Online Dispute Resolution – More Than The Emperor’s New Clothes

By

Julia Hornle

“That’s an amazing invention—but who would ever want to use one of them?”

(Rutherford B. Hayes, US President, after participating in a trial telephone conversation in 1876)

1. What is Online Dispute Resolution?

"Online dispute resolution" (ODR) means different things to different people. Collating the different uses of the term, one could say that ODR is information technology and telecommunication- (together referred to as "online technology") applied to alternative dispute resolution. The term alternative dispute resolution (ADR) in this context refers to dispute resolution other than litigation in the courts, including other adjudicative techniques such as arbitration. In other words, ODR applies information technology and distance communication to the traditional ADR processes such as conciliation, mediation and arbitration (including the various mutants thereof). Thus ODR is essentially an offspring of ADR. Like ADR, it generally has the same advantages over litigation of greater efficiency, greater party control and lower costs- in fact, the introduction of information and communication technology increases these advantages of ADR over litigation. In one sense, therefore, 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. Therefore ODR introduces possibilities for a new paradigm of dispute resolution.

ODR is particularly convenient and efficient where the parties are located at a distance, as distance communication obviates the need for travelling. In principle, ODR can be used for both disputes arising from online interactions and transactions and for disputes arising off-line. However it is particularly apt for e-commerce disputes, where it is logical to use the same medium (the Internet) for the resolution of disputes and where the parties are frequently located far from each other.

A distinction is sometimes made between proceedings exclusively conducted online and proceedings only supported by different elements of ODR. In fact, there is no such clear-cut distinction. Nowadays, all dispute resolution falls in the latter category to some extent,
in the sense that online technology plays some role or other in most modern dispute resolution. On the other hand very few proceedings falls squarely into the former category. Thus ODR is a matter of degree- there is a broad spectrum of ODR, with at the one end proceedings using hardly any online technology and at the other end proceedings using a high degree of online technology. Online Dispute Resolution is not a monolithic concept- for this reason it is more accurate not to speak of ODR but in the plural of ODR techniques. The task for dispute resolution professionals is to choose the right mix of ODR techniques and traditional off-line dispute resolution techniques, appropriate to the dispute in question.

It is also sensible to distinguish between consumer and commercial ODR, since the requirements and underlying interests of the parties are quite distinct- ODR for commercial users is discussed in section 2 and for consumers in section 3.

Finally, it is necessary to distinguish between ODR techniques applied by the traditional providers of ADR, in particular arbitral institutions, and new providers of ODR techniques. Some of these are specifically targeted at e-commerce, whereas others are open to any dispute, whether arising online or off-line. Initially mainly driven by the aim to create dispute resolution for e-commerce, some of these initiatives also provide dispute resolution for disputes arising from off-line transaction. There are a plethora of different initiatives and it is difficult to keep up with the fast developments in this sector. Some of the initiatives appear ephemeral, while others seem commercially successful and more robust.

In the next section we shall look at the legal issues arising in ODR and in particular in the context of online arbitration.

2. Online Dispute Resolution in Business to Business Disputes

2.1 Business disputes and ODR-an introduction

It makes sense to distinguish between consumer and business disputes when discussing ODR, for the reason that the underlying interests of the parties to the dispute are quite distinct. While the main concerns for consumer disputes are the cost and the difficulty of obtaining redress between parties located at a distance or across a national border, these aspects are not the only or main issues for business disputes. In addition business parties are concerned about confidentiality, and subject-matter expertise of the neutral and control over the procedure. Frequently, it will also be a consideration that the parties wish to maintain an ongoing business relationship- ODR techniques have to take into account these considerations. In principle ODR can, of course, be used both for the solution of disputes stemming from (traditional) off-line transactions or online e-commerce. The main issue to be looked at here is online arbitration and the legal issues raised thereby. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.

2.2 Legal issues relating to online arbitration

This section analyses whether arbitration conducted by online techniques is recognised as such by the legal framework of national arbitration laws. It is arranged in a chronological fashion, proceeding through the steps of the arbitration procedure. For lack of space the
discussion will mainly focus on English law and the 1996 Act, but mention other jurisdictions in an ad hoc comparative fashion.

For international arbitration, where the award must be enforced in a country other than that of the seat of the arbitration, the additional question arises whether an award resulting from arbitration using online techniques will be enforced. The parties may well find that the arbitration award is valid under the law of the seat, but not recognised under the law applicable to enforcement in the enforcement country. For this purpose, the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") will be considered.

Thus this section is mainly concerned with the formal requirements and requirements of due process under national arbitration law and the New York Convention. However, similar considerations may also apply to the interpretation of the formal requirements contained in the institutional rules and any other procedural rules agreed by the parties.

