

Challenges to ODR Implementation in a Developing Country

by
Claro V. Parlade*

I. Introduction

The term “digital divide” is descriptive of the disparity in the access to technology among the rich and the poor. It is a divide engendered, not by technology itself, but by a pre-existing economic gap: like other benefits of human invention and labor, access to technological devices such as the telephone, computers and the internet come at a cost that is usually beyond the means of the underprivileged comprising a large segment of society.

The multitude of applications developed using the internet provides an indication of the far-reaching impact of, and the many benefits that may be derived from, this technology. Given the manner by which the internet has transformed the shape of commerce and society, particularly in developed nations, the concern for the digital divide springs from the internet’s exclusionary effect: to the extent that commerce, government services and civic interaction become dependent upon the internet, the ill-effects of lack of access is exacerbated.

Online dispute resolution (“ODR”) is an example of a beneficial application that takes advantage of online technologies. The lack of recourse for grievances arising from online transactions was perceived as one of the formidable barriers to the growth of electronic commerce. Accordingly, early ODR initiatives focused on its use to enhance confidence in electronic commerce. With the explosive growth of online transactions, the use of ODR is similarly growing,¹ and it is taken for granted that high internet diffusion and public confidence in e-commerce are preconditions to the enjoyment of benefits from ODR. The fact that ODR has taken root in developed countries with high internet penetration rates appears to confirm this belief.

Developing countries typically do not have the infrastructure to enable widespread internet access, and this naturally limits the level of e-commerce and, correspondingly, the need for ODR in online transactions. Still, despite the relative infancy of ODR and its underlying technologies, it is quite plain that it may be adapted for the offline environment. Thus, while a low level of internet diffusion may understandably hamper access to ODR, it ought not necessarily preclude the exploitation of ODR technologies to benefit both the online and offline community. The identification of specific situations and models for maximizing the benefit from ODR, taking into account a developing country’s financial and infrastructural constraints, is certainly a huge challenge. In this Chapter, I will describe a simple proposal to precisely take on this challenge and implement ODR in the Philippines, a developing country with a population of 80 million spread across over 7,000 islands. Section 2 briefly describes existing initiatives to

* Executive Director, Cyberspace Policy Center for Asia Pacific;

Chairman, Philippine Information Technology and E-Commerce Council (ITECC) Legal and Regulatory Committee

¹ Squaretrade alone has resolved over 230,000 disputes from 2000-2002. See Steve Abernethy, *Trusted Access to the Global Digital Economy/Square Trade International ODR Case Study*, UNECE Forum on Online Dispute Resolution, June 6-7, 2002, Geneva Switzerland.

use ODR to supplement or improve the efficiency of judicial processes, or to increase access to justice beyond the judicial framework for dispute resolution. In Section 3 of this Chapter, the positive and negative factors that may influence the wide-scale adoption of ODR in the Philippines shall be explored and weighed. Finally, Section 4 describes the proposed ODR implementation in the Philippines.

II. Enhancing Access to and Quality of Justice using ODR²

ODR, as used in this chapter, refers to the various uses of the Internet and other web-based technologies to facilitate traditional Alternative Dispute Resolution (“ADR”) or adapt ADR techniques to the online environment, or may even cover mechanisms for dispute prevention (such as education, outreach, rating and feedback programs), ombudsman programs, conflict management, assisted negotiation, early neutral evaluation and assessment and consumer programs³. ADR refers to methods of resolving disputes, outside the traditional litigation process, that may be chosen by the parties to resolve a future or a current dispute.

ADR grew as a response to shortcomings of the court system decades ago, as the clogging of court dockets worsened and the period for dispute resolution through litigation correspondingly lengthened. It was called “alternative”, being outside of the judicial process, and slowly gained currency because of the perception that it could respond to concerns of parties to a dispute more efficiently, inexpensively and quickly than traditional litigation. ADR offers to parties the flexibility to choose the dispute resolution procedure that seems most appropriate given the nature of their relationship, the subject matter of the dispute, and their specific needs such as confidentiality, cost-effectiveness, and similar requirements. Being a private process, it is generally informal and less adversarial, solution-oriented rather than blame-oriented, and less likely to be stymied by procedural or jurisdictional roadblocks.

In an ADR Workshop organized by the World Bank and USAID, the Conflict Management Group⁴ presented an analysis of the ADR experience in developing countries,⁵ particularly in Bangladesh, Bolivia, South Africa, Sri Lanka and Ukraine, and concluded that ADR programs can play a positive role in support of judicial reform, particularly in reducing the cost and time required to resolve disputes.

