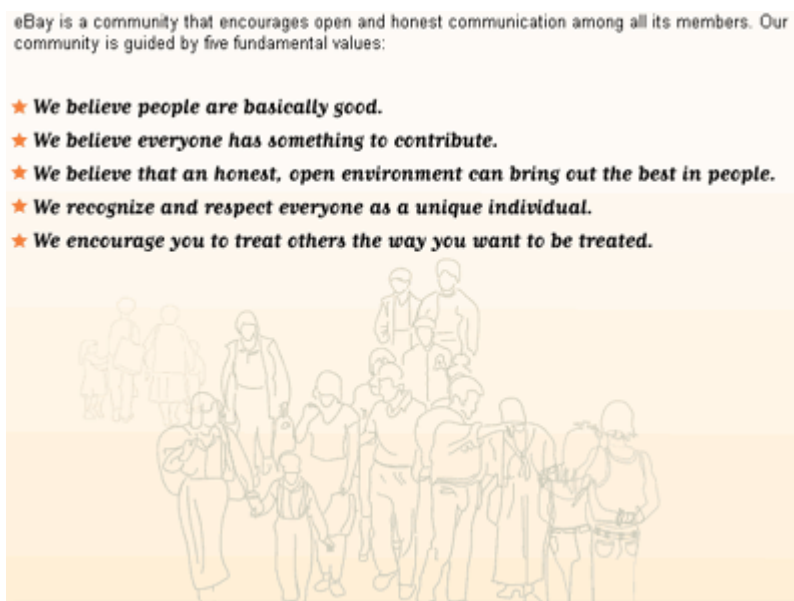
- **Enforcement**

The outcome of these Dispute Resolution Systems can be enforced by means specific to this community: such as eBay’s feedback system and own “law enforcement” mechanisms.

#### **3.3.1. eBay’s community values and policies (“prescription”)**

eBay’s communitarian norms and values represent “the social context”, referred to earlier as one of the points of reference, necessary to engender confidence.

The social context is best understood by eBay's statement of community values, to wit:



Source: <http://pages.ebay.com/community/people/values.html>

At <http://hub.ebay.com/community>, buyers and sellers can keep abreast of community-related issues such as rules, policies and recent news. Other characteristics that resemble social context in traditional communities are the discussion boards, the chat rooms, “the town hall meetings” (for those that cannot attend on-line, minutes are made available), on-line workshops and, finally, Associations of eBay sellers and buyers that share common interests. All these resources - obviously - operate on-line. Apart from that, eBay organizes “eBay Live!” gatherings for buyers, sellers and company executives to exchange views and engage in constructive dialogue about particular issues of interest or concern.

Knowledge of eBay's community rules and policies helps to understand how, from eBay's perspective, the following ODR-redress mechanisms provide major communitarian benefits.

### **3.3.2. eBay's Online Dispute Resolution System (“adjudication”)**

Evidenced by eBay's enormous growth figures over the past years, it may be assumed that the vast majority of transactions do not give rise to any dispute whatsoever.

Although eBay does not disclose specific totals concerning the amount of transactions that go “off-course”, there is some public information available on the strength of which some quantitative assumptions can be made.

According to Rule [2002, page 4] 1 to 3 percent of the transactions take place with some type of a “hitch”. eBay says that, yearly, “tens of millions” of cases go awry [Colin Rule - Director Online Dispute Resolution at eBay - during radio interview in Stanford Law School, 2006].

eBay’s community, evidently, faces a number of problems, inherent to commercial transactions and to the huge amount of transactions offered through eBay’s auctions. Considerable efforts are made by eBay to avoid problems up-front by means of a set of precautionary rules in the form of recommendations.

To mention a few:

Sellers, generally, should not dispatch merchandise before payment is received (in that case, limiting the “actual loss” to re-listing the item on eBay in case buyers do not pay).

Buyers are, amongst others, recommended to choose, in all cases, a secure method of payment.

The common-sense “golden tip” when it comes to protecting parties on eBay and other auctions, is without the shadow of a doubt: “just like in the stock market or at a gambling casino, one should not engage in a transaction for an amount that one cannot afford to lose” [Washington Post, 2006, page F1 and F2].

In spite of eBay’s exhortations to its clientele “to be careful” and “to behave”, it should not come as a surprise that many things go wrong in the process. Ranking highest on the list are:

- Goods that are damaged;
- Good that are not delivered;
- Unpaid items<sup>2</sup>;

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<sup>2</sup> In eBay communications, this phenomenon is paraphrased with the acronym “UPI” (Unpaid Item) which in actual fact does not denote the unpaid item as such but rather the winning bidder that failed to “foot the bill” after the he/she received the goods. The reason why eBay resorts to this misnomer (“UPI”) is apparent: it does not want to antagonize anyone on the market place with such terms as “defaulter” or “deadbeat” bidder, by which the “happy eBay community” might well be offended, the term “community” in itself already being somewhat suggestive in that eBay should like it to be associative with an inherently satisfied “family of eBayers” that all share that “do well, feel good” coveted feeling of belongingness.

- Products that are not according to specifications<sup>3</sup>;
- Cases that, besides other issues, involve (negative) feedback<sup>4</sup> that is perceived as unjust or unfair.

In all instances, whether goods are damaged, counterfeit, do not match what was advertised or are never paid or delivered, parties to the transaction have a serious disagreement that needs to be resolved.

A large proportion of the disagreements between parties to the eBay “market place” undergo some type of ODR.

An estimated 80 % (e.g. Schultz, 2003a, page 7; Rule, 2002, page 57) are being resolved in on-line direct negotiations - where parties elect to try to work things out amongst themselves - facilitated by eBay’s ICT-supported Direct Negotiation System. See chapter 5 for more information on possible ICT-technologies that are applied to facilitate this type of negotiation.

The remaining 20% undergo another form of ODR, such as mediation. It is estimated that more than two million eBay-borne conflicts have been handled through on-line mediation since the ODR-service was integrated into eBay in March 2000 (Rule, 2002, page 102).

According to SquareTrade (Abernethy, 2003), on-line mediation shows success rates of 80%. A 98% follow-through after agreement is reported and 80% of SquareTrade users indicate that they are satisfied with their experiences and would use the service again.

For disputes that do not lead to a resolution in direct negotiation or in mediation, parties may opt to be referred to (1) voluntary arbitration or (2) “independent feedback review” (at present in place for automotive transactions only), made available by one of eBay’s preferred third party ODR providers.

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<sup>3</sup> In eBay-parlance, the so-called “Significantly Different As Described” (acronym SNAD) articles which denote mismatches in varying degrees. It covers a large variety of situations where items delivered fall (far) short of buyers’ expectations, like when, to name only one, a Louis XV mantel clock is offered and an unsightly cuckoo-clock delivered.

<sup>4</sup> Feedback refers to observations, whether positive, negative or neutral, left by former trading partners, on the opposite party’s performance in a particular transaction, which are recorded for future reference. See section 3.3.3. for more information on feedback.

eBay recommends SquareTrade, Better Business Bureau and NetNeutral. SquareTrade (at <http://www.squaretrade.com>) provides the majority of ODR services to eBay buyers and sellers.

### **3.3.3. ebay's redress mechanisms ("enforcement")**

To create a trusted virtual market place for individuals and businesses, eBay established redress-systems that allow for predictable remedies to prevent on-line conflicts and resolve these, if found to be unavoidable.

The underlying rationale was aptly and concisely articulated by Rule (Lecture Stanford University, 2006), reason why he is being quoted verbatim on this:

"As an organization pioneering the creation of on-line marketplaces eBay has long acknowledged the need for effective on-line redress, and that is why eBay has invested heavily in ODR processes and partnerships. The work done by eBay in this area offers a blueprint for how other institutions, especially public institutions, can provide redress systems as they steadily move their operations on-line".

The most important mechanisms that were institutionalized are reviewed in detail below:

#### **A) Redress through the Reputation Management and Feedback System**

In a nutshell, the eBay Feedback System is made up of a database in which observations ("feedback ratings") by former trading partners, on the opposite party's performance, are recorded for future reference.

The eBay feedback-site at <http://pages.ebay.com/services/forum/feedback.html> elucidates the working in more detail; the relevant extract is reproduced here below:

"Every eBay member has a profile in the Feedback Forum. A profile has basic information about the member and a list of feedback left by their trading partners from previous transactions. Learning to trust a member has a lot to do with what their past customers or sellers have to say. At the conclusion of the transaction, only the buyer and seller can rate each other by leaving feedback. To avoid abuse, feedback can only relate to that specific transaction. Leaving honest comments about a particular eBay member gives other Community members a good idea of what to expect when dealing with that member, so they can better decide whether to transact with the person in the future. Once it is left, the feedback becomes a permanent part of the member's profile."

The vast majority of eBay cases being disputed and mediated involves (negative) feedback that is perceived as unjust or unfair. The parties on eBay appear to be motivated enough to uphold their good name and reputation in the social context of eBay's cyber-community. As such, parties seem willing to cooperate as long as the withdrawal of negative feedback, or changing a negative comment into a neutral or positive one, can be part of the overall agreement in mediation.

I venture to suggest that feedback is probably the most crucial trust component why parties are willing to engage in eBay-based transactions. It has attracted considerable theoretical attention as it demonstrates how reputation can be established in the on-line environment (see Calkins, 2001 as well as "Caslon Analytics note eBay and PayPal", 2006, page 3 for an overview of academic studies related to eBay's reputation system).

From a procedural point of view the feedback and management system is, neither a "formal" pre-dispute commitment<sup>5</sup> nor does it make eBay's "referral" to ODR mechanism enforceable or, as Hedeem (2005) very fittingly describes, as "coerceable in and into mediation". After all, within eBay, the other party's consent<sup>6</sup> is a pre-requisite to start any ODR procedure. In addition, the consent and commitment of the parties is required to come to an agreement, if any, and the neutral needs an explicit approval of the parties if he wants to make a non-binding suggestion for resolution.

Callies (2006, page 650 and 653) describes the function of, amongst others, the feedback system "as a *"socio-legal bond"*<sup>7</sup> for potential dispute parties to commit to the process, where the commitment is streamlined by the potential repercussions offered by the eBay feedback system".

Schultz (2005) made a similar assertion (earlier referred to in chapter 3.3), namely that the violation of norms or rules may be submitted to Dispute Resolution Systems and *that the outcomes can be enforced by means that are specific to the community, viz. feedback.*

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<sup>5</sup> This is referred to as "procedural consent" (Callies, 2006, page 650).

<sup>6</sup> This is referred to as "substantive consent" which relates to the substance and result of the procedure (Callies, 2006, page 650).

<sup>7</sup> In a broad sense this is referred to as a form of "societal consent" that relates to a social contract as part of a "private ordering" (Callies, 2006, page 650 and 653).

Rule (2002, page 105) argues that feedback is the “*number-one motivation* to participate in a dispute resolution process”.

The quantities of feedback cases being resolved through ODR clearly demonstrate that self-regulation and “self-enforced” redress through ODR mechanisms meet the needs of e-commerce users.

There is, obviously, also some criticism to the feedback system. Calkins (2001) says the feedback system weakened over the years. Aggressive sellers, for instance, can retaliate against buyers who file disputes, by leaving negative comments about buyers, which might make other sellers shun them.

The [commercial] benefits that eBay derives from the feedback system is that positive feedback is a form of publicity demonstrating that users successfully connect and transact on eBay, thus suggesting repeat transactions and success. Calkins argues that this is one of the reasons why eBay, for all practical purposes, has stayed out of conflicts arising out of these feedback transactions.

## **B) Redress through law enforcement**

eBay has a team of some 1000 “eBay law”-enforcement professionals worldwide who focus on protecting its “community” (Records eBay Community Town Hall Meeting, 2005, page 2). In addition, eBay encourages private investigation and “net-policing” to deal with reputation, fraud and consumer protection in general.