2.2.1 General: conducting the arbitration proceedings online

The fundamental concept behind most arbitration laws is the concept of party autonomy. Therefore the parties may agree that the whole or part of the arbitration proceedings are conducted online or they may expressly exclude electronic means. The parties may agree to use email to correspond with each other and the tribunal and to exchange documents in this way. Alternatively, the parties may agree to use an online electronic file management system, accessing and filing all documentation on a web-based platform and communicating with each other via such a platform.

In addition, the parties may agree to conduct the arbitration by email or web-based online technology without an oral hearing on a documents-only basis. Under English law, the Arbitration Act 1996 gives neither party a right to an oral hearing unless the parties have agreed to an oral hearing or the tribunal orders a hearing. Or else, the parties may decide to conduct the hearing online and to examine and cross-examine witnesses using video-conferencing technology.

If there is no agreement, the tribunal may order the use of electronic means, and considering the tribunal's overriding duty under the English Arbitration Act 1996 ("the 1996 Act") to avoid unnecessary delay or expense the use of online techniques may well be called for in certain circumstances. However online techniques may not be used where this prejudices one party. A party could be prejudiced if it had less access to or know-how of the technology than the other party. In any case, the use of electronic means should be properly documented and formalised in procedural orders issued by the tribunal or by agreement between the parties.

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5 Section 34 of the Arbitration Act 1996; contrast this position with Article 24 (1) of the UNCITRAL Model Law on International Commercial Arbitration: "unless the parties have agreed that no hearings shall be held the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party".
6 Section 33 (1) (b)
7 This issue is discussed further below
If the arbitration is subject to institutional or other rules it is necessary to check whether any formal requirements are imposed and how these requirements can be met by electronic means. Where necessary, the applicable institutional arbitration rules should be supplemented by an express agreement between the parties or a procedural order by the tribunal. If this was omitted there is a risk that the award will not be enforced or set aside on the ground that the arbitral procedure was not in accordance with the agreement of the parties, as, of course, the rules are deemed to be agreed by the parties.8

2.2.2 Writing for the purposes of an arbitration agreement

(a) Validity

Many arbitration laws, including the 1996 Act, stipulate that the arbitration agreement must be written or recorded in writing, or something similar.9 It is questionable whether this formal requirement is fulfilled by electronic communications. The parties may wish to conclude an arbitration agreement by an exchange of email with the agreement either set out in the emails or in a word document attached to them. Alternatively, the email exchange may refer to a written arbitration agreement. Or the parties may wish to reach agreement through a website by exchanging electronic communications through their browser software with the website platform. For this, the arbitration agreement could be concluded by completing a standard form agreement or the arbitration clause could be contained in standard terms and conditions used by the website operator and available on the website. Either method (email or website) will ultimately lead to the same question as to whether an electronic communication provides a record.10

Where the parties use email or other electronic communication to refer to an arbitration agreement, which is documented in writing (on paper), no problem of interpretation arises, at least under English law. Under the 1996 Act, section 5 (3), an arbitration agreement is validly concluded by reference to such a document.

Unfortunately, where the arbitration agreement itself is in electronic format, the law is not entirely clear on whether in these instances a valid arbitration agreement has been reached. Maybe at this point an explanation of the nature of an electronic document is called for. An electronic document is a set of numbers (normally in ASCII or some other code) representing text. This set of numbers, or "file" will be stored temporarily in the computer's working memory or more permanently on a storage disc, such as the computer's harddrive or a CD Rom. The file can be sent from place to place using telecommunications technology via the Internet.11 Keeping the nature of electronic

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8 Article V (d) of the New York Convention; Section 68 (2) (c) serious irregularity subject to the restrictions in Section 70 (2) and (3) and Section 73 (loss of the right to object for not objecting forthwith that there has been a failure to comply with the arbitration agreement) of the Arbitration Act 1996; Article 34 (2) (a) (iv) and Article 36 (1) (a) (iv) of the 1985 UNCITRAL Model Law on International Commercial Arbitration.
9 English Arbitration Act 1996, s.5; US Federal Arbitration Act, s.2; Hong Kong Arbitration Ordinance 2000, s.2AC; German Arbitration Law 1998, s.1031 (1) Code of Civil Procedure; French Code of Civil Procedure, ss. 1443 and 1449; Arbitrations Law of the People's Republic of China 1995, Art.16; Belgian Judicial Code, Art.1677
10 The 1996 UNCITRAL Model Law on E-commerce refers to the quality of writing that it provides a record. It provides in Article 6: "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for future reference."
documents in mind the question arises whether it amounts to writing under the various national arbitration laws. As far as English law is concerned, the 1996 Act stipulates writing in section 5 (1) and defines writing in section 5 (6) to include "its being recorded by electronic means." This leaves open the question whether an electronic document is a record. Thus the 1996 Act by itself does not provide the answer.