In the European Union, the impetus for encouraging ADR is drawn not only from practical problems that beset court systems. Access to justice is a fundamental right that is enshrined in various international instruments in effect within the European Union. Most notable among these instruments is the European Convention for the Protection of Human Rights and

² See C. V. Parlade, S. S. Panga, Jr. and M. C. Parlade, *ODR and Judicial Reform*, Cyberspace Policy Center for Asia Pacific 2003, upon which Sections II and Section III of this Chapter are largely based.

³ This definition was taken from the paper of the *American Bar Association Task Force on E-commerce & Alternative Dispute Resolution*, <<http://www.law.washington.edu/ABA-eADR>>.

⁴ <<http://www.cmgroup.org>>.

⁵ The paper may be viewed at <<http://www.info.usaid.gov/democracy/techpubs/adr>>.

Fundamental Freedoms,⁶ as well as the Charter of Fundamental Rights of the European Union.⁷ Thus, the right to valid remedies has been declared by the European Court of Justice to be a general principle of Community Law.⁸

Accordingly, various European nations have undertaken programs to promote and utilize ADR in various ways, like the setting up of a consultative council on family mediation,⁹ providing financing for ADR structures (such as Consumer Complaint Boards),¹⁰ as well as vocational training programs, information campaigns on ADR, and amendatory legislation for ADR.¹¹ The European Commission, on the other hand, has set up networks like the European Extra-Judicial Network (“EEJ-NET”) and the Financial Services Complaints Network (“FIN-NET”) to facilitate consumer access to justice using out-of-court procedures for the resolution of cross-border disputes. The EEJ-NET is a consumer support and information infrastructure dealing with general consumer disputes, while the FIN-NET is a network of competent national ADR bodies providing direct access to an ADR facility to consumers who have problems relating to financial services (banks, insurance companies, and investment services).¹²

The use of ADR to ease the burden of the court system and to provide the public with a more expeditious and cost-effective recourse for grievances is even enhanced with ODR technology. ODR has been implemented in a variety of ways that amply demonstrate its facility for increasing consumer access to justice. One example of such an ODR implementation is Squaretrade,¹³ which uses a “blind-bidding” process that allows communication of both parties’ parameters for an acceptable compromise without undermining either parties negotiating position. SmartSettle¹⁴ employs a similar process but offers greater flexibility with its more complex software that allows variables in addition to monetary amounts, representing each party’s preferences and interests, to shape an acceptable compromise. Thus, it aids the negotiation process in ways not possible in traditional offline negotiations.

The foregoing models offer an inexpensive and expeditious approach to dispute settlement for both small and large value claims. For small claims especially, both judicial dispute resolution and traditional ADR may be impracticable since the cost of dispute resolution

⁶ Article 6.

⁷ Art. 47.

⁸ *Green Paper*, citing Case 222/84 *Johnston* [1986] ECR 1651 (judgment given on 15.5.1986).

⁹ <<http://www.justice.gouv.fr/presse/com091001.htm>>, cited in *Green Paper*, p. 13.

¹⁰ *Green Paper*, p. 13.

¹¹ *Id.*, p. 14.

¹² *Id.*, p. 18.

¹³ <<http://www.squaretrade.com/cnt/jsp/index.jsp>>

¹⁴ <<http://www.smartsettle.com/html/process.html>>.

may exceed the amount in dispute, effectively negating access to justice. But ODR not only provides access to justice where before there was practically none, it also provides such access 24 hours a day, 7 days a week via the internet, not being bound by time and physical constraints. It fosters quicker resolution of disputes by eliminating the posturing and gamesmanship that usually prolong off-line negotiations.¹⁵ The simplicity of the process and its reliance upon willingness of the parties to accept a compromise amount, rather than an adjudication of their respective rights and obligations, makes it unnecessary to go into the complicated issues of jurisdiction and governing law, application of evidentiary rules, and enforcement of a foreign electronic judgment. By providing new and more efficient avenues for communication, with or without the aid of a third party, ODR increases the possibility of out-of-court dispute settlement and, in that manner, contributes to the reduction of the burden of courts.

ODR's underlying technologies may also be used to improve upon traditional ADR such as negotiation, mediation and arbitration. For instance, Squaretrade offers a password-protected "Case Page" in its website which parties may utilize to communicate directly, without the aid of a mediator or other Squaretrade personnel. If the parties are unable to settle the dispute, information about the case can be submitted to a mediator. According to Squaretrade, self-service tools achieve over 80% successful resolutions.¹⁶ Ecodir.org¹⁷, an ODR provider supported by the European Commission, uses a three-step process of negotiation, mediation and recommendation. Like SquareTrade, Ecodir.org uses an online facility that allows online registration and, subsequently, negotiations using e-mail, and only after negotiations fail will mediation be utilized.