## **C) Other venues for redress**

Other resources that exist for consumers to reduce their chances to run into problems or to avoid being “scammed” or otherwise wronged:

The use of PayPal (at <http://www.paypal.com>) or another major credit card. PayPal is an eBay subsidiary that makes on-line bill paying more secure by acting as a “firewall” between buyers and seller.

(a) PayPal pays for an item on behalf of the buyer without divulging personal financial information to a merchant;

(b) The use of PayPal, generally, allows the issuing bank to investigate claims of wrongdoing. If parties report a problem to, for example, Visa, the company will do what is called a “chargeback”. This means it will remove the charge in question from the party’s credit card - and, in Visa’s case, from the debit card account - while it investigates the claim with PayPal;

[c] PayPal offers monetary reimbursement programs. Before a dispute can be elevated into a claim, parties have to make an all-out effort to work things out amicably amongst themselves and reimbursement is granted subject to certain conditions only.

### 3.4. How an eBay ODR procedure works

Following is an example of a typical eBay conflict with a breakdown of phases in eBay's ODR procedure. Its aim is to illustrate how the eBay ODR-mechanisms, as discussed earlier, work in practice.

**Case summary:** A buyer in Minneapolis purchases an old-timer automobile from a private seller in New York. Prior to purchase, the buyer opts not to have the car pre-inspected, as suggested explicitly by the seller. He settles the amount of US\$ 15000.- agreed upon and the car is delivered basis "free on site NY". A few months after the purchase, the buyer notices that the car has defects that he was not made aware of at the time of purchase, as these were not explicitly specified in the car's description at the auction. His perception is that the seller misrepresented the condition of the car. He appears to be extremely dissatisfied by the perceived lack of acknowledgment by the seller in relation to the damages he incurred. He decides to leave a negative feedback rating for the seller. The seller feels the negative feedback left for him is not justified. He asserts that he listed the car "as is" (this implies that the car is sold in the condition in which it just happens to be at the moment that ownership is transferred). Furthermore, he claims that, on several occasions, the buyer declined the offer to have the car pre-inspected.

He invites the buyer - through eBay - to participate in direct settlement discussions, in order to try to resolve the disagreement. The buyer is willing to participate in the process.

Before a dispute is opened<sup>8</sup>, the eBay system asks the seller whether he has given the buyer a chance to give his perspective of the events and whether he has offered the buyer an opportunity to come up with possible suggestions for resolution.

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<sup>8</sup> The ICT form used in this specific situation is text-based asynchronous communication over the internet (parties can connect to the ongoing discussion "at different times and places"). Parties discuss their issues through a password-protected case page. To sign in, the user ID and a case-sensitive password is requested.

The system recommends that parties exchange “polite” e-mails to explore the issues and that they “listen” to each other’s point of view. Further, e-mail-address verification procedures are advised to avoid miscommunications etc.

In a final endeavor to arrive amicably at a solution of the matter in dispute, eBay’s guidelines suggest that, before opening a dispute, the seller may opt to call the buyer on the telephone number that eBay has on file.

**Step 1** The seller may open dispute-proceedings on the following website: <http://feedback.ebay.com/ws/eBayISAPI.dll?InrCreateDispute>. All the seller needs to do is to register, enter the item number and write down what the issues are.

**Step 2** eBay dispatches an e-mail to the buyer informing him that a communication was received from the seller to the extent that the latter is quite unhappy about the negative feedback that the buyer left. The buyer can then choose to state one of the following multiple choice options: (1) that he feels the negative feedback is justified and that he not willing to discuss the withdrawal; (2) that he is willing to discuss the withdrawal of negative feedback under certain conditions and/or if other remaining issues can be resolved. The buyer could, for instance, ask for (a) a financial compensation to cover for the damages; (b) an acknowledgement or (c) an apology.

The buyer can also opt to send his own “self-drafted” message (self-drafted in contrast to filling out a multiple-choice format) to the seller giving his own summary of the events that occurred and the issues that are at stake. In addition, he may decide to make specific suggestions for resolution.

**Step 3** Parties try to work out the issues directly between themselves, sending and receiving messages back and forth. If applicable, they can agree on a solution that is mutually acceptable.

**Step 4** If after 30 days (or 10 days if the buyer didn’t respond) the disagreement has not been resolved, the seller may opt (1) to withdraw the claim and have the dispute closed or (2) pursue the claim.

Parties may also apply for assistance from one of the neutral third party ODR providers recommended by eBay, for instance SquareTrade.

One of the parties files the dispute for mediation and, generally, pays for the mediation. Squaretrade will invite the other party to participate and, in the affirmative, will assign the mediator to facilitate the process.

In this specific case, parties could resolve their disagreement in mediation. Initially, the buyer considered the feedback that he left justified and saw the feedback venue

as a means to “warn” other parties to the market place against this seller. Despite the financial damages (US\$ 3000,-) the buyer was not looking for a financial compensation but wanted an acknowledgement that the seller understood that he, the buyer, felt misled.

The mediation process turned out to be helpful to address the underlying issues and to re-establish trust in the transaction partner (In chapter 7 of this thesis on-line mediation including this case will be reviewed from a more or less psychological perspective).

As is the case in the vast majority of mediation proceedings, whether conducted on- or off-line, the most important is to engender and/or re-establish trust in the other party, the process or the neutral. I believe that this, in particular, can be achieved through providing the participants an opportunity to say what they have to say, to make sure they are being heard and to give them an opportunity to actively participate in the process.

The mediation procedure in the case described lasted three weeks, the average “transition” time of an eBay dispute being 10-14 days, the net time depending on the frequency and speed at which parties connect to the discussion.

The case shows how eBay has institutionalized Dispute Resolution mechanisms that can help resolve disagreements in cyberspace without having to resort to formal law. After all, the decision of consumers to engage in e-commerce transactions is based on convenience and savings in money and time. With no uniform laws or court systems in cyberspace, on-line marketplaces and customers have thus found dispute resolutions options that are in keeping with the speed and convenience of the Internet. If a problem occurs, going to court - for the first time in history - neither is needed, nor is it a viable option.

While in the majority of cases the intentions and behavior of parties to the marketplace are fair and sincere, a growing number of transactions involve fraud.

***eBay challenges to bar fraud:***

- *Calkins (2001) describes the challenges that eBay's reputation system faces in relation to on-line auction fraud protection. Amongst others she asserts that the social norms and values, which are embodied in the feedback system, have failed to prevent fraud.*

*According to Calkins, eBay will, increasingly, have to more strictly enforce code and [formal] law if it wants to stay out of conflicts arising out of feedback transactions. After all, eBay has a distinct commercial interest to encourage positive and discourage negative feedback comments;*

- *Criticism is also noted in relation to eBay's [user] registration system, which appears to be highly sensitive to fraud and the increasing activity of cyber criminals on the eBay auction site. Fortinet [at [http://www.fortinet.com/FortiGuardCenter/reports/roundup\\_july\\_2006.ht](http://www.fortinet.com/FortiGuardCenter/reports/roundup_july_2006.ht) recently reported that numerous sellers massively create fake user accounts, powered by automated web spider software, in order to manipulate feedback scores. They also observed that "malicious use of top-selling items is a habitual quality of eBay scammers [people setting up auctions for bogus/non-existent items for real bargains], and [.....] that eBay phishers and eBay scammers work hand in hand."*
- *Finally, strict privacy laws, not in the least in Europe, put additional pressure on the "laissez-faire" policy of eBay.*

The next paragraph discusses the greatest dilemma for self-regulated on-line marketplaces, namely to maintain a neutral position, necessary to preserve the atmosphere of trust, on the one hand, and, as long as fraud cannot be prevented, the responsibility to prosecute fraud (and cyber crime) on the other.

### **3.5. Preservation of Neutrality**

eBay defines fraud as items either not paid for or not delivered or those items that are defined as "Significantly Different As Described", that is, when the condition of items sent are not in conformity with their description at the time they were auctioned. A recent article in The Washington Post (2006, page F1 and F2) stated that eBay believes that 1% percent of the items offered for sale in the year 2005 ended up as confirmed cases of fraud. The newspaper further reported that some company critics suspect the actual percentage to be considerably higher.

Earlier it was observed that many cyber-disputes originate from misperceptions of the trustfulness of the other side. As such, fraud can be real or perceived.

Recent national and international developments<sup>9</sup> and jurisprudence<sup>10</sup> illustrate the external pressure that virtual market places are exposed to and due to which they may have to, slowly, give up their “passive” position.

The cyber-crime referred to is only one example of current developments. All this has given rise to a presently ongoing and somewhat longwinded discussion in commercial as well as academic circles, as to who is responsible for “law in cyberspace”.

Reviewing eBay’s experience, I, personally, come to the conclusion that it is the presence of ODR, to which “the violation of norms and rules may be submitted” that make people trust the market place. eBay’s conflict management system has proven to have an important function to prevent and resolve disagreements that arise in e-commerce but it can, arguably, not handle all issues. One of these issues is crime.

Essentially, the question is to what extent the current ODR systems take into account the instant needs of (“robbed”) e-commerce consumers adequately. Firstly, for these consumers, redress through the court system is (generally) not a feasible and affordable option. Secondly, the impartiality of the market place (and its ODR providers) is crucial to build consumer confidence. If this neutrality is being compromised, a “safe” venue may be taken away from consumers to resolve disagreements amicably and amongst themselves without any intervention by formal code or law. I assert that self-regulation through ODR is an ultimate exponent of “self-determination” that should be nurtured. However, several issues remain<sup>11</sup> to be regulated or co-regulated by formal law.

Rule stated (2002, page 12) that “modern disputants agree on the rules they want to govern the resolution of the dispute and then work out a resolution without having

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<sup>9</sup> For instance, the high-end jeweler Tiffany and Co. has sued eBay arguing that eBay is responsible for the sale of illegal goods through its venue (The Washington Post, 2006, page F2). The French industry group Unifab (<http://www.unifab.com>) plans to file a complaint seeking damages from eBay and other Internet auction sites for the sale of counterfeit products (Reuter, 2006; Webwereld, 2006b).

<sup>10</sup> For instance, the recent (Dutch) verdicts in the subject matters Marktplaats B.V. (an eBay company) vs. Stokke AS (LJN: AW6288, 3 mei 2006, Rechtbank Zwolle-Lelystad, 106031, HA ZA 05-211) and in UPC vs. Stichting Brein (LJN: AY6903, 24 augustus 2006 Voorzieningenrechter Rechtbank Amsterdam, 345291, KG 06-1112 AB). More information is available at <http://www.rechtspraak.nl>.

<sup>11</sup> Amongst others, Schultz (2003c) and Morek (2005) draw attention to the various other issues that remain unregulated in cyberspace.

to depend on judges, courtrooms, or legal precedents". In the next chapters, I will explore why ODR in general should be defined as another appropriate alternative dispute resolution instrument with its own unique features, dynamics and restrictions.

## 4. The current State of ODR

On-line Dispute Resolution is a relatively new form of conflict management which has developed over the last ten years and that should be defined as another authentic instrument to resolve disputes on-line. At least for now, these disputes are practically all of a commercial nature but I venture to suggest that this may, sooner than now generally expected, be extended to other types of "civil" conflicts (divorce proceedings, employment disputes, insurance claims, complex litigation etc.). In this chapter, the growth of the Internet will be explored as this is the main context in which ODR operates. Furthermore, the history of ODR and its current phase of development, the experience gathered as well as the legislative issues will be described. This will be supported by some trends and figures.

### 4.1. The growth of the internet

The growth of e-commerce closely coincides with the increased use of the Internet. New ICT-technologies, of which the Internet is only one feature, have been widely accepted as an important component in our private lives and businesses. Recent figures show that 73% of the Dutch population regularly surf the Internet and that e-commerce transactions increase with 28% per year (Webwereld, 2006a). eBay, world's largest auction site, has 200 million users worldwide.