In other jurisdictions a global reform of the writing requirement has solved the issue. Going back to English law, no global reform in this sense has been carried out, as there is a majority opinion that email and website electronic communications generally fulfil a writing requirement imposed by statute, including that of the 1996 Act. This is notwithstanding the definition of "writing" contained in the Interpretation Act 1978, Schedule 1 requiring words in visible form. The argument goes that both the computer screen display and any print outs provide a sufficiently visible form. Thus it seems electronic communications are apt to fulfil the writing requirement in the 1996 Act.

(b) Evidence

Even if we accept that under English law, electronic communications are recognised as "writing", unless a statute specifically demands a writing on paper, this does not mean that the courts will treat electronic writing in the same way as writing on paper in all cases. We need to ask what evidential weight is accorded to an electronic document. An email or an electronic word-processing document saved on a computer can be altered and then displayed again (on the screen or by printing out) without these changes being necessarily obvious, depending on how it is stored. Also, a virus or even a hacker gaining unauthorised access may corrupt the data on the computer on which it is stored.

Admittedly, paper records can also be forged. Nevertheless, it is questionable whether an electronic communication has the same evidential weight as a paper record. Thus arguably, an electronic communication can only be equated with writing if a method were to be used whereby the electronic message was immediately fixed such that it cannot be manipulated. This can be achieved, for example, by writing it onto a CD-Rom in such a way that it cannot be altered, immediately on receipt of the message. Provided there are trusted computer bases at either end of the communication, electronic signatures may also be apt to prove the content of a message.

Generally speaking, some kind of audit trail is required demonstrating that the document is authentic or that it has not been changed. This can be achieved by an internal audit trail or by an audit trail maintained by a third party such as a cybernotary. Thus, in the author's view electronic communications fulfil the writing requirement but may only have the same

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12 for example in Germany

13 ibid and also Law Commission Advice, Electronic Commerce: Formal Requirements in Commercial Transactions, December 2001, Para. 3.23. However this applies only generally, of course the interpretation of the formal requirements depend on the statutory context- some statutes may impliedly or expressly demand paper documents- for such cases the Secretary of State is given power to amend the legislation under Article 8 (1) of the Electronic Communications Act 2000. The 1996 Act does not fall under this category.

14 ibid, paras. 3.09 et sequi

15 See for example the HP WORM Optical Disks allowing easy data storage that cannot be altered or erased, see <www.products.storage.hp.com/prise/main/storage/DisplayPages/overview.htm?DataPage=worm-disks> last visited on 23. July 2003
evidential weight in proving the agreement, if suitable recording methods are used and this can be adequately demonstrated.\(^{16}\) In this respect standards developed to improve the evidential weight of electronic communications should be taken into account to improve standards for record keeping.\(^{17}\) In the end, however, the judicial evaluation of electronic evidence will depend on the circumstances of the case in question.

Others\(^{18}\) also argue that arbitration agreements concluded by electronic communication are likely to fulfill the writing requirement (in the US jurisdiction). On the other hand, they also argue that a durable record can simply be achieved by common-sense business practices such as retaining printed or electronic records, by systematic filing and electronic archiving of electronic communications. Thus the real question is whether an electronic communication provides a probative evidential record per se, on the basis that it can be printed out or stored on a computer, or whether further technical stipulations should be made to enhance the evidential value of electronic records. This will depend on the circumstances of each case and also the jurisdiction of the forum.

In fact, the former argument, that an electronic communication provides a sufficient evidential record has succeeded in a decision of the US District Court for the Northern District of Illinois.\(^{19}\) The Court in this case has held that an arbitration clause contained in an online software licensing agreement constituted "writing" to satisfy the requirements of the US 1925 Federal Arbitration Act\(^{20}\) and was therefore valid. The licence agreement was presented on the user's desktop and the user had to click a button to accept its terms, before he could download the defendant's software. The Court referred to the ordinary dictionary meaning of writing as the representation of language, regardless of the medium. The Court conceded that not all electronic communications may be considered to be in writing. However, if the clause can easily be printed out or stored, it amounts to writing. This was despite the fact that there was no screen button on the licence agreement itself to print or save. The Court found that the user could easily print the licence by highlighting the text and using the copy and paste technique. In addition, the licence was automatically stored on the user's hard disk when he accepted its terms. Thus, the Court concluded that the licence agreement including the arbitration agreement was a written agreement.

It is difficult to predict whether a UK court would come to the same conclusion.\(^{21}\) In the UK, the 1996 Act stipulates that writing includes "being recorded by any means"\(^{22}\) and that the

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\(^{16}\) See also the 1996 UNCITRAL Model Law on Electronic Commerce, Article 9 (2) evidential weight assessed in the light of manner in which the message was generated, stored and communicated.

\(^{17}\) BSI protocols BSI PD 5000:1999 and BSI PD 0008:1999 and equivalent other standards


\(^{19}\) In re RealNetworks Inc Privacy Litigation, MDL No.00 C1329, N.D.Ill. also reported in Mealey’s International Arbitration Report, Vol. 15, No.6, June 2000

\(^{20}\) Section 2, "a written provision (…) in a contract evidencing a transaction….."