ClicknSettle.com enhances its arbitration and mediation services by offering an array of conflict resolution options and tools such as video-conferencing and claims to utilize the "most technologically advanced online and case management and reporting systems to in-person arbitrations and mediations."¹⁸ As a result, arbitration can be completed in a number of hours, while the decision is typically rendered within 30-60 days. Because of its use of videoconferencing technology, parties and third-party neutrals do not have to meet physically in the same location.

Although videoconferencing has become significantly more affordable during the past few years, the technology is still not widely available. Thus, some ODR providers offer

¹⁵ See <<http://www.webmediate.com/intro>>. The site further explains: "Experienced mediators and litigators attest that there is no greater obstacle to achieving rapid, mutually agreeable settlements in the off-line world than the posturing and "reactive devaluation" of claims by disputing parties that WebSettlement eliminates.

¹⁶ S. Abernethy, *Trusted Access to the Global Digital Economy/Square Trade International ODR Case Study*, UNECE Forum on Online Dispute Resolution, Palais des Nations, 6-7 June 2000.

¹⁷ The website describes the ECODIR project as a university initiative supported by the European Commission and Irish Department of Enterprise, Trade and Employment, devoted to the electronic resolution of Internet disputes arising between consumers and merchants. It is operated by a consortium consisting of European universities and North American partners specialized in the resolution of disputes on the Internet. The ECODIR project is a pilot project that provides online consumer conflict resolution services until the end June 2003. See <<http://www.ecodir.org>>

¹⁸ <http://www.clicknsettle.com/why_cns.cfm>.

videoconferencing facilities for parties who would otherwise not have access to the same.¹⁹ Resolution Forum offers a text-based conferencing system without video tailored for mediation and arbitration, although it is also in the process of implementing a video-conferencing system.

Consensus Mediation²⁰ offers both “traditional” face-to-face mediation and e-Mediator, which is mediation carried out online. For the latter, instead of using videoconferencing, the parties and the mediators simply communicate using encrypted e-mail. IntelliCourt²¹ offers arbitration and mediation in the same manner. Like Consensus Mediation, InternetNeutral offers face-to-face mediation but also offers mediation using several private and secure Internet technologies, either singly or in combination. These technologies are e-mail, instant messaging, chat conference rooms and video conferencing. It claims settlement rates of 85% of all disputes.

Some ODR providers adopt procedures patterned after court procedure, except that the process is completely online. But because of the built-in advantages of the online environment, cases can move in Internet speed. iCourthouse²², for instance, describes itself as a “greatly streamlined” version of the court system in the real world, deciding real cases using real jurors.

NovaForum, another “electronic courthouse”, claims that it is 95% cheaper and 99% faster than litigation, and that it achieves greater confidentiality and higher compliance rates.²³ It combines a variety of online collaboration tools, video, live chat, text and transcript capabilities with full case management, fact assessment, analysis, and weighted issue/interest variables.

TheClaimRoom was launched as the “first comprehensive European-based online dispute resolution service”, designed to provide a worldwide multi-lingual ODR using a proprietary software platform. The software is also being licensed for direct in-house use by organizations. TheClaimRoom offers an “always open” online negotiating/mediating area as well as a “blind bidding” tool for resolving monetary disputes and consumer complaints.

Technologies applied to ODR, by opening new channels for negotiations, not only offer the opportunity to resolve disputes expeditiously and inexpensively but in many cases prevent the same from ripening into a full-blown dispute requiring third-party intervention. Virtual rooms for negotiation, e-mail and web-based asynchronous communication, real-time chat facilities give parties the opportunity not available before to discuss their grievances and their respective underlying interests. As earlier noted, among all modes of ADR, negotiation is the most common form that has led to an out-of-court settlement of dispute. ODR magnifies the potential of negotiation with the use of technology. To a certain extent, the geographical distance aids the ODR process where focus on personalities or other emotion-driven discussions are avoided. This advantage, though, may be negated where lack of face-to-face interaction results in cultural insensitivity or similar unintentional offensive communication that may undermine the possibility of a negotiated settlement.

¹⁹ See <<http://www.eneutral.com/tour>>.

²⁰ <<http://www.consensusmediation.co.uk>>.

²¹ <<http://www.intellicourt.com>>.

²² <<http://www.i-courthouse.com>>.

²³ <http://www.novaforum.com/novaforum_revised.html>.

ODR empowers mediators in many ways, regardless of a mediator's approach, that is, whether he uses "interest-based approaches" or "rights-based approaches", or whether the method employed is "facilitative" or evaluative". Any approach, after all, depends almost entirely upon the effectiveness of communication. Online mediation as a mode of dispute resolution is but a mirror of offline mediation, except that the mediator benefits from a variety of communication tools that can facilitate settlement of the dispute. The tools can be as simple as e-mail, just to allow convenient communication between a disputant and the mediator, unhampered by geographic distance or differences in time zones²⁴. If greater online interaction is needed, as when quicker responses are desired, more complex tools may be used – instant messaging, chat conference rooms, similar online discussion tools, or even videoconferencing²⁵, although the hardware requirement of these tools may limit their applicability. Software can assist mediators in analyzing the parties' interests and developing alternative solutions to disputes.²⁶ In fact, just by being offered online, ODR already provides the benefit of greater accessibility compared to offline mediation.