Caplin (2003, page 207) asserts that the development of the Internet acted as a catalyst for the global movement of information and global commerce. He argues that we are currently in the second phase of globalization. The first phase of globalization took place at the end of the 19th century and lasted until World War I. It was based on the minimization of travel costs and greatly shaped demographics (*i.e. causing tremendous changes in the composition and locations of populations - MK*). Phase two began after the end of the Cold War, in the early nineties. This second round of globalization is based on the minimization of communication costs. With long-distance communications as inexpensive as they are nowadays (*just think about what VoIP applications such as Skype can mean for ODR! - MK*), the flow of information gained and is still gaining momentum rapidly and has accelerated to a degree that was previously thought to be well-nigh impossible.

Noteworthy in this context is that in addition to (1) the development of new technologies; (2) the growing use of the Internet and (3) the globalization, another trend is

gradually manifesting itself, namely the tendency for our traditional off-line social contacts and communications to shift more and more in the direction of on-line engagements.

Larson (2003) and Coupland (1991) explored "the social acceptance" of the Internet. Larson observed that "our children already have developed effective on-line relational behaviors and can establish trust and intimacy on-line". Coupland distinguishes between three generations and claims that in particular the "Einstein"-generation (born after 1988) engages in socializing through the Internet, whereas with the other generations, the use of the Internet has grown into being an important source for information.

It is, therefore, likely that with the growth of on-line engagements, cyber space will be an equally acceptable medium to resolve disagreements that arise out of our day-to-day social interactions.

<b>Three generations, their social background and their computer use</b>		
<b>Babyboomers Born in 1940-1955</b>	<b>Generation X Born in 1960-1985</b>	<b>Generation Einstein Born after 1988</b>
<i>Starts using computer only at an advanced age, surfs the Internet [with library function] doesn't use MSN</i>	<i>Starts using computer as [young] adults, surfs the internet [with library function], uses MSN regularly</i>	<i>Computer is part of social life, used for social engagements, continually on MSN</i>

*Source: "Generatie Einstein: slim, sterk, sociaal" (22 juni 2006) Volkskrant, page 3 ("The Einstein Generation: smart, strong, sociable").*

#### **4.2. History of ODR**

The development of ODR can be defined as having passed through the following stages (Katsch and Rifkin, 2001):

- A "hobbyist" phase (that lasted until around 1996) where individual enthusiasts started working on ODR, often without formal backing;
- An "experimental" phase (around 1997-1998) where foundations and international bodies funded academic and non-profit organizations to run pilot programs;
- An "entrepreneurial" phase (1998-2001) where a number of commercial organizations launched private ODR sites;

- An "institutional" phase (2001 and onwards) where ODR is pilot-tested and in which it has been adopted and institutionalized by a range of official bodies including Courts and other Dispute Resolution Providers.

### 4.3. Current State of ODR

Conley Tyler (2003; 2004; 2006) has systematically researched the developments in ODR since 1996. For more statistical information and trend analyses, reference is made to the research conducted.

Some trends and figures - adapted from Conley Tyler's conclusions - that hold good for the current "institutional" phase of ODR worldwide, are:

By March 2006, some 150 ODR-services had been launched and more than 3 million disputes were handled on-line. ODR services have proved surprisingly sustainable with the large majority of services launched still operating and 20 new services having been added since 2004. Moreover, further growth is observed in Europe, Asia the developing world, in the institutional contexts, especially in Courts and other justice institutions, as well as within, both traditional and on-line, service providers as they extend their services to new markets. Finally, an increasing demand is observed to provide ODR in languages other than English, at present only 7% of the services being offered in other languages.

### 4.4. Experience with ODR

Essentially, all types of conflict can be handled on-line (Conley Tyler, 2004) ranging from transactional issues such as real estate disputes<sup>12</sup>, employment disputes<sup>13</sup>, divorces including co-parenting schemes (Melaned, 2002), to workers compensation- and liability claims<sup>14</sup>. Other examples are the on-line platforms that are used in peace processes<sup>15</sup> and the "eCourt" facility, used by the Federal Court of Australia, in hearings involving aboriginal people living in remote areas (Khouri, 2006).

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<sup>12</sup> For instance, Squaretrade (<http://www.squaretrade.com>) offers ODR services for the Californian Association of Realtors.

<sup>13</sup> The U.S. National Mediation Board (<http://www.nmb.gov>) applies ODR in employment disputes.

<sup>14</sup> For instance, Cybersettle (<http://www.cybersettle.com>) has handled 160,000 cases on-line.

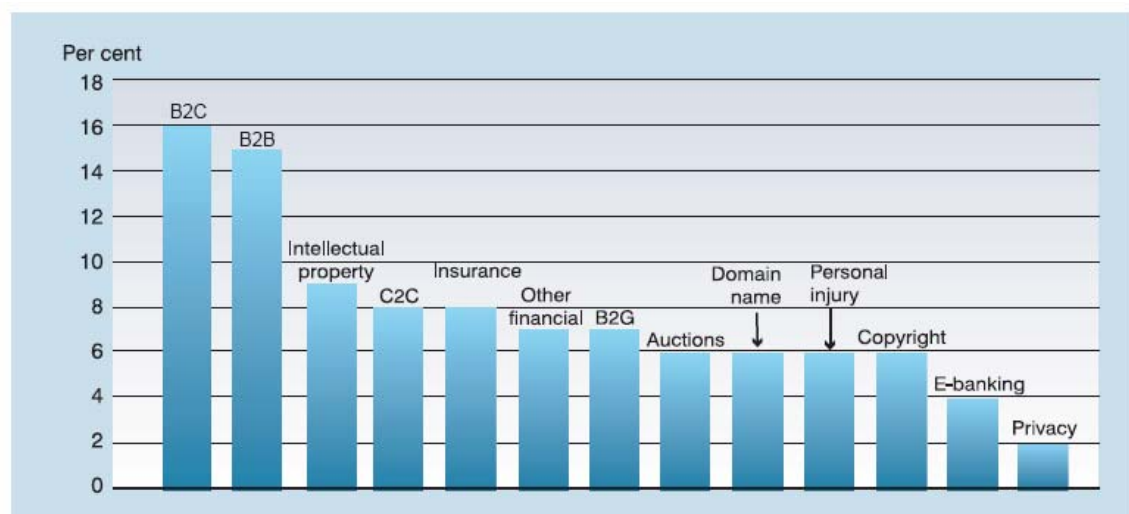
<sup>15</sup> InfoShare (<http://www.infoshare.org>) provides on-line platforms to foster dialogue in the Sri Lankan peace process.

As with all other ADR-proceedings, a pre-assessment needs to be made concerning indications and contra-indications. Parties must be willing to resolve matters amicably or at least make a “good faith” effort to engage in a constructive dialogue to discuss their disagreement. The mediation venue should not be abused and criminal charges, if any, cannot be part of the mediation agenda.

Additional pre-requisites for acceptance of ODR is, that (1) participants should have access to basic computing infrastructure and (2) that parties are equally comfortable and competent in relation to the on-line communication channel.

ODR, thus far, has attracted most attention in the new area of e-commerce disputes and less in the traditional (ADR)-areas. The application of ODR closely followed the growth of e-commerce. The more goods and services were sold over the internet, the more obvious it became that on-line transactions needed to be supported. On-line-only (e-commerce) disputes were a new type of dispute, for which traditional off-line judicial mechanisms did not work (Rule, 2002). The need to resolve on-line disputes was one of the key-drivers for the development of ODR (Conley Tyler, 2004, page 4) and both individuals and organizations needed access to redress systems to resolve their on-line disputes. ODR served as a convenient, quick, low-cost option (Rule, 2002).

The following chart gives an overview of types of services offered.



Source: UNCTAD, 2003

The main types of disputes that are, in actual fact, being submitted to ODR nowadays are e-commerce business-to-consumer and business-to-business disputes. ODR is, however, not strictly limited to e-commerce disputes. Other important categories of disputes that are submitted to ODR are “civil” conflicts (including complex litigation),

disputes in the field of Peace and Conflict, and Internet domain name disputes. An example of the latter category is ICANN, at <http://www.icann.org> which implemented a Uniform Domain Name Dispute Resolution Policy (UDRP) that has been used to resolve more than 5000 disputes over the rights to domain names.

Most of the experience in ODR communication has been gained with text-based asynchronous communication. Asynchronous communication avoids the problem of different time zones and the need of traveling. Parties can connect to the ongoing discussion at different times and different places.

#### **4.5. Lack of (formal) regulation for ODR**

It should be noted that in most on-line-only disputes, dispute resolution is often the default “redress” mechanism and that Courts are not really an alternative for two reasons. As Rule (2002) stated, pursuing litigation through the traditional legal system is often very costly and slow relative to the monetary value of most on-line disputes. Further, judicial systems are usually too much tied up to geography and jurisdiction and as such complicate the effectiveness of applying “the local law” when different laws and legal frameworks apply to disputing parties due to geographic, cross-border, differences.

Formal legislation regarding e-commerce does exist however. Relevant for Europe are the EU Directive 2000/31/EC for electronic commerce, the 1999/93/EG Directive regarding a common framework for electronic signatures and the 1997/7/EG Directive for distant selling. All these directives have, meanwhile, been implemented in the Dutch jurisdiction (6:22 b BW).

Uniform guidelines or standards of practice regulating ODR have not been identified or adopted (Morek, 2005, page 31). The existing norms come from diverse guidelines, action plans, codes of conducts and best practices. As Morek (2005) observed, they are not specifically meant for ODR-providers but only apply to fast, impartial, affordable and effective dispute resolution mechanisms for disputes that arise on the Internet.

Jurisprudence in relation to both e-commerce and ODR is still limited.

### **5. Technology as the fourth party**

In this chapter, details will be provided related to the technology underlying ODR systems (sometimes also referred to as the fourth party) and examples will be given as to how ODR-technology can be applied in complaints handling- and conflict resolution proceedings.

## 5.1. Technology underlying on-line communications

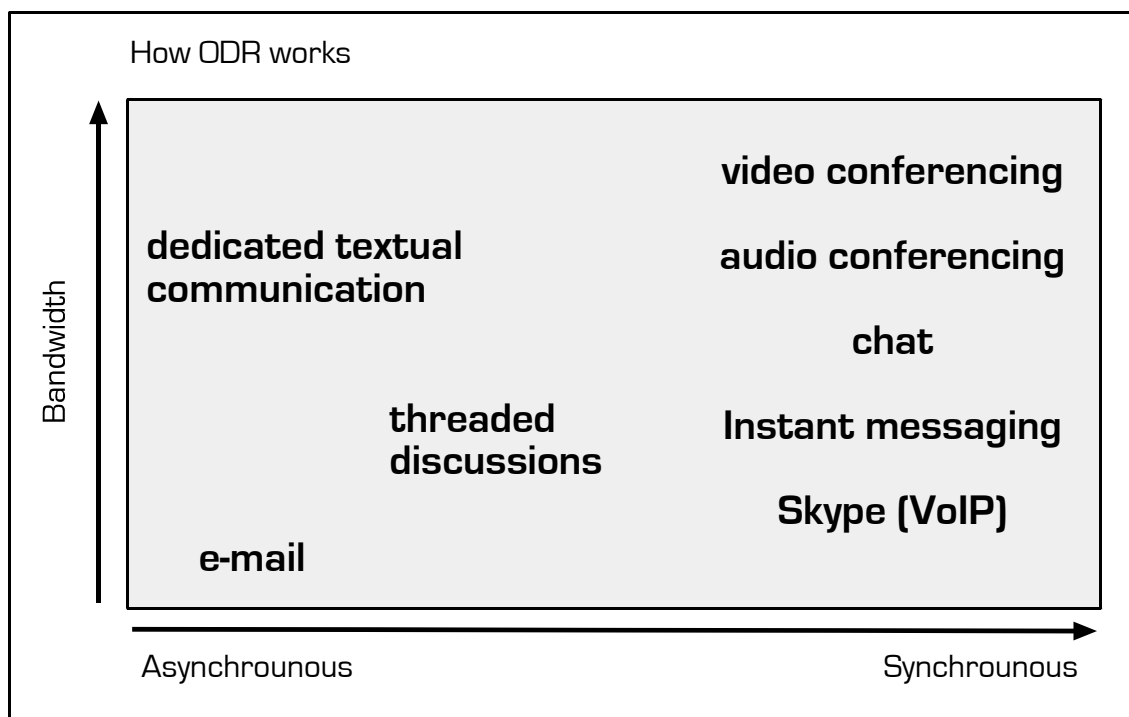
Many authors (Rule, 2002; Schultz, 2003a) distinguish between three basic forms of Alternative Dispute Resolution namely negotiation, mediation and arbitration. All other forms of ADR are derivatives thereof. For an outline of the above-referenced terminology, see Appendix 11.1.