\(^{21}\) One reason obviously is that the user in the case was a consumer so that the arbitration clause may be void under the Unfair Terms in Consumer Regulations 1999, Directive (93/13/EEC) on unfair terms in consumer contracts, Annex lit.q, in the UK implemented by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), Schedule 2, lit q: "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions……..". However, in the UK this is limited to claims not exceeding £5,000, Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167)
agreement may be made by an exchange of communications in writing. As has been pointed out above, although the 1996 Act clearly does not require a paper record, it does not specifically refer to electronic communications. In other words, the answer to the question whether electronic communications provide a probative evidential record is not contained therein.

To an extent, the question as to what is a record will also depend on business practice and judicial acceptance thereof. Thus even if it can be argued, as the author of this chapter does, that an electronic record may not have the same evidential quality as a paper document, courts may nevertheless decide that electronic communications provide a record for the purpose of proving the contents of arbitration agreements. Albeit it is not unlikely that English courts will accept for example printouts of electronic communications to prove the content of an arbitration agreement, only practice and case law will tell under what circumstances this is the case. Thus to be sure parties may be well advised to follow the standards mentioned above.

The UNCITRAL Model Law on International Commercial Arbitration provides in Article 7 (2) that an "agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement". For those countries having adopted the exact wording of the Model Law the same question as to what provides a record arises.

UNCITRAL is currently discussing the issue of arbitration agreements being concluded by electronic means and intends to issue an updated version of the Model Law. The current draft includes a clarification that "writing includes any form that provides a record of the agreement or is otherwise accessible so as to be useable for subsequent reference, including electronic, optical or other data messages".

(c) Enforcement

As to international enforcement of awards, the New York Convention imposes a duty on Contracting States to recognise an arbitration agreement "in writing". This term includes an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". Obviously the reference to telegrams but not to more modern forms of telecommunication is due to the fact that the Convention dates from 1958. However, UNCITRAL is discussing an Interpretative Instrument on the interpretation of the relevant provision to clarify that certain forms of electronic communication constitute a written agreement. The Working Group has not yet decided on a draft wording of the operative provisions.

22 Section 5 (6)
23 Section 5 (2) (b)
25 Article II (1)
26 Article II (2)
The courts of some jurisdictions may refuse to recognise and enforce an award under the New York Convention where the award is based on an arbitration agreement concluded by electronic means such as email, in particular where no proper recording mechanisms or electronic signatures have been used. This point can be illustrated by a decision of the Hålogaland (Norway) Court of Appeal dated 16. August 1999. This decision throws doubt on whether an award based on an arbitration agreement entered into through the exchange of emails is enforceable under the New York Convention. The parties had purportedly reached agreement in an exchange of emails referring to a draft GENCON charter-party containing an arbitration clause providing for arbitration in London. The arbitrator found for the Russian ship-owner seeking to enforce the award against the Norwegian charterer. On appeal, the Court held that the fact that the English arbitrator had found that a charter-party had in fact been concluded does not mean that the requirements of the New York Convention Article II (2) had been fulfilled. The Court of Appeal found that it followed from Article IV (1) (b) that the local enforcement court had to verify the requirements of Convention Article II (2). The Court then looked at the content of the email exchange and found that this was incomplete and obscure. The Court also generally doubted whether email transcripts and a reference to a draft charter-party can amount to an "arbitration agreement signed by the parties or contained in an exchange of letters or telegrams", Article II (2). The Court of Appeal therefore dismissed the request for enforcement.

Thus the same considerations as to evidential weight of electronic records apply for enforcement of awards made pursuant to an electronic arbitration agreement as for the question of the validity of arbitration agreements under the applicable law, discussed above. Again, to be safe, the parties should use proper recording mechanisms such as the BSI standards (or equivalent) mentioned above.

2.2.3 Unequal access to technology

If online technologies are used in arbitration, one of the parties may be at a serious disadvantage because of unequal access to the technology. There might be an incompatibility of software or hardware or one party may not be familiar with the particular technology used. Another problem may be the lack of broadband access to the Internet, which is required for video-conferencing and fast audio-streaming technology. Finally certain techniques may require the acquisition of expensive software for one of the parties. Such discrepancies between the parties in access to technology may be particularly acute in international arbitration where one of the parties comes from an emerging economy. This is a matter which the tribunal has to take into account to comply with its duty of impartiality, in England and Wales, under Section 33 (1) (a) of the Arbitration Act 1996. Non-compliance with this provision means that the award can be challenged under section 33.

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28 i.e. those complying with BSI or ISO standards
30 to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

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Finally, for foreign awards, if they are enforced under the New York Convention, recognition and enforcement may be refused on the grounds that one of the parties was unable to present his case. Where the parties have not agreed the use of particular technology, the tribunal has to be careful not to discriminate between the parties when selecting a particular procedure. However, even where the parties have agreed to use certain technology the tribunal has to ensure that this does not effectively prevent one of the parties from participating in the procedure. In practice this will rarely be a problem, as most international law firms and the arbitration centres have the requisite technology, but it is nevertheless a point to keep in mind.