Although arbitration, being an adjudicative process, requires less complex communications than mediation, the same technological tools available to online mediation may be used for online arbitration to expedite dispute resolution. But online arbitration costs far less on average. Resolution can be accomplished in a matter of hours for some providers²⁷ but generally requires less than 30 days. Moreover, many ODR providers offer hybrid services, or simply a range of separate ODR services, probably because the various ODR modes may be complementary or simply because the same technological tools may be shared for different applications.

The potential of innovative uses of technology in the various ODR models discussed earlier, as well as ODR implementations yet to be devised, upon broadening access to, and improving quality of, justice is quite evident. The power and efficiency of technological tools in storing, processing and conveying information underlies this potential, although realization of the potential greatly depends upon the architecture or procedural framework of the service. The huge disparity in speed of dispute resolution between ODR and court litigation may, perhaps, prompt due process concerns because of the possibility that a party may be deprived of time sufficient to validate its position. But this overlooks the fact that the online environment was built for speed *and interactivity*, so that the opportunity for multiple exchanges of information and articulation of positions ought to eliminate due process, at least conceptually, as a limitation to ODR. With appropriate implementation of technology within a procedural framework that guarantees fairness, ODR may prove to be a vital instrument for judicial reform.

²⁴ Consensus Mediation uses a simple e-mail facility for its online mediation with an e-mediator. See <<http://www.consensusmediation.co.uk>>.

²⁵ Internet Neutral is one of the providers that utilizes these tools. See <<http://www.internetneutral.com>>.

²⁶ See, for instance, <http://www.smartsettle.com>.

²⁷ Novaforum estimates resolution at 72 hours after submissions have been filed. See <<http://222.novaforum.com>>. Dispute manager does not give specific time frame but mentions resolution "in a matter of hours". See <<http://www.disputemanager.com>>.

III. Weighing the ODR Value Proposition

Delay in the administration of justice, though not peculiar to developing countries, is a problem that has serious implications upon access to and quality of justice. Not surprisingly, together with corruption, it is often cited as one of the root causes for the continued marginalization and disaffection of significant segments of society.²⁸

According to a recent report prepared by the Office of the Court Administrator²⁹, there are almost 9 million cases pending before the trial courts as of the end of 1999. This number, while staggering, does not even include those disputes now pending before the Court of Appeals as well as those before the Supreme Court, nor those pending before the courts of special and limited jurisdiction³⁰. On the average, the number of cases filed before the regional trial courts increases by 13.5% every year.³¹ Taking into account current disposition rates at about 120,000 cases a year,³² it would take the trial courts more than seventeen years³³ just to clear the present backlog, assuming no new courts are created in the meantime.

The clogging of dockets results not just delay in the disposition of cases, but raises concern about a perceived decline in the quality of decisions. Given their workload, courts can

²⁸ See Businessworld, Sept. 29, 1993, citing a report made by the National Unification Commission to the President of the Philippines.

²⁹ This is the administrative arm of the Supreme Court. It is headed by the Court Administrator, who holds a rank equivalent to that of the Presiding Justice of the Court of Appeals. The Court Administrator is under the direct supervision of the Chief Justice.

³⁰ Records from the Office of the Court Administrator show that a total of 3,574 *new* cases were filed before the Supreme Court in 1999 and another 12,104 *new* cases were also filed before the Court of appeals during the same period. As of December 31, 1999, there were 18,381 cases pending before the Court of Appeals. Source: Supreme Court Annual Report, pp. 11-13 (1999).

³¹ Supreme Court Annual Report, p. 14 (1999). 155,112 new cases were filed with the regional trial courts in 1998 and 176,153 new cases were filed in 1999, or a 13.5% increase.

³² *Id.*, p. 15. RTC's resolved 121,086 cases in 1999 and 113,041 in 1998.

³³ No data is currently available on how many cases are disposed of voluntarily by the parties through compromise agreements. Likewise, no hard data is available on whether the figures cited include cases that have been terminated on some kind of motion such as motions to dismiss or motions for summary judgment.

handle the cases in a variety of ways, namely: first, to concentrate their attention on complex litigation that may involve larger sums of money, greater public interest concerns, or more numerous parties, to the detriment of the other cases. Second, the court may simply divide its time equally on all its pending cases, thus devoting marginal attention to all. Third, it may rely heavily on the work of clerks or assistants who neither have authority nor public accountability. Or, conceivably, the courts may be receptive to overtures from party-litigants and counsel to let them draft the decision to reduce the court's work, oftentimes in exchange for financial or other consideration.