We earlier described ODR as ADR-procedures assisted by Communication and Information Technology (CIT), in particular the Internet.

Communication over the Internet is something of very frequent occurrence these days. Many of us have also started to discover the benefits of accessing the internet through cell-phones, instant messaging (on-line chat) and PC/Internet-mediated phone (better known as VoIP with applications such as Skype).

What we actually do (without always realizing it) is that when hassling by phone with a supplier over the amount of an invoice received, we are actually engaged in a basic form of online dispute resolution. Communications over the phone or through the internet are actually simple forms of on-line negotiation tools. Phone, e-mail or Skype are merely the (on-line) tools to convey our relevant messages.

The different ways people can communicate on-line can be viewed along the following spectrum:



source: Rule, 2002, page 47

In any negotiation, the proceedings can be assisted by a person of “flesh-and-blood”. Within the earlier described building blocks of traditional ADR-proceedings, the impartial neutral is often referred to as the third party in the process, in addition to the two (or more) disputants.

Katsch and Rifkin (2001) introduced the concept of ICT as the fourth party to illustrate the significant role that ICT can play in facilitating the (ODR) process and to make clear how the earlier mentioned primitive on-line tools, such as phone or e-mail, become more sophisticated when these are made to play an active role in the negotiation.

## **5.2. Why would the technological medium be seen as the fourth party?**

In the sophisticated form of on-line negotiation, we distinguish between:

### **5.2.1. “Technology-assisted mediation”;**

Here, ICT assists in the negotiation that is being facilitated by a human neutral. This is where **ICT enhances the expertise of the neutral**.

### **5.2.2. “Assisted negotiation” or “technology-assisted negotiation”**

Here, ICT assists in the direct negotiation between parties (without the intervention of a human neutral). This is where **ICT substitutes for the expertise of the neutral** (Schultz, 2003a, page 3).

Technology can be highly sophisticated. As long as it does not serve a purpose, it does not serve a need either. That is why I personally prefer to define ICT and its function in ODR as:

“A customized tool that provides some type of “added-value” to the direct negotiations between parties and **that is considered as suitable to meet their needs**”.

The following scheme illustrates the negotiation spectrum in ADR/ODR schematically:

Process controlled by disputants	Process controlled by technology	Process controlled by neutral (mediator, arbitrator or evaluator)
<i>Non-Binding</i>		<i>Binding</i>
Direct Negotiation	Automated Negotiation	Arbitration Mediation-Arbitration Expert evaluation Mediation

Source: Rule, 2002, page 37

### 5.3. Examples of ICT-Technology and -Applications

Hereafter a number of possible ICT tools and applications will be explored that can be applied to prevent and to resolve conflicts more effectively.

The American Bar Association (ABA) Taskforce Report (2002, page 5) rightly observed that the terms “complaints” and “disputes” are used frequently and interchangeably without providing any definition or context. When discussing the role of technology in complaints handling proceedings, a distinction should be made between the handling of (1) customer grievances and complaints (whether legal or not legal) and the handling of (2) disputes (where a grievance or complaint has been rejected in whole or part) as well as lawsuits.

The following section focuses on conflict prevention and reviews possible ICT-applications that assist parties and organizations **in grievance and (legal) complaints handling**. The second part covers examples of supporting technology to assist participants and the third party neutral in **actual dispute resolution proceedings**. Some examples of applications will be discussed. The overview is far from complete, for that matter.

#### 5.3.1. Grievance and (legal) complaints handling

ODR-technology can assist organizations and businesses not only to reduce the number of grievances and complaints but also to deal with them more effectively. The ABA (2002) Taskforce Report concluded that effective complaints handling is more important than effective third party dispute resolution. Rule (2002, page 62) observed that, “businesses benefit from an ability to address complaints and disputes much earlier than is possible through traditional dispute resolution as they demonstrate an intention to “do right” by customers and partners”.

In a stage before professional assistance is sought, on-line tools may provide disputing parties with information about their position in the negotiations, to assist them in assessing the legitimacy of the grievance or complaint or to get information about the legal possibilities to claim compensation.

As such ODR-technology can be an important tool to assist consumers as, more often than not, they have no insight into their legal rights when they come into conflict with a supplier or with governmental institutions. Because of this, some clients give up defending their rights, whereas others hold on to their conflict – some of them irresponsibly and always at relatively high cost - when they opt for court-proceedings.

An example is the on-line complaints filing system, as applied by the “Stichting Geschillen Commissie” (SGC) at <http://www.sgc.nl> in the Netherlands. Based on the input given by the complainant, this type of filing system engages in a sort of “decision tree analysis” in order to give the complainant a “feeling” for the legitimacy of the claim. Also, in case the complainant decides to proceed with the claim, the system shows claimants more effectively the way to the venue that is most suited to deal with the claim. Similar filing systems can be applied by insurance companies to enhance the effectiveness of the intake of (potential) insurance claims and to manage complaints more effectively.

Above ODR-tools can be even more sophisticated when they establish a dialogue with the ODR-system that provides consumers with tailor-made (legal) advice on their rights, obligations and opportunities (BATNA<sup>16</sup>-analyses).

These systems are gradually emerging, also in the Netherlands, for example the BEST-project<sup>17</sup> and the Layla-project<sup>18</sup>.

To further enhance the effectiveness of complaints handling proceedings, organizations can integrate on-line feedback-loops for customers and participants to provide information on the degree of (dis)satisfaction. Provided comments are dealt with attentively by the providers, the input and experience collected can lead to improve-

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<sup>16</sup> Acronym for Best Alternative to Negotiated Agreement.

<sup>17</sup> Acronym for BATNA Establishment using Semantic web Technology. See for more info at <http://www.best-project.nl/> (funded by the Netherlands Organisation for Scientific Research).

<sup>18</sup> Abbreviation for Layman’s Digital Assistant see for more info at <http://www.tilburguniversity.nl/faculties/frw/research/schoordijk/tilt/research/259-2005/?lang=UK> (part of the NWO ToKeN 2000 project).

ments in customer service offerings and, over the long term, may result in better customer loyalty and satisfaction.

### **5.3.2. Dispute handling (mediation)**

#### **A) Intake, direct negotiation and pre-mediation**

Generally, the intake and preparation phase of the ODR-proceedings aims at (1) structuring the negotiations and assist parties to work things out amongst themselves, and (2) in case parties are not able to resolve the disagreement in direct negotiations, at effectively and systematically preparing the subsequent ADR proceedings.

On-line “intake” proceedings can be combined with additional tools that support parties to the case to become engaged in constructive direct negotiations - on-line or off-line - with or without the help of third party neutrals.

An illustration of how a so-called “reference-based” type dialogue works and how it can be integrated in direct negotiations proceedings, can be found in eBay’s ODR system for a typical e-commerce type dispute where, for instance, a product has not been paid. When seller and buyer argue about the non-payment (and possibly question each other’s good intentions), the system may pose questions that - based on past experiences with this type of conflict - relate to this sort of issue by asking the buyer whether he/she can make available a proof of payment. Depending on the answer, the system can suggest common resolutions in a multiple choice type format which are based on earlier experiences with identical problems. In this specific example (1) the buyer and seller can opt to hold on to the transaction and investigate the payment issue; (2) the buyer can choose to cancel the transaction and return the merchandise; (3) and so forth. See appendix 11.2.A for a screen shot of this application.

This tool is particularly powerful as technology may take on an “evaluative” role, for instance, by suggesting options for resolution, without the concern that it will be blamed for “being biased” or for pushing an option on the disputants (Rule 2002, page 56).

In case parties do not reach consensus over the issues at hand, the information collected may serve to enhance the effectiveness of the subsequent mediation proceedings, whether conducted on- or off-line.

## **B) Starting the mediation**

An example of a tool that is at the mediator's disposal when he/she starts the discussion, is to suggest that parties provide him/her with an opening statement that allows the same length limit for both parties (e.g. 4000 to 5000 characters). This helps to level the playing field between the parties right from the start. These and other tools that support textual communication - such as a spell checker - throughout the mediation process are irrelevant in the traditional, spoken context. On-line they can strongly facilitate, even in part substitute for, the mediator's challenging task to level the power balances between parties. This gives the mediator more leeway to focus on other tasks such as encouraging parties to take their time for drafting and be reflective in their responses. See appendix 11.2.B for a screen shot with examples of some of the textual communication-support tools.

## **C) Exploration**

On-line brainstorming tools can be applied to set up the communication or to have parties engage in productive discussions in order to identify underlying needs and interests. The mediator, who manages both the process and the tools, can opt to hold such brainstorming sessions with all parties in real time or at different times. Also, he may opt to either allow or not allow parties to give immediate comments on the ideas brought in, depending on how he assesses the parties' attitude to each other. In, for instance, a highly-escalated situation, where feelings "run high", it is likely that the mediator will not give such an opportunity of reacting instantaneously and impulsively to each other, this in order to allow for maximum creativity to be maintained and as such reducing "emotional" imbalances and disturbances to the process.

## **D) Negotiation**

The same brainstorming tool, designed and applied according to the specific circumstances of the moment and time, can be used in the negotiation phase to engage in constructive discussions and to generate added momentum towards achieving workable solutions.

## **E) Settlement and closing**

Parties that have reached an agreement can jointly draft the settlement agreement on the discussion board of a secured website that can be accessed with a case-sensitive password. To avoid that on-line discussions run out of control, tools such as version tracking and "new content" tracking are available.

Another possibility is the use of general (multi-lingual) text-templates, in combination with the use of standard settlement agreements, that are automatically suggested to the parties when they have clearly defined the nature of their dispute and have agreed on (some or most of) the terms for settlement. This particular tool, for instance, has been institutionalized in the ODR-closing procedure of eBay and SquareTrade. See appendix 11.2.C for a screen shot of the multi-lingual capabilities.

#### **F) Suitability for on- and off-line proceedings**

The suitability of most of the tools described is not limited to on-line processes only but can also be applied as an “add-on” or be implemented in face-to-face proceedings to (1) create structure for the negotiations and/or (2) support the third party neutral, as such alleviating part of the neutral’s tasks. Additional examples of such add-on applications are:

- Built-in facilities for upload and storage of digital case-related data (such as settlement agreements, exchange of case relevant documentation);
- Case management devices and software;
- Devices and software for the scheduling of on-line and off-line meetings;
- Generic reminders by the system, sent to parties, to check on the status of the negotiations.

An example of “automated negotiation” where ICT completely substitutes for the third party (and which has no off-line equivalent) is “blind bidding”, in which an automated algorithm evaluates monetary bids from each party and if the two bids are within a pre-set range then the system settles for the median. If it does not produce a “hit” within this range, the bids are destroyed and the proposals of the parties are not revealed. The system deals with monetary bids only. This implies that, when engaging in blind bidding, underlying interests related to non-monetary issues ought to have been already addressed and resolved. “Blind bidding” should, therefore, be seen as a negotiation tool that can be used when the parties deem it useful to discuss monetary issues only, in a tiered (last) step in an ADR or ODR process. It is mostly applied in negotiations between insurance companies.