2.2.4 Location of the seat of an online arbitration

Where arbitration proceedings are conducted entirely online at a distance, with the parties and the tribunal being located in different countries, prima facie it might be difficult to determine the seat of the arbitration. In such a scenario the arbitration is not pertaining to any particular geographical territory. Under the 1996 Act and also under other modern arbitration laws, however the seat is determined by designation, so that the geographical place of hearings or proceedings or the lack of such a place is completely irrelevant. Thus for the sake of clarity, it is important for the parties to expressly agree the place of arbitration. Section 3 of the 1996 Act provides that the juridical seat of arbitration is designated by the parties or by the arbitral institution or other person vested with power to do so by the parties or by the arbitral tribunal. Under the 1996 Act, if no such designation has been made it is the proper law of the arbitration agreement, which also governs the procedural law. For the sake of clarity, the award is to state the seat of the arbitration.

2.2.5 Confidentiality and privacy on the Internet

In most arbitration proceedings the parties will wish to maintain all aspects of the proceedings private. The Internet being an open, public network, communications per email or communications via a website platform may be less secure than mail, fax or telephone. There is a risk that unauthorised persons could intercept communications transmitted over the Internet and hackers may break into computers connected to the Internet. For example one such technique to gain unauthorised access is spoofing, the unauthorised person assuming the identity of an existing authorised user to access confidential information. Sniffer packages may be used to intercept and manipulate particular data such as keyboard strokes to obtain a person’s password or credit card details. Thus, it is not only necessary to ensure that messages are protected while being transmitted over the Internet, it is equally important to ensure that they are sent to and

31 Subject to the loss of the right to object under Section 73 of the 1996 Act. Likewise in a country, which has adopted the Model Law, the courts can refuse to enforce the award under Article 36 (1) (a) (ii) or is it liable to be set aside under Article 34 (2) (a) (iii): “or was otherwise unable to present his case.”

32 Article V (1) (b)

33 In this context see for example the decision of the US Court of Appeals for the Federal District (15. April 1997-source: Westlaw WL 178009) Yukio Ltd v Shiro Watanbe. The Court held that a brief submitted on a CD Rom was not acceptable as the other side did not have the requisite hardware to read it.

34 Art. 1693 Belgian Judicial Code; s.1043 (1) German Arbitration Law 1998

35 Section 52 (5) of the Arbitration Act 1996

36 And this aspect distinguishes general commercial arbitration from the procedure conducted under the UDRP. For the procedure under the UDRP the names of the parties and the full decision are published. This makes it easier to conduct the UDRP procedure online.
from a trusted computer base, i.e. a computer base secure from attacks. It is important that the computer system used by each participant in the proceedings, be it the parties, the arbitrator or any third party platform is secured from both internal and external attacks. Likewise it is important that the database of archived documents is protected against hacking. Secure technologies such as encryption, electronic signatures and the use of secure, passphrase-protected services and other technologies may go some way to solve the problem of Internet security.

By contrast, more secure than the Internet are private closed systems, which are screened from the Internet. Instead of using the Internet, i.e. public networks, closed systems use dedicated private lines to transmit communications. Thus they do not rely on the open network and for this reason there is a reduced risk of external intrusion or interception of data, which makes closed systems more secure. The disadvantage of a closed system is that it is less easily accessible and more expensive to set up.

Essentially it is for the parties and the tribunal to determine the suitability of the mode of communication used and to take the appropriate preventative steps. Thus the parties and the tribunal should consider the security aspects of using online technology and obtain suitable professional advice. Many of the commercial online dispute resolution service providers have implemented (some) security technology. Other providers of security technology or of secure web platforms can be found on the Internet. Parties or arbitrators considering using online technology on the Internet should obtain competent advice as to technology protecting confidentiality and privacy.

It should be recalled that in addition to technology, the civil and the criminal law protect the secrecy of communications against unauthorised access by third parties. The Computer Misuse Act 1990 makes hacking a criminal offence. The Regulation of Investigatory Powers Act 2000 makes it a criminal offence to intercept a communication. The Data Protection Act 1998 imposes an obligation on the controller of data to keep personal data secure- thus the operator of an arbitration platform is under an obligation under data protection legislation to protect the data from unauthorised access. Furthermore the common law of confidentiality may apply in appropriate circumstances. However it should be pointed out that laws work by deterrence and this might not be effective in all cases.