The clogging of dockets, of course, is a direct result of simply not having enough courts to handle the amount of cases being fed into the judicial system, and such lack is, in turn, attributable to financial constraints. Many of the existing courtrooms are in a state of disrepair, and many others are empty because of lack of judges – the combination of low salaries and heavy caseloads are significant disincentives to pursuing a career in the judiciary, and this actually perpetuates a vicious cycle that leads to further clogging of dockets.

Precisely because of concerns regarding the slow pace of the justice system and the overcrowding of court dockets, the Supreme Court commissioned a study in 1998 to determine the feasibility of using ADR for existing court cases. The Subcommittee on ADR, which conducted the study, recommended the use of mediation, and accordingly, the Supreme Court approved the creation of pilot courts for this purpose. As the pilot courts showed favorable results, with 80% of cases referred successfully resolved in an average of 2 weeks of mediation (many of the cases had been pending for 10 years), the Supreme Court directed that mediation be adopted in all civil cases nationwide³⁴.

Thus, there is no question as to the value of ADR in easing the burden of the judicial system. Resort to arbitration, in particular, has been consistently encouraged by the Supreme Court in a long line of cases as an alternative mode of settling disputes.³⁵ As a matter of judicial policy, the Supreme Court will uphold an arbitration agreement unless it completely ousts the courts of jurisdiction, in which case it shall be declared void for being contrary to public policy³⁶. The Supreme Court considers the enactment of the Arbitration Law as the congressional adoption of the modern view of arbitration as an inexpensive, speedy and amicable method of settling disputes that should receive every encouragement from the courts as a means of avoiding litigation.³⁷

Yet, even despite the growing recognition within the judiciary and the business sector that ADR presents a viable and attractive means of resolving disputes, the reality is that the backlog of the courts remains daunting. It must be noted, in fact, the number of cases pending before the courts reflects only half the problem, the other half being the disputes that are not

³⁴ The Supreme Court exempted certain cases from the requirement of mandatory mediation. Among these are: those cases, which under the Civil Code, cannot be the subject of any compromise by reason of public policy (e.g. cases involving validity of marriages; legal separation; annulment of marriage, cases involving civil status of persons; petitions for habeas corpus; and similar cases).

³⁵ *Chung Fu Industries (Phils.), Inc. v. Court of Appeals*, 206 SCRA 545; *Chan Linte v. Law Union Rock Ins. Co.*, 42 Phil 458; *Vega v. San Carlos Milling*, 51 Phil 917; *Manila Electric Co. v. Pasay Transportation Co.*, 57 Phil 600.

³⁶ *Wahl v. Donaldson, Sim and Co.*, 2 Phil 301.

³⁷ *Eastboard Navigation Ltd. V. Juan Ysmael*, 102 Phil 1; *Chung Fu Industries (Phil.), Inc. v. Court of Appeals*, 206 SCRA 545.

brought before the courts because of (1) low expectations that the dispute will be resolved by the courts; (2) concerns about expenses, especially when the same will likely be disproportionate to the cost of the dispute; and (3) the overly disruptive nature of litigation where cases requiring substantial time and attention from a litigant may drag on for years

In light of this reality and considering the ODR experience, albeit limited, in other countries, there is in fact a compelling reason to explore the possibility of ODR implementation to speed up the administration of justice in the Philippines. The speed, convenience and lesser costs the ODR offers, even in compared to ADR, not only may contribute to the reduction in the backlog of cases, but may also facilitate the resolution of disputes that for a variety of reasons are not submitted into the judicial system.

The positive impact of the reduction in the existing backlog of the courts and upon disputes that are not submitted into the judicial system cannot be underestimated. Even the unloading of small claims for resolution using ADR or ODR would have a significant impact upon the court caseload – it has been observed, for instance, that a bulk of the pending cases before the lower courts concern dishonored checks.³⁸ These cases, which involve no fraud, are ideal for ADR because, more often than not, they are filed with a view to out-of-court settlement anyway. With a lighter caseload, it is reasonable to expect speedier disposition of cases by the court and an improvement in the quality of justice dispensed.

As ODR may be private-sector service, whether for profit or not, it may be implemented with little or no cost to the government, depending upon how the service may be integrated into the judicial dispute resolution process. Compared to the creation of new courts, establishment of an ODR network does not require substantial financial outlay for real property and other expenses associated with obtaining large physical offices, and its deployment may be inexpensive and quick. Practical considerations, therefore, clearly weigh in favor of ODR implementation even in a developing country context.