#### **5.4. Conclusion**

To submit and evaluate statistics on cases handled and on “success-rates” or to make comprehensive judgments on the functionality of the fourth party is difficult for various reasons (Hornle 2003; Morek, 2005).

Firstly, to make a clear-cut distinction between proceedings exclusively conducted on-line and proceedings supported by “add-on” ICT technology is disputable: traditional ADR systems, almost always integrate some form of ICT such as telephone, fax, e-mail or word processing. As Hornle (2003, page 1) asserts, “ODR is simply about the use of new tools - information management tools and communication tools - for dispute resolution”. But it is equally true that these tools change the methods by which disputes are being solved *[as far as this is concerned: some ODR procedures, like blind bidding automated negotiation, have no off-line equivalents - MK]*. ODR introduces possibilities for a new paradigm of dispute resolution”.

Secondly, Horne (2003, page 2) asserts that “it is sensible to distinguish between consumer and commercial ODR, since the requirements and underlying interests of the parties are quite distinct”. In this context, it appears to me to be equally legitimate to include grievance and complaints handling systems in, what Horne describes as, the new “paradigm of dispute resolution”. Actually, grievances and (legal) complaints can be addressed much earlier through ODR, than is possible in traditional proceedings (Rule, 2002, page 62). Systematic and quantitative research about the effectiveness of ODR (and its relevant technology) in grievance- and complaints handling systems seems justified when more experience with these systems, as a strategic component of on-line or off-line Conflict Resolution Systems, is gained. The difficulty to draw systematic conclusions also lies in the wide variety (and purposes) of services that can be observed and is illustrated by, amongst others, the fact that the largest complaints handling organizations (for instance, the Better Business Bureau at <http://www.BBBOnline.org>), when reporting case statistics, make a distinction between consumer grievances and complaints being filed or handled. Along the spectrum, one can also identify complaints handling systems by businesses that serve a completely other purpose namely to increase customer satisfaction and -detention.

Thirdly, a clear-cut distinction can also not be made between ODR techniques applied by the traditional providers of ADR and new providers of ODR techniques. Again, a large variety of different applications and initiatives can be observed – ranging from ODR services targeted at e-commerce only to others that offer services for any dispute, whether arising on-line or off-line.

Finally, the fast developments in this sector make it extremely difficult to adequately keep track of all of these.

## **6. Assessment of Needs and Acceptance of ODR**

This chapter explores the assessment of needs and the acceptance of on-line proceedings based on the author’s own practical experience as well as on scientific studies that have been consulted.

The most commonly-heard concern among skeptics of ODR, undoubtedly, is the lack of face-to-face contact in the on-line environment

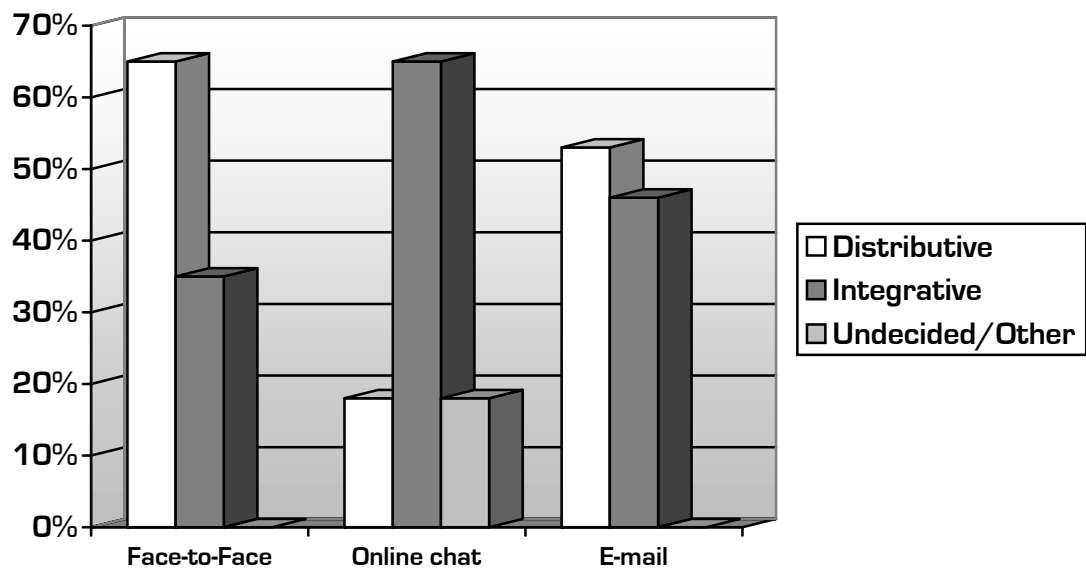
This skepticism is particularly widespread in the mediation community itself. Eisen (1998) asserts that much of the suspicion towards on-line mediation is based on the belief that verbal and non-verbal expressions of feelings in the face-to-face interaction have a richer and more meaningful context than when these feelings and emotions have to be articulated in writing. Syme (2006) draws attention to both the difficulties and the imperative need for each of us to keep pace with changes in technology and he claims that the current resistance to ODR, particularly among ADR practitioners, is similar to the initial resistance to ADR among lawyers and other professionals, Larson (2004, page 129) sees this as partly a generational issue and observes that “compared to other professions, dispute resolution practitioners may have been the slowest group to embrace technology”. Rule (2003) made a similar observation, noting that many mediators are profoundly skeptical about ODR and some go as far as to say that face-to-face communication is absolutely essential..

Whether, indeed, better outcomes are achieved in traditional proceedings is not evidenced by scientific research. The lack of face-to-face communication certainly does create barriers but experience and research in the field of on-line mediation (which will be reviewed in detail in the following paragraphs) have brought to the fore that the on-line environment can also enhance the effectiveness of communications.

Some conclusions of studies conducted that demonstrate the effectiveness/ineffectiveness of on-line communications and ODR (in part originating from research by Conley Tyler (2003; 2004; 2006) are:

The University of Melbourne (Tan, Bretherton and Kennedy, 2003a) analyzed on-line interactions and compared the distributive and integrative results with those obtained off-line. Empirical evidence from a study of 98 negotiations indicates that on-line mediation may actually generate more integrative “win-win” outcomes than live mediation. This research suggests moreover that on-line mediation has the potential to generate more resolution-focused movement between the parties.

### Distribution of negotiation outcomes across three media of communication



source: Tan, Bretherton and Kennedy 2003b

A study in Canada (Hammond, 2003) found that disputants who underwent ODR had positive feelings about it: 80% of disputants who were exposed to ODR stated that they had no trouble expressing their ideas, concerns and issues on-line and that they were confident that the other participants understood them. When it comes to expressing their emotions on-line, 82% of them said they had no problem doing so.

I, personally, would caution against accepting these figures at face value. An upward bias may, as a matter of fact, have been brought about by a deeply-engrained tendency in people to overrate their basic skills when it comes to making a judgment on how proficient they are in making themselves understood and in articulating their feelings, especially in a non-verbal context. All the same, even if some allowance is made for this, the percentages are still impressive.

Another conclusion that can be derived from the findings in Hammond's study is that a major obstacle to the growth of ODR may be disputants' lack of knowledge of the availability of various forms of dispute resolution rather than any lack of demand for it or previous negative experiences with it.

Raines (2005) researched the appropriateness of applying transformative techniques in on-line mediation. She asserts and demonstrates that there are indeed some disputes that may benefit from the transformative approach such as encouraging the appropriate use of apologies, magnifying the effectiveness and improvement

of direct communication, encouraging the “re-humanization” of the “opponent” and providing the required coaching to help disputants improve their own communication and conflict management skills.

Another area where scientific studies have been conducted relates to the acceptability/unacceptability of ODR. What do these studies show?

A needs assessment, using surveys and focus groups of a broad cross-section of citizens/individuals, that had been exposed in some way or other to ODR, conducted in the State of Victoria, Australia, found that 72% of respondents were willing to try ODR to settle a dispute (Conley Tyler, Bretherton and Bastian, 2003).

The main factors influencing this choice were cost, speed and convenience. Some of the other conclusions were:

- Most people surveyed expressed a lively interest in ODR-proceedings;
- Findings in both the survey and in focus groups were generally consistent with each other;
- A small group (28%) showed dislike of on-line communication as well as an aversion to on-line technology. This is, in actual fact, borne out by an analysis of factors such as age, culture, disability and income identified by Sourdin (2004) as factors impacting on the use of technology. His findings suggest that ODR is a valuable additional service but should not completely replace existing dispute resolution methods;
- Users of on-line banking facilities and participants in auctions, identified as the most frequent users of ODR, were most likely to (re-)consider the use of ODR.

Opie (2004, page 7) researched the degree of actual adoption by businesses and concluded that the use of ODR amongst businesses should grow as users become more knowledgeable of, and familiar with, the processes. She, however, asserts that “ODR needs to be accessible before it can become a viable ADR tool, particularly for international trade disputes. Adaptability for cultural differences, global access to technology and legal recognition of ODR are therefore three of the main prerequisites for its continued development as an efficient means of dispute resolution”.

Femenia (2000) makes the point that cultural differences do indeed affect the use and implementation of ODR systems. She also concludes that offering effective and appropriate ODR systems across cultures requires cross-cultural competence not only to comprehend but also to deal effectively with (1) different patterns of consum-

ers' complaining behavior and with [2] differing perceptions of what is considered "just/equitable".

An additional factor that creates barriers for the acceptance and adoption of ODR, in particular for consumers, is of a financial nature. An ongoing discussion between corporate establishments and consumer groups relates to the degree in which ODR-programs are biased in favor of corporate interests, since these programs are primarily paid for by corporations. Within the operating-cost model of most ODR-providers, a distinction ought be made between services offered to consumers and those offered to businesses. Services to the latter category can be based on subscription- or license type fee agreements related to the use of the technology, or, alternatively, on "neutral party" mediation expenditure (unilateral or bilateral fees per hour or per case being mediated) and combinations thereof. For e-commerce disputes, ODR-providers depend on external funding but these sources (public funds, consumer associations) are hard to get by. Moreover, the perception of impartiality with the ODR-provider is important if one wants to bolster and sustain trust and avoid any appearance of "conflicting interests" between e-commerce retailer and ODR-provider. At the same time, the system should remain available and affordable for consumers. At present, a unilaterally fixed fee of approximately US\$ 30 is being paid to file an eBay.com dispute with SquareTrade. Mediators, contracted by SquareTrade, are compensated in a range of US\$ 10-15 per hour.

With a view to the target participants (primarily consumers or private entities), as well as the relatively small monetary value of the transactions, it is impossible and, from an "equal access to justice" perspective, unacceptable to charge regular market fees.

One more aspect related to the non-adoption of ODR that has so far not been answered and researched systematically, is how trust in ODR can be built and sustained.

A statement made by authorities in the field (Rule, Cyberweek, 2005) is that organizations aiming at implementing ODR systems with the purpose of bolstering "trust" (either in a marketplace, a community, or in general), need more understanding on how ODR can engender trust.

An in-depth analysis of how trust can be built whether in the above referenced context of ODR or in relation to public- and procedural trust, goes beyond the scope of this thesis, For more information reference is made to academic literature related to these topics, for example Tyler, 1997a and 1997b and Warren, 2000.

In any case, the aspect of trust in the context of ODR (and ADR) requires substantially more research and analysis as to why parties choose to use or not use ODR. The behavior of disputants should also be studied in much more detail.