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37 Section 34 of the Arbitration Act 1996; Article 19 of the Model Law on International Commercial Arbitration

38 See for example for technology allowing apparently secure remote access to a server computer and digital signature products: SSH at [www.ssh.com](http://www.ssh.com), RedCreek at [www.redcreek.com](http://www.redcreek.com), GlobalSign at [www.globalsign.net](http://www.globalsign.net), VeriSign at [www.verisign.com](http://www.verisign.com); For web-based encryption services which do not require installation of encryption software, please see Certified Mail, see [www.certifiedmail.com](http://www.certifiedmail.com). An example for a desktop based encryption product is McAfee/Sniffer PGPmail and PGP File Encryption 7.1 see [www.pgp.com/products/mail-file-encryption/default.asp](http://www.pgp.com/products/mail-file-encryption/default.asp); last visited on 23. July 2003. These products are merely examples and not recommendations.

39 Because of the rate at which Internet technology is changing, this Section does not discuss any specific technology in detail. Appropriate advice on current technologies should be obtained.

40 Section 1: Unauthorised access to computer material; Section 2: Unauthorised access with intent to commit or facilitate commission of further offences etc

41 Section 1

42 See Section 4 (4) and Schedule I, 7. Principle: "Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of or damage to personal data."
At this place, although probably self-evident, it should be pointed out that no communication method used can provide for absolute security. This statement holds equally true for online as for off-line communication in the sense that physical mail can be intercepted, offices can be broken into or bugged with listening devices, papers lying around in an office can pose a security risk etc. Thus security is always a question of risk management, requiring a careful assessment of risks and balancing of risk with costs of implementing security. However, because of the fast developments in security technology and concomitant fast developments in hacking technology, it is difficult to assess this risk for online technology.

In conclusion, therefore, there are three aspects to security, first the use of secure technologies for communications over the Internet, second, the use of closed systems and third, pleadings, briefs and other lengthy documents may be exchanged on a medium sent by traditional physical delivery, such as a CD-Rom sent by registered post or courier. This avoids the insecure environment of the Internet- but still preserving the convenience of having electronic documents. In fact, this is often done in practice for the very reason of the inherent insecurity of the Internet. Of course, the disadvantage of this method is that it takes longer and is less convenient, as it means there is no immediate Internet access to documents via a filing platform.

2.2.6 Service of documents and non-repudiation

In some instances, it is necessary to send a message in such a way that the recipient cannot deny having received the message. This is the reason why in the physical world some documents are sent by registered mail or served personally on the intended recipient. Where the sender of a message requires proof that the other side has received the contents of the message in an unaltered, legible format, email and other forms of electronic communication may not fulfil this purpose. Emails sometimes arrive with considerable delay, with corrupted contents or not at all. Most email software does provide for an electronic receipt, which is automatically sent back to the sender of the original email either when the email has arrived in the recipient's mailbox or when the recipient has opened the messages. Unfortunately these receipts are not reliable- they were not designed to be a legal acknowledgement. It is quite possible that the sender receives a receipt, even though the email has arrived in illegible format at the recipient's computer. Or the receipt may inform the original sender that the recipient has read the message when in fact the recipient has immediately deleted the message without reading it.

One way to solve this problem would be to say that a message has not been received until the recipient has actively acknowledged the receipt of the email. Interestingly, the 1996 UNCITRAL Model Law on Electronic Commerce also provides that a “data message is treated as though it has never been sent until the acknowledgement is received”. Thus, a protocol could be used, whereby the parties agree to (a) acknowledge receipt of all electronic communications and (b) that an electronic communication not acknowledged is treated as not received. Under such a protocol physical delivery would only be necessary where the recipient completely refuses to acknowledge receipt of an electronic

\[43\] See further Bruce Schneier, Secrets and Lies (John Wiley & Sons Inc 2000), at pp. 383-386


\[45\] If the data message has been made conditional on receipt, Article 14
communication. Documents in electronic format can, of course, be sent on a physical medium, such as a CD Rom by registered mail, recorded delivery or personal delivery. But, then, again the recipient may claim to have received the contents in illegible format.

2.2.7 Online hearings

It is now common in international arbitration to examine and cross-examine a witness by two-way video link, for example, where it is impractical for the witness to travel to a hearing venue. This allows the evidence to be given directly to the tribunal without the witness having to travel far. Also the rules of civil procedure, for example in England and Wales and the US, allow for this under certain circumstances. One issue here is technology - it will be important that the link is of sufficient quality. This means in particular that the connection avoids delays and interruptions and that the witness can be clearly seen and heard. The physical demeanour and tone of voice should be easily detectable to assess the credibility of that witness. For example, it might not be apparent if a witness blushes because the colour resolution of the monitor is not sufficient. Therefore, the hardware used should be suitable and the connection should be of sufficient capacity. In order to avoid a coaching of the witness, the picture should cover the whole room at the witness end, which necessitates at least two cameras.