Numerous challenges, however, must be hurdled along the way. These challenges pertain to the architecture of the ODR system, the infrastructure upon which such system shall operate, the level of public awareness of ODR and ADR, the level of confidence of potential users of the ODR system, and laws that bear upon the validity and enforceability of decisions crafted to conclude an ODR process.

1. Architecture

Numerous international organizations and business associations have developed recommendations on how an ODR service ought to be structured. Some focus on key principles for implementation, while some are in the nature of best practices guidelines. For instance, the Global Business Dialogue on Electronic Commerce (GBDe) developed a set of recommendations for ADR service providers to render services. The Transatlantic Consumer Dialogue (“TACD”), a forum of 45 EU and 20 US consumer organizations, also released a resolution on ADR in the context of electronic commerce,³⁹ formulating principles for resolution of consumer complaints in the context of electronic commerce using ADR systems. More recently, the American

³⁸ Panganiban, A., *Reforming the Judiciary* (Supreme Court Press, Dec. 2002)

³⁹ Doc No. Ecom 12-00, released on February 2000

Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution recommended the adoption of a set of Guidelines for Best Practices for ODR Service Providers (“Guidelines”),⁴⁰ setting minimum substantive standards of best practice for provision of ODR services.

Most of the recommendations set as a minimum requirement that the ADR/ODR service possess impartiality, transparency with respect to coverage and procedure, and low cost, while preserving a parties right to go to court. An evaluation of the existing ODR services, however, indicates the difficulty in adhering to all the recommended principles.

The report issued Consumers International in 2001 highlights some of the deficiencies of the existing ODR services, noting that while ODR providers are typically less expensive than its offline counterparts, most still charge fees that exceed the disputed amount in many consumer transactions.⁴¹ Furthermore, few ODR service providers give adequate assurance of their impartiality or impartiality of their ODR officials.⁴² While most ODR providers provide adequate information on the services they offer, inadequate information is given on their governing structure, their ODR officials, and results of their ODRs.⁴³ Furthermore, few ODR providers give adequate attention to relevant cultural and linguistic differences between disputants.⁴⁴ Competence is not an issue since most ODR providers use professionally qualified and/or trained ODR officials. One problem, however, is that those more qualified and experienced charge more.⁴⁵ Among the conclusions of Consumer’s International was that the financial sustainability of effective ODR services requires either public funding, exclusive partnerships with online marketplaces, or business subscription, although the latter raises concerns about independence.⁴⁶

If ODR is to succeed achieving acceptance as a viable alternative to judicial dispute resolution, compliance with the aforementioned key principles is essential, as the public demands no less from the judicial system. Unless an ODR service is at least as competent, impartial, transparent and inexpensive as the judicial system, and offers added advantages such as greater accessibility and speedier disposition of cases, there will be little impetus for its uptake. In crafting the architecture of an ODR system, a fine balance must be achieved between providing the appropriate expertise and maintaining low costs for users of the ODR system. And as can be gleaned from the

⁴⁰ *American Bar Association Task Force on E-Commerce and ADR: Proposed Guidelines for Recommended Best Practices* by Online Dispute Resolution Providers (2002).

⁴¹ *Disputes in Cyberspace 2001*, p. 9.

⁴² *Disputes in Cyberspace 2001*, pp. 9-10.

⁴³ *Disputes in Cyberspace 2001*, p. 10.

⁴⁴ *Disputes in Cyberspace 2001*, p. 11.

⁴⁵ *Supra*.

⁴⁶ *Id.*, p. 15.

report of Consumers International, sustainability of the service must not be at the expense its independence, without which the service cannot develop into an institution of trust. In the Philippine context, this means that the ODR system – its intake points, referral procedures, sourcing of expertise, ability to reach and availability of access to the public, as well as other programmatic aspects, must take into account the local setting.

2. Infrastructure

One obvious challenge for the realization of ODR's potential to improve access to justice is the problem of access to technology. Like in other developing countries, the telecommunications infrastructure of the Philippines is not as extensive as those in developed countries. The unique topography of the Philippines, with more than 7,000 islands, amplifies the difficulties in establishing telephone and internet connectivity throughout the territory.

The liberalization of the telecommunications sector during the past decade and the implementation of a universal access program substantially increased telephone density in recent years, although still very low compared to developing countries. Dial-up internet access is still the most common and inexpensive means of using the internet but its further growth is hampered by the availability of landlines. Broadband internet access is largely limited to the business districts in Metro Manila. Computer ownership was estimated at only 19.3 per 1000 people, with only 2 million internet users in 2000.⁴⁷ The Gartner Group estimates that by the end of 2003, consumer internet users will have grown to 11,640,669; business users, on the other hand, will have grown to 31,554,048.⁴⁸

Clearly, however, the infrastructure for electronic commerce still lacks the maturity comparable to developed markets, for which reason any ODR implementation must not be overly reliant upon extensive internet diffusion.