Essentially, the main reasons for limited adoption of ODR can be summarized as follows:

- lack of awareness (rather than lack of experience);
- skepticism amongst mediation professionals;
- problems with the funding of ODR for e-commerce disputes;
- problems with cyber crime;
- areas of law that remain unregulated and lack of uniform laws and court systems in cyberspace.<sup>19</sup>

It should be noted that the scientific studies that have been conducted differ considerably in type of conflicts, issues, populations and countries. Furthermore, most of the ODR experience was gathered and the research conducted in English-speaking societies, which are characterized, as are other Western societies, by a more pronounced presence of individualistic traits, than are found elsewhere (Hofstede, 1980).

As the ABA report (2002) stated: “the ODR community is, in large part, still in its infancy”. I believe that the studies that were conducted are important for a better understanding of the emerging field of ODR but I also think that much more additional experience is needed before it can be advantageously subjected to further scientific research. As the behavioral scientists Tan, Bretherton & Kennedy (2003a) cautioned: “if we believe in the role of technology (*and ODR-MK*) we have to be prepared to hold our belief up to analysis and provide the necessary evidence”.

## **7. ODR proceedings and the role of the third party**

As Colin Rule observed (2002, page 13): “ODR grew directly out of the history of off-line ADR and in its earliest incarnations, ODR procedures were simply unchanged ADR procedures conducted on-line; the lessons learned over the years about the importance of impartiality, how to effectively move parties toward resolution, about the

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<sup>19</sup> Amongst other the problems related to enforcement of settlement agreements in cross-border transactions (see for more information Schultz, 2003c),

listening and transparency and the challenges of managing power imbalances, are all central to both effective ADR and ODR”.

In this chapter the differences between on- and off-line procedures (from a rather “psychological” point of view) will be analyzed and it will be demonstrated that the main underlying basic principles are indeed central to both ADR and ODR, but that the on-line environment does require some additional skills from the third party neutral. In the final analysis I will then, on the basis of the available evidence, venture to conclude that ODR can be as effective as, if not sometimes even more effective than, off-line proceedings.

### 7.1. Fairness and trustworthiness of the process

My starting point for the definition of an **effective ODR proceeding** is how the procedure is perceived by the participant and whether it meets his expectations of offering a “fair process”.

Studies show that the four main factors that appear to engender “fairness”<sup>20</sup> (Warren, 2000, page 14; Tyler 1997b) are the notions of **respect**, **neutrality** (free of bias and interest), **participation** and **trustworthiness**. Trustworthiness appears to relate not so much to “honesty” or competence but rather to the notion of “an ethical carefulness”.

Various aspects of on-line proceedings will now be elaborated upon, with the aim of giving some answers to the questions: (1) how on-line mediation can be organized and managed effectively and (2) what behavior, skills, strategies and/or tactics are required from the neutral third party to facilitate the on-line communications effectively.

At the end of this chapter this will be illustrated with some “boxed-in” fragments of an on-line mediation case that I handled. The case concerned spanned a period of three weeks. The net time spent amounted to about 3.5 hours, including the sending of e-

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<sup>20</sup> Research in the procedural justice field furthermore indicates that participants make a distinction between the fairness of the process and the fairness of the outcome (e.g., the survey carried out by the National Center for State Courts in the US (1999); Tyler 1997a and eBay internal research). Research conducted at the UWV (2005) in the Netherlands concluded, for instance, that participants attach more importance to the personal contact, the speediness and the quality of the process. The outcome appeared to be of less importance.

mails back and forth and posting messages on the discussion board, taking an average of 10 minutes each time<sup>21</sup>.

## **7.2. Attentive reading and delayed response**

On-line disputes differ from traditional disputes notably in that the former is, in the main, text-based and asynchronous. If there is one thing that completely changed the dispute resolution process, it is the on-line interaction in ODR. The most determinative in this is the timing-factor. Parties engaged in an asynchronous on-line communication can connect to the on-going discussion at different times and may opt to delay their response. This allows for less emotional and more reflective communication, on the part of participants in the first place, but not only that: it is also helpful to the mediator. Supported by my own experience, as a matter of fact, I can only confirm that thanks to the option of being able to step back and reflect at times, I feel more “balanced” and confident in my own reactions.

Furthermore, in on-line settings, shuttle diplomacy has proven to be a crucial tool for mediators to reframe angry, and sometimes even foul-mouthed, language and “filter” it before it is being communicated to the other side (Raines, 2006). This shuttle diplomacy resembles the caucus format in off-line mediation, except that the asynchronous format allows for more careful and reflective responses by the mediator, enabling him/her to simultaneously caucus with the other party (or parties) during the session.

When comparing on- and off-line proceedings, it is to be noted that the issues and concerns that ought to be addressed by the mediator do not substantially differ. Based on my experience with mediating both types, it is my considered opinion that parties’ underlying motives in both ADR and ODR proceedings usually relate to lack of communication and/or respect and other misunderstandings bearing on the trustworthiness of the other side. Thus, as in face-to-face mediations, addressing these “emotional factors” adequately makes that people are willing to move from “entrenched” positions to negotiable ones.

In on-line mediation “attentive listening”, however, becomes “attentive reading”. As a mediator, it is important to find the relevant clues between the lines and to clearly

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<sup>21</sup> The average “transition” time of an e-commerce-borne dispute amounts to 10-14 days, depending on the frequency with which the parties responded to messages from the mediator.

reframe and restate that he/she “did get the message”, without the necessity, for that matter, to reflect back on everything that was written.

### **7.3. Establishing and maintaining an equal level playing field**

My experience, borne out by literature (Rule, 2002; Conley Tyler, 2004), shows that moving the traditional face-to-face communication to the on-line environment can positively change the “power-balance” between parties by creating a more equal-level playing field. I recall those incidents in e-commerce, where self-confident “power-sellers” and less assertive private buyers entered the on-line mediation after having had unfruitful oral communications and where the change in medium from verbal to text-based paved the way for a more constructive dialogue. There are, also, various examples of highly-escalated conflicts, where one of the parties opted out of meeting face-to-face and preferred to go on-line, so as to be more at ease in communicating and putting emotions into written words.

Further, textual communication tools such as same length limits for messages, and also spell checkers (both as discussed in chapter 5) help the mediator to create a more leveled playing field between the parties and avoid any notion of bias through e.g. misspellings.

Parties, furthermore, tend to use much stronger language on-line (that is, more escatory behavior and emotions) to compensate for the lack of face-to-face contact and (non-)verbal clues. Also participants show these negative attributions strongly at the beginning of the mediation (see Thompson and Nadler, 2000, for more on attribution theory). It is generally assumed, and supported by scientific research (Brett and others, 2004), that the quality of the opening phase (managed by the mediator) in on-line mediation is of crucial importance to bolster the effectiveness of the proceedings. The above referenced study models the time it takes to resolve a dispute in an on-line setting. The results clearly identify what elements of opening moves accelerate or delay resolution and frame the dispute for more rapid resolution.

### **7.4. Re-assuring participants of the fairness and “neutrality” of the services**

My own experience with mediating disputes on-line is that I spend relatively more time, compared to traditional face-to-face proceedings, on re-assuring the parties of the “fairness” of the procedure. It would also seem to me that such procedures, as are in place, are an important factor in gaining the confidence of the parties.

It is generally assumed that the more escalated a conflict is, the more parties rely on formal procedures. I add to this the knowledge that the presence of ODR-mechanisms can instill trust and that ODR technology can help “structure” negotiations. When it comes to “procedural trust”, I would not be surprised if ODR mecha-

nisms could create a more orderly process, not in the least from the perspective of the participants.

Although there is no systematic research to bear this out, I do feel all the same that the more “procedural” nature of the ODR-mechanisms tend to make people more inclined to put their trust in the process. It would actually be an interesting research-topic to find out whether in an on-line setting the confidence in the ODR provider and relevant technology would not, if not wholly then at least partly, substitute for personal trust in the neutral third party in an off-line environment.

### **7.5. Transparency**

On-line mediation in all its forms being subject to confidentiality, both the participants and the mediator ought to be very much aware of the fact that on-line mediation communications are completely based on written records. This is essentially different in off-line proceedings where communications are supposed to take place “behind closed doors”. Apart from the liability-issues (see chapter 8), the text-based medium is precisely where, as a mediator, I feel that one’s trustworthiness and “ethics of carefulness” is exposed the most. The smallest error can jeopardize the so cautiously established trust in the mediator as well as in the procedure followed.

### **7.6. Other challenges for on-line mediators**

- In on-line settings it is easier for parties to “walk away” (that is to say, to stop responding) without “loss of face” and that, evidently, is what one wants to avoid under all circumstances. Therefore, any expression of emotions by the parties signaling doubt whether the mediator is really “on the ball” or, else, “does not get it”, should be immediately acknowledged and addressed;
- Multi-tasking is an essential skill for on-line mediators. Managing different treads (and let’s not forget: making sure communications go to the right parties!) can be challenging and confusing because of a multitude of cases all “open” simultaneously and multiple concurrent discussions (jointly or caucusing with parties separately) within each case (Rule 2002, page 73). Add to this that ODR is sometimes too convenient; as Raines stated (2006, page 368): “You can find yourself mediating at 2 o’clock at night or in the middle of a family reunion. As work and home merge, make sure you establish and maintain good boundaries so you can do your work well”;
- Due to the fact that mediation communication can take place over a period of days or weeks, there is the constant need for summary statements and re-assessments every time when you communicate (to remind parties of where they are in the process, what they have achieved so far and what still needs to be done). The challenge for a mediator is, however, to establish a

“resolution focused mindset” and not to let the case be unnecessarily dragging on;

- On-line mediators have to be “thick-skinned” (and not suffer from a king-sized ego) when dealing with emotions that are very often directed towards the mediator. Expressions such as “every idiot can see that Mr. X. is a liar” (implying that every “idiot” can see what that the feeble-minded mediator apparently does not see) should not be taken personally. The mediator should show resilience in putting up with criticism and insulting language. A certain humbleness (without necessarily abasing oneself) and, let’s not forget, the ability to show some vulnerability, are also valuable assets.

So far, the mediator’s performance and (required) behavior have been difficult to gauge because of (1) the confidential nature of the proceedings; (2) the fact that there are hardly any mechanisms in place to get feedback from the parties (this is also true for most traditional mediation programs) and (3) the fact that the large ODR providers are reluctant to share (commercially-) sensitive information derived from mediations conducted. On this, further research should be undertaken.

### 7.7. Fragments of mediation communication

Following are a few fragments of a case study to illustrate the “dynamics” of on-line mediation as described in the preceding section. My own comments are shown in italics.

#### Fragment 1:

##### **Opening message mediator as sent to both parties:**

Dear Mr. X, Dear Mr. Y,

My name is [name withheld], and I am the mediator assigned to try to help you resolve the problem concerning an eBay transaction involving an old-timer automobile.

Before starting the mediation, I like to draw your attention to the following:

- Mediation is a way to resolve problems amicably through agreement;
- I am not a judge and I do not decide the outcome of your case. Any outcome is wholly determined by you;
- As a mediator, I do not find fault with anyone or place any blame;

- I do not give legal advice or represent either party;
- The mediation communications are confidential;
- It is extremely important that there is commitment to have a frank discussion about your concerns and that you are willing to make an all-out effort to resolve the disagreement.

*The starting points for the on-line procedure are similar to those in off-line mediation settings.*

If we should reach a point where an agreement cannot be reached, I have two options:

1. The first is to suggest a possible solution. I will only make such a suggestion after I have permission from both parties. Whether or not to accept this suggestion will be up to you. *My starting point is a facilitative approach. However, a mediator may opt to take on an "evaluative" role for the sake of convenience and speed of the process and ONLY if parties agree.*

2. The other option is to close the case. You would then be at the same point you are now: as if the mediation had not taken place and leaving it up to you to refer to other (legal) venues if you desire. *For cyberspace-borne disputes, going to court is generally not an option.*

I will be asking you for information to explore possibilities for settlement. In order to help you resolve this as quickly as possible, I like you to reply within a day or two.