Another issue to be considered is that, for evidence given on oath, the oath is only effective, if false testimony amounts to perjury at the place where the evidence is given. Finally, the most weight can be given to evidence per video-link if both parties are represented or if a member of the tribunal is present at either end of the link. However this might not always be possible. Alternatively a trusted third party such as a law firm, an arbitral institution, a notary or a court could be used. Another method to examine and cross-examine a witness would be using written synchronous online technology such as online chat. This allows parties to communicate in real time, writing and answering questions. Of course it is much more difficult to assess the credibility of a witness using online chat, which is not a real alternative to an oral (and visual) hearing.

2.2.8 Is it appropriate for the arbitrators to deliberate between themselves online?

If the tribunal consists of more than one arbitrator the question arises whether the arbitrators have to meet in one place in order to decide the issues and draw up an award. If the arbitrators were free to conduct their deliberations online at a distance, this would save them the expense of time and cost to travel. English law does not impose a particular procedure on the decision-making process, the only requirement being that all arbitrators actively participate in the decisions and vote. Each arbitrator must consider the facts in the dispute and the ultimate award must reflect the state of mind of all of them at the time when they signed it.

46 see CPR Part 32, rule 32.3 or PD 23 by leave of the Court, or the US Federal Rules of Civil Procedure: Fed.R.Civ.P. 43 (a), "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."

47 a dedicated link or broadband, this might not be available in all countries, often the last mile (or local loop) is not able to carry the capacity necessary

48 European Grain and Shipping Ltd v Johnson, CA, [1982] 3 All ER 989 (992)
The 1996 Act stipulates that provided the parties have not agreed otherwise, decisions are to be made by majority. If there is a chairman his vote is included, unless there is neither unanimity nor a majority, in which case the view of the chairman prevails as to any decision, order or award. However, English law does not stipulate that the decision-making process must be done orally in the presence of all the arbitrators.

As Lord Denning MR said:

Business convenience requires it [a change in the requirement that all arbitrators had to be physically present when signing the award]. Nowadays, whenever an agreement or award ... is to be done by two or three jointly, the practice is for one or the other to draw up a draft and send it to the others for their consideration and comments. One or other may suggest amendments and send it back. So it goes to and fro until the draft is agreed.

This procedure may easily be replicated online.

In principle, therefore, it is possible that the arbitrators deliberate and make the award by asynchronous electronic means. Asynchronous electronic means are those where there is a time lapse between the communication and the reply. For example, the arbitrators could agree and draft the award by using the "track changes" facility in Word or other word-processing programs, allowing changes to be marked electronically. This facility highlights in colour changes made by each arbitrator in the travelling draft document. The drafts could be exchanged as email attachment or uploaded (and accessed) on a secure platform until the award has been finalised. Alternatively, the arbitrators could use synchronous computer mediated conferencing, such as online chat or Internet Relay Chat. Online chat allows users to engage in real time, instant conversations exchanging written text messages from their computer. The arbitrators could use other real time synchronous electronic means such as video or telephone conferencing in order to have a virtual meeting.

In any case, it will be necessary to check that the parties have not excluded decision-making at a distance by electronic means in the arbitration agreement or that this is not excluded by the rules of the arbitral institution. If the institutional rules exclude deliberation by electronic means an agreement of the parties allowing for deliberation by electronic means at a distance will override the rules. Furthermore, it is a requirement that all the arbitrators agree to the use of electronic means and this is properly documented by a procedural order. Also it is necessary that all the arbitrators are fully equipped to participate in the decision-making process and vote.

Finally the method used must provide for adequate security in two respects. The first concern is to ensure the privacy of the proceedings. Thus it is important that communications are sent to and from a trusted computer base and that communications are protected from interception. Second, it is important to ensure that the communications of the arbitrators are properly authenticated. This could be achieved by password or pass-phrase protection to gain access to the communication platform, where appropriate and by electronic signatures. Therefore, provided certain precautions are taken, it is possible for...
the arbitrators to deliberate online at a distance. Similar questions arise in the context of the form of the award, which will be considered next.

2.2.9 Formal requirements for the award- signatures as creatures of function not form

Many arbitration laws provide that the arbitrators must sign the award. By contrast, under the English 1996 Act, the parties are free to agree on the form of the award. Thus, if the arbitration is conducted at a distance wholly online, it may be convenient for the parties to agree that the award should take the form of an electronic text message, digitally signed by each arbitrator (or at least by the arbitrators assenting to the award). On the other hand, the question arises what advantages has a digital signed award over an award written on paper and signed by the hand of the arbitrators. Clearly, a digitally signed award has the advantage that this method would enable the arbitrators to approve the award at a distance without the time-consuming requirement of circulating the paper document containing the award for signature by each arbitrator. The importance of this benefit depends on the timeframe of the arbitration- or in simple words, if the proceedings have taken several months or even a year to complete a few more days to circulate and sign the award may not make such a difference. This might be different in mediation where the momentum of the settlement process has to be maintained, so that it is important to conclude the settlement agreement very quickly. Also, it may make a difference in the case of arbitration if the award has to be enforced very quickly. But in general it may well be argued that it is appropriate for the award to be written on paper and signed by hand by the arbitrators. Under the 1996 Act, if the parties have not agreed on the form of the award, it also must be in writing and signed by all the arbitrators or all those assenting to it.