3. Public Awareness and Confidence

As early as in 1949, the Philippines already had a law on arbitration, modeled after the US Federal Arbitration Act. Fourteen years later, the Philippines deposited its ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Then in 1985, a special law mandating arbitration of construction disputes was enacted.⁴⁹

Despite this long history, it was only during the past decade that private industry began to warm up to arbitration, and many attribute the delay to the reluctance of both members of the bench and bar to adopt the same. Other modes of ADR like mediation labor under even lower levels of awareness on the part of potential litigants,

⁴⁷ Development Data Group, World Bank

⁴⁸ E. Lallana, P. Pascual, Z.R. Andam, *SMEs and E-commerce in Three Philippine Cities*, Digital Philippines, 2002

⁴⁹ Executive Order No. 1008, otherwise known as the Construction Industry Arbitration Law

although recent initiatives of the Supreme Court encouraging mediation is expected to substantially correct.

In other countries, the move towards alternative modes of dispute resolution began decades ago, a result of growing dissatisfaction for the court system. Although the advantages of ADR over traditional litigation may seem evident now in the commercial sphere, it had not always been the case. In the Philippines, it took decades before judicial attitude in towards arbitration shifted from skepticism to its positive encouragement, and this shift, together with sustained actions to educate the legal and business community, were indispensable prerequisites to its widespread adoption. Exploration of mediation as another ADR mode is slowly gaining ground. But other modes of ADR such as early neutral evaluation and mini-trial are virtually unheard of in both commercial and non-commercial settings.

If ADR and ODR are to be developed into realistic options, efforts to increase public awareness must be made hand in hand with building-up the ADR and ODR services to be offered. One step in this direction is the recent filing of a bill in the House of Representatives seeking to “institutionalize the use of alternative dispute resolution system in the Philippines and to incorporate the Philippine Center for Alternative Dispute Resolution.”⁵⁰ The bill’s declaration of policy provides that the “Supreme Court may adopt any alternative dispute resolution mechanism, in addition to court-annexed mediation which it is already implementing, conciliation, arbitration, or any combination thereof, as a means of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from time to time.”⁵¹ The bill also explicitly recognizes support for the Electronic Commerce Act.⁵² It deals lengthily with mediation and includes a provision on court enforcement of mediated settlement agreements.⁵³ Recognition is made also of other ADR forms such as third-party evaluation, mini-trial, med-arb, and arbitration.⁵⁴

4. Legal

The Arbitration Law provides that the award must be in writing and signed and acknowledged by a majority of the arbitrators.⁵⁵ With the passage of the E-commerce Act, there ought to be no question regarding the validity or enforceability of electronic awards in the Philippines. Similarly, there should be no legal impediment to any proposed approval by the courts of an electronic settlement agreement. Last year, the Supreme Court promulgated Rules on Electronic Evidence which addresses issues such as admissibility and authentication of electronic messages and documents as evidence.

⁵⁰ House Bill No. 5004, introduced by Honorable Jose C. De Venecia, Jr.

⁵¹ Sec. 2.

⁵² Sec. 4.

⁵³ Sec. 18.

⁵⁴ Secs. 19-47.

⁵⁵ Republic Act 876, Sec. 20.

An issue that remains pertains to the requirement under the Arbitration Law that arbitrators must make findings of fact and state the law on which the decision is based since judicial review on questions of law is allowed.⁵⁶ Such findings are also important because of the potential need to seek the assistance of foreign courts in the enforcement of the decision or award. Many ODR services, however, do not comply with this requirement.

IV. Initial Steps

In our initial research for the Cyberspace Policy Center for Asia-Pacific (“CPCAP”) on “ODR and Judicial Reform”, we concluded that for b2b transactions, ODR is an ideal complement to ADR, rather than its substitute, and together they open an avenue for dispute resolution where the delay associated with judicial resolution is simply irreconcilable with the business objectives of the parties. Even in situations where, during negotiations, mediation and arbitration, the parties themselves demand physical presence of the parties with the neutrals, ODR may still be helpful improve the process through the various assessment and management tools it offers. And certainly, in cases where the parties desire face-to-face interaction but are concerned with the costs, ODR can be an inexpensive and efficient alternative.

Most of the perceived deficiencies of ODR pertain to consumer protection, and that is truly a paradox because it is in b2c e-commerce that ODR offers the greatest potential as an instrument of judicial reform. As the high cost of judicial recourse practically denies consumers access to justice, a low-cost ODR implementation could be a viable option. ODR also offers considerable promise in helping decongest the court dockets, particularly in cases involving unpaid claims in ordinary consumer or business transactions, by creating a mechanism whereby current cases involving such disputes could be diverted to an ODR system offering mediation or arbitration of the dispute, and enabling future or potential litigants to avail themselves of this option prior to instituting the complaint in court. Consequently, the pressure on already overheated court dockets could be considerably decreased, thus allowing the courts to spend more time adjudicating issues of public concern as well as those involving public policy.