As a matter of principle, you won't be shown each other's messages, but I will, of course, be sharing relevant information with you about what your messages, in essence, boil down to. If there is anything in your communications that you don't want to be disclosed to the other party, please let me know. Also, please contact each other directly only in case you are sure that you can have a constructive dialogue. I would strongly prefer, though, that you communicate through me. In case of direct communication please do so through the discussion board on the secured website (and not by private e-mail) so that, at all times, I am informed about your direct communications and the substance of your dialogues

At this point, I have read all the information that you have given to me. It appears to me that despite the unfortunate circumstances that gave rise to this disagreement, both of you have already worked hard to clear things up and that both of you are committed to finding a solution. Based on the limited information I have, I conclude that the buyer claims defective merchandise. It appears to me that he feels misled by the auction specifications and that he has left negative feedback towards the seller to express his unhappiness about the events. The seller has indicated that he feels the feedback is unjustified. He asserts that he clearly specified the condition of the car "sold as is" and that he offered the buyer the opportunity to have the car inspected beforehand.

My question for you is to tell me a little bit more about the events that led to your disagreement. Please explain the issues at stake, your concerns and wishes and let me know what you think needs to be done, from your own perspective, to resolve your disagreement. .

From the information you have both given, I also see that as part of an agreement, you would both agree to have the transaction-related feedback posted against the seller withdrawn, if the other is-

sues can be resolved.

I am quite sure that we can all find a way out together if both of you are willing to really go for it.

I hope to hear from you soon. If in the meantime you have any questions, by all means, let me know.  
Thanks in advance for your cooperation

With best regards,

[Name withheld] - Mediator

### Fragment 2:

#### Message from buyer to mediator:

"[...] I simply give them the details of what happened. If this feedback is so horrible to him, he should just create another eBay account. If he simply represented the vehicle as it was rather than SHAMELESSLY lying in the ad and on the phone about the condition, it would not have brought \$12,000. It would have brought around \$3,000. I highly suggest that before this feedback is removed that you contact me further. If it is removed without my consent I will not be pleased at all. I still after all these years feel that this sale represented the WORST of eBay. I dont think it would be fair for eBay's to not know the details of this when dealing with this seller [...]"

*Insulting language such as "he is SHAMELESSLY lying" ought not be communicated literally to the other participant as this would only escalate the conflict. Instead, care should be taken to rephrase it through the caucus format*

### Fragment 3:

#### Message from buyer to mediator:

"[...] the car was NOWHERE near restored and had several problems that were said to have been fixed. The gentleman was very belligerent and BLALANTLY called me a LIAR and refused to even discuss this [...]." *The use of capital letters is the equivalent to shouting in the off-line context.*

#### Message from seller to mediator:

"[...] "however I was not a body technician or a mechanic as he told me that he is a used car dealer..In his feedback to me he invites ebay bidders to contact him,which I feel is unfair to me and unbusiness like. When you peruse my ad on item #xxxxx# everything that I have stated here will be verified. I am disheartened that the buyer is unsatisfied with his purchase ,however he should have had a prepur-

chase inspection prior to his bidding.' I gave him a POSITIVE rating and you can see that he has two negative ratings from other buyers. To call me a LIAR is unfair. Thank you." *The use of the words "LIAR" and "unfair" are clear signs that there is a lack of mutual trust!*

**Possible response of the Mediator (sent to both parties):**

"[...] At this point I have read all the information that you both have given to. It appears to me that both of you are really frustrated and disappointed about all this. It's good that all this comes to the fore now. I fully respect your feelings as shown in your comments and I can only say that this is quite normal as in an on-line context we can not meet and see each other face-to-face and, of course, it happens all the time that we start to mistrust the intentions and the good faith of the transaction partner, when we enter into a deal with him. *Parties in cyberspace generally have no past nor any future relationship. The lack of interdependence and face-to-face contact poses challenges for the mediator to normalize and neutralize communications, particularly at the beginning of the mediation.*

We also cannot run away from the fact that we are all humans that make mistakes.

I read that the buyer feels that the negative feedback is justified due to all kind of issues related with the purchased car, that he feels misled and that he is very unhappy about the transaction. The seller, in turn, feels that he did not want to mislead the buyer and that the buyer was offered the option for a pre-inspection before purchasing the car. Also, he appears to be very unhappy that the buyer invites other people in the market place to discuss this transaction and the issues with this seller. I can also see that both of you have left negative respectively positive feedback for each other [...]."

**Fragment 4:**

**Message from buyer to mediator:**

"[...] The purpose of feedback is to let other people be aware of problems like this. It gives the buyers a voice as well as the sellers. If the system works as it should, the feedback will stay. if not then your system is meaningless *These are clear symptoms that he is looking for "justice" and "fairness".* The choice is yours. In any case DO NOT REMOVE THE FEED-BACK WITHOUT MY CONSENT [...]" *The wordings "the choice is yours" and "do not remove feedback" require an adequate and prompt reaction from the mediator to re-establish trust in him/her (and the procedure), to re-assure impartiality and to remind the party that he/she has "an active voice".*

**Possible response of the mediator (sent to the buyer):**

"[...] I am writing to you as I feel I need to clarify a few things. It appears to me that you feel there may be some impartiality on my side. You wrote: "it is not up to me to..." and "do not remove feedback without my consent". Please believe me when I say that there is no such bias, or any prejudice whatsoever, from my side and that I will do my utmost to keep my neutrality in this matter. Of course I will

not do anything without your prior consent. Please remember that mediation is a voluntary process that aims at facilitating negotiations between the two of you. You participants decide on the outcome, not me. That is why I believe it is so important that you have an active role in suggesting options for solutions. Before we get to this let me just restate what you said so as to be sure that I fully understand what you wrote [...]". *The mediator acknowledges and validates the concerns of the buyer. In addition, the buyer is "reminded" of his power and influence. To maintain an equal-level playing field, the mediator will obviously and, if applicable, equally acknowledge and validate any concerns from the seller.*

## 8. The ODR provider as the fifth party

It is to be noted that the academic literature also refers to a fifth party in ODR, viz. the ODR-provider.

Bol (2005) introduced this concept to denote a, mostly commercial, entity that provides the ODR-technology (that is to say, the fourth party) combined with, in most cases, the provision of the neutral-services (that is to say, the third party). She asserts that the singling out of a fifth party as a separate entity has several economic implications, such as the influence this has on the forum shopping possibilities and on the freedom of choice of ODR services. It also has legal implications, the main one being the liability issue of the ODR service provider versus the ODR-mediator. For more details, reference is made to Lodder (2006) and the dissertation that Bol will present in the foreseeable future (probably in the fall/winter of 2006/2007).

In traditional ADR-proceedings it is exclusively the third party neutral who brings the skills, experience, competence and "ethical carefulness" to the mediation table.

In on-line settings, the neutral, the 4th party (ICT) and the 5th party (the ODR-provider) bear a shared responsibility to jointly facilitate and streamline the proceedings effectively. In chapter 5 we have already demonstrated how, in ODR, some of the tasks of the third party can be replaced by technology.

When analyzing the notion of neutrality or transparency as perceived by the participants, it would seem to be relevant to clearly mark the bounds in the roles of these parties, in particular between the third party (the human neutral) and the fifth party (the ODR provider and the procedures and technology offered).

Considering the narrow confines of a thesis like this one, it would take us too far afield to engage in an in-depth exploration to distinctly demarcate the roles of these parties. It may, therefore, suffice to provide some "food for thought" on these aspects by venting a few beliefs and impressions on the possible implications that the responsibility of the fifth party may have on e.g. the perception of trust.

Many ODR-providers do not offer parties the choice to select their neutral on the basis of the neutral's subject-matter expertise or reputation. This may lead to the somewhat intuitive assumption that, because of this lack of choice, ODR mechanisms may well undermine trust.

In general, I also notice that the vast majority of large ODR providers lack transparency in that they do not disclose their "success-rate", nor do they provide more detailed statistics derived from mediations that fall flat out of the total conducted.

To illustrate this: it is still unclear (at least to the interested observer) how many cases are actually resolved and what exactly are the surrounding circumstances that account for the published success-rates. For instance, SquareTrade publicly states, "that 80% of the cases are being resolved in the direct negotiation process" and gives a "90% success-rate for completed cases". Seen the astonishingly high degree of resolution it may be interesting to know how these statistics are arrived at.

In the somewhat tight framework of this thesis this question must, of necessity, be left unanswered. Suffice it to say that the information on settlement rates, that I derived from my own mediations does not warrant an academically viable conclusion. Even if such a conclusion were feasible, my own non-disclosure agreement with amongst others SquareTrade would stand in the way, so to say, as it constitutes a constraining factor in the divulgence of such information.

As to the trustworthiness of the fifth party, whether real or perceived, it is to be observed that this can be affected by the extent that ODR-providers (1) publicly offer an appellate process (that is, the possibility to lodge a complaint against the way the mediator handled the case or against the procedures followed) and (2) safeguard a balanced stakeholder representation (that is, to guarantee that the ODR provider's neutrality is not, in any way, compromised).

This, finally, brings me to an aspect of trust in the ODR-service provider that should be addressed in this context, namely "legitimacy". Essentially, the aspect of legitimacy boils down to the question as to how the general public that uses an ODR-service can be certain that it is dealing with a trustworthy party, in this case the ODR-provider. I strongly feel that this legitimacy can be created by the establishment of proper standards and rules as well as by professionalism (accreditation of ODR-professionals), as also advocated by Schultz (2003b and 2004) and by Hornle (2005) and as likewise embodied by the recommendations issued by the American Bar Association (2002). This appears to be particularly true for countries, especially those in Europe, where people still associate dispute resolution with "the formal law".

## 9. Conclusions and recommendations

Online Dispute Resolution has so far not managed to attract widespread popular attention. As with every institution or concept, especially those in their infancy, discussions in academic and other circles that center around ODR's *raison d'être*, its advantages and drawbacks, are fraught with controversy, the relevant issues being hotly debated by enthusiasts and skeptics alike.

It is from a vantage-point in the "no man's land between the warring factions" that the writer of this thesis has made a sincere effort, and hopefully so a successful one at that, to highlight and analyze objectively the numerous, sometimes complex, issues.

This thesis serves to demonstrate how, in specific circumstances, on-line proceedings can be as effective as traditional proceedings and how eBay's Conflict Management System, proves – both quality- and quantity-wise – to have an important function to prevent (or resolve, as the case may be) disagreements that arise in e-commerce without having to rely on formal law.

I am fairly certain that the information that is provided in this paper will also give a better understanding of the emerging field of ODR and that the reader will have been persuaded to concur with the writer that ODR, as it is now presents "changes, challenges and chances" not only to the traditional conflict management field but also to its present and future users.

In this thesis, I contend, first of all, that along the spectrum of Conflict Management Instruments, Online Dispute Resolution is undoubtedly one more appropriate tool, with its own unique features, capabilities and challenges. ODR grew directly out of the history of traditional ADR and many of the lessons learned in ADR, are also central to effective ODR (Rule, 2002). This thesis also serves to show that ODR, in turn, can complement, and at times may well provide added effectiveness and efficiency to, traditional conflict management proceedings.

The most important benefits of ODR that have been identified in this thesis are:

- The on-line environment and the ODR-technology, tailored to the needs of the particular situation, giving both participants and neutrals new tools and techniques;
- The important advantages and capabilities that ODR systems and technologies can bring to the area of conflict avoidance and prevention. As likewise asserted by Rule (2002, page 62), both businesses and consumers can benefit from the fact that – through ODR - grievances and complaints can be

addressed much earlier than is possible in traditional proceedings. I personally believe that this area of dispute prevention is of strategic importance, not only to “seed” and develop effective Conflict Management Systems, but also to contribute, at least partially, to a structural “transformation” (Cloke, 2006) of the way in which we deal with conflicts.