However, the effectiveness of any such ODR system is anchored on public acceptability and, thus, the challenge for any ODR systems design would not only be to ensure that the ODR mechanisms being offered are essentially fair, accessible, independent, transparent, economical, speedy and enforceable, but also to make them appear to the public as such. The criticisms against the current ODR models, particularly those pertaining to lack of transparency and assurances of impartiality and competence), *not being inherent to ODR*, may be hurdled by improvements in ODR implementation. Tapping expertise through or in conjunction with institutions that have already gained the trust of the public (such as the Philippine Dispute Resolution Center, the Department of Trade and Industry, and well-known trade associations) may be extremely helpful in building public trust in an ODR service.

CPCAP is currently designing a program involving a pilot ODR implementation project in the Philippines that takes into account the foregoing observations, as well as the financial and

⁵⁶ Republic Act 876, Sec. 29.

infrastructural constraints experienced in the Philippines. The pilot also applies the “multi-door” courthouse concept introduced by Professor Frank Sander of Harvard Law School, envisaged as a large courthouse with multiple ADR “doors” including, but not limited to, conciliation, mediation, arbitration, and social services.

Numerous states in the United States have experimented with multi-door courthouse programs and the results were generally favorable, with increased case disposition rates and satisfaction for litigants. There have been previous suggestions to implement a multi-door courthouse program in the Philippines. However, there are numerous constraints to a wide-scale implementation such as (1) lack of built-up ADR services, except for arbitration; (2) concentration of ADR expertise within Metro Manila business districts (3) administrative difficulties in managing “single-courthouse” system; and (4) lack of funds to develop ADR centers to service each court throughout even a single judicial region. ODR can be utilized to address these constraints.

Using ODR technologies, an online “multi-door courthouse” may be set-up establishing a link between potential litigants, ADR service providers, and the courts. This multi-door courthouse may be a pre-condition to litigation or an optional facility provided by private sector through business associations or other non-profit organizations, or even both. In any case, it will utilize technology to ensure widespread availability of ADR/ODR to parties to a dispute.

In many ways, the multi-door courthouse system and ODR can be complementary systems. ODR can allow diffusion of expertise by dispensing with the need to establish physical ADR centers in close proximity to courts, and allowing courts in different locations throughout the country to tap the existing ADR expertise in Metro Manila. With its broader reach, its educative or informative potential will greatly enhance public awareness of ADR and reduce reliance upon court litigation. Furthermore, by the same token it reduces the potential cost of development of ADR capability, and may therefore spur both the demand for and supply of ADR services other than arbitration.

A multi-door courthouse system will also provide a boost to ODR as it will provide for its viable deployment even before the Philippine online community reaches the maturity normally deemed a precondition for wide-scale ODR with the public. This can be accomplished by (1) minimizing the necessity of an intelligent interface and intensive communication at consumers’ homes, for which public access points may be more appropriate; (2) focusing on court-to-court, or neutral-to-court for the online component of the process; and (3) opening the use of ODR to offline disputes, rather than limiting it to online disputes.

We are exploring ways to reach a wider base for the system without requiring a costly build-up of infrastructure. One idea involves the use of mobile phones. While fixed telephone density in the Philippines is relatively low, the subscriber base for mobile telephone has reached 22 million out of a population of 80 million, or almost 30%, and is still growing rapidly. Simplified message service (SMS) usage in the Philippines, at 100 million messages a day, is easily the highest in the whole world, and is indicative of the Filipinos’ receptiveness towards use of technology when affordable. What these statistics suggest is that although computer access is limited, the mobile phone may be utilized to link the public into any ODR system. Simple communications functions for the ODR process may therefore rely on mobile phones, while moving intelligent functions (such as software-aided negotiations, videoconferencing, extensive real-time or asynchronous communications, case-management) into selected public access points. Among the suggested venues for the public access points are government

offices (e.g., office of the executive judge in each city, office of the Bureau of Consumer Affairs), office of business associations), and other community access points established under existing government programs.⁵⁷

This illustrates that the digital divide does not necessarily have to exclude the underprivileged from the benefits of technology. With appropriate use of available technology, even if far from the cutting-edge, ODR may be able to deliver on the promise to improve access to justice and quality of justice even in a developing country context.

⁵⁷ The Philippine government has a proposed “telecenter program” that precisely establishes public internet access points. It also has an ongoing program to set up business centers all over the Philippines for SMEs.