ADR remains an area in development and it appears legitimate to re-define the whole spectrum of conflict prevention- and resolution mechanisms as trust-building conflict management instruments that, effectively, meet specific needs and circumstances. I am, moreover, convinced that the traditional dispute resolution mechanisms - ADR and derivatives or combinations thereof as well as the traditional judicial system - ought to be applied with a greater sense of flexibility and creativity and should, increasingly, be looked upon from the “demand”-perspective of the general public, and more specifically, the ODR-participants.

Furthermore, when reviewing eBay’s experience, the conclusion must be drawn that the ODR-mechanisms that eBay provide and to which any violation of norms and rules may be submitted, are a crucial factor in assuring customer satisfaction and building consumer confidence.

This thesis asserts also that, in cyberspace, self-regulation through ODR should be given preference over juridical intervention as long as (1) it satisfies the needs of users; (2) it creates and sustains trust; (3) it is made accessible and affordable for consumers and, finally (4) it effectively prevents fraud, to the extent possible.

In this paper, numerous issues that remain to be regulated or co-regulated by formal law were identified and reviewed. After all, legitimacy and trust cannot be created and sustained by ODR on its own. I allege that self-determination should be nurtured but that governmental bodies and/or the law (nationally and internationally) ought to undertake a coordinated effort to provide the optimal regulatory framework of ODR by developing a strategy that combines “the best practices” of both “private ordering” and formal mechanisms,

The most interesting personal conclusion that I, personally, have been able to draw from my study is that self-regulatory mechanisms, provided that these have been successfully institutionalized, may cast some doubts on the relevancy of the ongoing discussions as to whether mediation, in a procedural sense, should be voluntary or mandated. Aspects such as the enforceability of mediation appears to have become a matter of no consequence in the context of eBay, as the mediation service is “transacted” by the parties to the market place as a (commercial) product that indeed satisfies a distinct demand. The feedback system and the “self-enforced” commitment to resolve matters amicably could therefore be defined as an element of the “societal

consent” (and part of the “social contract”) that is an essential component of any personal and commercial relationship that people engage in, whether on-line or off-line.

Finally, numerous areas that could benefit from more academic attention and systematic research have been identified. The area of (procedural) trust and the question of how to design trustworthy systems and procedures (whether or not supported by technology) is where I believe ADR as a field can benefit the most from a better insight. This will help us “craft” and, possibly redefine, the role of the various parties in ADR (as well as in ODR).

I conclude this thesis by appealing for a steadfast commitment to a spectrum of dispute resolution mechanisms (including ODR) that forms part of, figuratively, a multi-door courthouse, “of the people, by the people, and for the people”<sup>22</sup>.

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<sup>22</sup> Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863)

## 10. References

The author of this thesis apologizes for any unintended inaccuracies in, or misrepresentations of, the citations used. No responsibility can be assumed for the content of anyone of websites cited. All websites listed were accessed before August 20, 2006.

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## **10.2. Additional websites and -services assessed**

<http://www.BBBOnline.org>

<http://www.best-project.nl>

<http://www.cybersettle.com>

<http://www.ebay.com>

[http://www.fortinet.com/FortiGuardCenter/reports/roundup\\_july\\_2006.html](http://www.fortinet.com/FortiGuardCenter/reports/roundup_july_2006.html)

<http://www.hub.ebay.com/community>

<http://www.icann.org>

<http://www.infoshare.org>

<http://www.nmb.gov>

<http://www.odr.info>

<http://www.pages.ebay.com/community/people/values.html>

<http://www.pages.ebay.com/services/forum/feedback.html>

<http://www.paypal.com>

<http://www.rechtspraak.nl>

<http://www.sgc.nl>

<http://www.squaretrade.comhttp://feedback.ebay.com/ws/eBayISAPI.dll?InrCreateDispute>.

<http://www.tilburguniversity.nl/faculties/frw/research/schoordijk/tilt/research/259-2005/?lang=UK>

<http://www.unifab.com>

## 11. Appendices

### 11.1. Glossary of Terms<sup>23</sup>

In this thesis the term **Online Dispute Resolution** (acronym ODR) is used to denote ADR-procedures, assisted by Communication and Information Technology (hereafter referred to as CIT), in particular the Internet.

Synonyms of ODR are “e-ADR” (where -e- stands for electronic), “on-line ADR” or CIT-assisted ODR-procedures.

The term **Alternative Dispute Resolution** (acronym ADR) is used to denote other than judicial processes, in which a neutral third party assists those in a dispute to resolve the issues between them. The role of the neutral can be facilitative, evaluative or determinative. Alternative Dispute Resolution comprises negotiation, mediation and arbitration, all other forms of ADR being derivatives thereof. The term “alternative” refers to the option that parties choose ADR instead of, or in addition to, traditional litigation through the judiciary system.

**Negotiation** is the process where parties communicate directly in an attempt to reach a settlement for their disagreement.

**Mediation** is the process that provides for trained third party neutrals to facilitate the above-referenced communication- or negotiation-processes among parties in order to help resolve current disputes.

By helping parties in dispute to change the quality of their conflict interaction from negative and destructive to positive and constructive, the mediator facilitates the parties to make decisions together, based on an assessment of their own views, the other party’s views and the situation the two of them face.

In addition to mediation, there are several other ADR-instruments, such as **Arbitration** and combined instruments such as **Mediation-Arbitration** (med-arb).

In arbitration, the arbitrator is the final “judge” and as such determines the outcome. Furthermore, it is a longer process than mediation with many typical court procedures, generally at considerably higher costs. Mediation-Arbitration (Med-Arb) is used if parties want to make sure that the conflict is resolved at the end of the procedure.

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<sup>23</sup> Partly originating/adapted from Conley Tyler, 2004

It starts with mediation and may end with arbitration (binding advice by third party) if parties do not reach an overall or partial agreement on the issue(s).

Among the many forms of ADR, negotiation and mediation are the only forms with self-determination as the backbone of the process; parties decide on the outcome.

**Complaints Handling** is a facilitative process where a complainant can express a grievance or make a (legal) complaint to a business/merchant (e-commerce) or a neutral party who will communicate a request for redress to the other side, usually for consumer disputes. It may or may not include a demand for redress.

**On-line** is a colloquial term that refers to communication through an electronic medium, especially the Internet.

**On-line Disputes** are any disputes that arise through or because of on-line communication methods. For example, a dispute between a consumer and a website that sells products on-line, or between a buyer and a seller over an Internet auction. **Off-line Disputes** are any disputes that arise in the "real world" outside of cyberspace. These include all possible types of disputes. Both on- and off-line conflicts can be resolved on-line.

In ODR two communication methods can be identified: **Synchronous** is when parties are communicating in "real time" and where one responds to the other side right away. Examples are phone, VoIP (such as Skype) and, of course, face-to-face interactions. **Asynchronous** communication is when parties are not communicating at the same time. Sending e-mails back and forth and posting messages on an on-line discussion board is asynchronous.

The most common form of CIT that is presently applied in ODR is text-based asynchronous communication over the Internet.

The term **third party** in ODR is used to denote the impartial neutral, in addition to the two (or more) disputants (which, in actual fact, are the **first and second party**).

The **fourth party** in ODR denotes any type of ICT-technology that supports or substitutes for the expertise of the neutral in on-line or off-line proceedings. ICT refers to a customized tool that provides some type of added-value to the direct negotiations between parties and that is considered as suitable to meet their needs.

The **fifth party** in ODR (Bol, 2005) is a, mostly commercial, entity that provides the ODR-technology (that is to say, the fourth party), combined, in most cases, with the provision of the neutral-services (that is to say, the third party).

## 11.2. Screenshots of ODR platform

A. Screenshot of "reference based" dialogue tool where the system poses multiple choice type questions that - based on past experiences with this type of conflict - relate to a certain type of issue.

The screenshot displays the JURIPAX ODR platform interface. At the top, there is a header with the JURIPAX logo and a green and blue gradient background. Below the header is a navigation menu on the left side with the following items: Juripax GK, Home, Cases, Case management, Create new case, Account, My preferences, Registration, Sign out, About us, Contact, languages, and Language selector. The main content area is titled 'File a case - dispute data' and contains the following elements:

- A green bar with the text 'Please provide us with the requested information for filing purposes' and a page indicator '1 | 2'.
- A note: 'Fields marked with an \* are required'.
- A section titled 'Dispute category' with the instruction 'Tell us about the type of dispute'.
- A section titled 'Please check all boxes that apply\*' with the note: 'This question is for organizational and statistical purposes only and is without obligation as to any substance of the conflict'.
- A list of 13 checkboxes with corresponding text:
  - Item not received (INR)
  - Damaged or incomplete merchandise
  - Item "significantly different as described" (SNAD)
  - Unpaid item (UPI) or insufficient payment, merchandise NOT sent
  - Unpaid item (UPI) or insufficient payment, merchandise sent
  - Non compliance with the auction terms
  - Quality of service not as expected
  - No timely response to my communication
  - Retaliation feedback
  - Feedback left for me was unnecessary or unjustified
  - "Unpaid item"-claim was filed
  - "Unpaid item"-claim will be filed if issues are not resolved
  - other and/or additional issues
- A green bar at the bottom with a 'Select language' button on the left and a 'Next' button on the right.

**B.** Screenshot to illustrate some of the tools to support textual communication such as spell checker or a memo field that allows the mediator to make a memo to his/her own use (this serves the same function as a piece of paper and/or a flip-over in traditional proceedings).

The screenshot displays the JURIPAX v0.70 Beta web interface. On the left is a navigation menu for 'Juripax GK' with options: Home, Cases, Case management, Create new case, Account, My preferences, Registration, Sign out, About us, Contact, languages, and Language selector. The main content area is titled 'New message control panel' and includes:

- Message title:** A text input field containing 'Response Mediator' and a placeholder 'Please enter a descriptive title here'.
- Message body:** A rich text editor containing the text: 'I am writing to you as I feel I need to clarify a few things. It appears to me that you feel there may be some impartiality on my side. You wrote: "it is not up to me to..." and "do not remove feedback without my consent". Please believe me when I say that there is no such bias, or any prejudice whatsoever, from my side and that I will do my utmost to keep my neutrality in this mat-ter. Of course I will not do anything without your prior consent. Please remember that mediation is a voluntary process that aims at facilitating negotiations between the two of you. You partici-pants decide on the outcome, not me. That is why I believe it is so important that you have an active role in suggesting options for solutions. Before'. Below the text is a toolbar with a bold icon and two circular arrows.
- Spell checking:** A section with 'Select language' set to 'English - English' and a 'check spelling' button.
- Send this message to:** A list with a checked checkbox for 'Mr. Marc Carizo, (Mediator)' and a 'Send Message' button.
- Send this message as a memo to myself:** A section with a yellow sticky note icon labeled 'Memo', the text 'You can add this message as a memo to yourself on the discussion board. This memo is only visible to you', and a 'Send Memo' button.

**C.** Screenshot to illustrate the multi-lingual function. One of the options for the user is that he/she files the grievance or complaint in a questionnaire-format in his/her native language. The system can subsequently translate the "intake" in the preferred language of the complaints handler, for instance Dutch.



**About the author:** May-Britt Kollenhof-Bruning is a professional mediator and co-founder of Alliance Mediation LLC and Juripax. She completed her formal mediation training in the U.S. and serves as a mediator and arbitrator in, mainly, commercial disputes and as an on-line mediator for amongst others eBay.com conflicts. She is an NMI-mediator in the Netherlands and an Accredited Professional Mediator (APM) in New Jersey, USA.

The activities of JURIPAX are geared towards supplying ODR-technology and services to support on-line negotiations and on-line dispute resolution proceedings, in particular for the European market.