However, there is no requirement that the arbitrators sign at the same place or time. Furthermore it is generally irrelevant in which physical location the award was made and signed. In other words it does not matter that this physical location cannot be determined if the award was made in through online deliberations and signature in different geographical locations. Section 53 of the 1996 Act provides that where the seat of the arbitration is in England and Wales or Northern Ireland, the award is deemed to have been signed there, regardless of where it has been in fact signed, despatched or delivered to the parties.

Supposing the applicable law requires a signed award, the questions arises how can an intangible electronic communication be signed and whether these methods fulfil the formal

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52 See also the decision by the Swiss Supreme Court Société S. contre Société K., 1ère Cour Civile, 23 October 1985 (ATF III la, p.336)
53 German Arbitration Law 1998, s.1054 Code of Civil Procedure; French Code of Civil Procedure, s. 1473; Arbitration Law of the People’s Republic of China 1995, Art.48; Belgian Judicial Code, Art.1701 (4), similar formal requirements are contained in the UNCITRAL Model Law on International Commercial Arbitration, Article 31 (1): “the award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”
54 Article 52 (1)
55 Katsh/Rifkin, p. 140; Jasna Arsic, "International Commercial Arbitration on the Internet", 14 Journal of International Arbitration, 209-221 (September 1997); Hill, No. 18 above
56 Section 52 (3) Arbitration Act 1996
requirements of a signature. In principle there are several methods by which an electronic document can be signed:

- by typing the signatory’s name at the bottom of an email or other electronic document
- by scanning in a hand-written signature so that it appears on the screen or on a print out immediately below the text in visible form
- by clicking on a button\(^{57}\) on a webpage signifying approval of that page and
- by an invisible and intangible electronic signature, not visually, but logically attached to the text.

The method mentioned last deserves further explanation: an electronic signature is achieved by applying a mathematical process (algorithm) to an electronic text (binary data). There are essentially two types of technology: Public Key Infrastructure (PKI) and biometric signatures. PKI uses an asymmetrical pair of keys, containing an algorithm. One of the keys is the private key, held by the signatory under his sole control. The other key (unsurprisingly called the public key) is publicly available. The sender of the message produces a digital signature with his private key. The recipient then applies the corresponding public key to the signature and from the result, the recipient knows that (i) the message has been encrypted with the private key and (ii) that the message has not been changed while being transmitted over the Internet.\(^{58}\) A digital certificate, confirming "ownership" of the public key establishes the link between the public key and the identity of the sender. If XYZ has lost control of his private key, it is assumed that he will notify the certification authority to revoke the digital certificate. Biometric signatures\(^{59}\) work on the basis of some unique physical human characteristic such as the image of a face, fingerprints, handwriting characteristics or the pattern of blood vessels in the retina. These are recorded by the system and a unique function is generated from the data, which is then used to encrypt the message. Biometric signatures are still under development (as of 2002).

It seems that English law would in principle recognise all four "signature" methods (typing, facsimile scanned-in\(^{60}\), clicking and electronic signatures) as legal signatures. Or in other words, all methods would generally satisfy a statutory signature requirement.\(^{61}\) The argument goes that English law takes a pragmatic approach to signatures- any process fulfilling the function of authenticating the signatory and showing his adoption of the contents of the document may be a signature.\(^{62}\)

\(^{57}\) A button is a visual round or rectangular object on a website, which activates some processing when clicked on by a mouse  

\(^{58}\) In fact the process of PKI encryption is slightly more complicated. But for clarity's sake this is the essence of the PKI process.  

\(^{59}\) See for example the fingerprint sensor BioMouse plus of the American Biometric Company or the PenOp Signature Pad or the Hesy Signature Pad of BS Biometric Systems GmbH for normal pens, see <http://hesy.de>, or the TrueFace Engine developed by Miros last visited on 23. July 2003  

\(^{60}\) See the case of In Re A Debtor (No 2021 of 1995) [1996] 2 AllER 345 (351)  

\(^{61}\) Law Commission Advice, para. 3.39. Unless a statute expressly or impliedly requires a hand-written signature on paper. In that case s.8 of the Electronic Communications Act empowers the appropriate Minister to amend the legislation.  

\(^{62}\) Law Commission Advice, above, paras. 3.31 et sequi
Thus, if English law is applicable, an award in the form of an electronic text message signed with an electronic signature may satisfy the formal requirement of a signature. However, the more important question is what evidential weight the courts will attribute to an electronic signature (or to any of the other signature methods described above). Thus the issue under English law is not so much one of form but of evidence. The evidentially strongest method is probably that of electronic signatures. The electronic signature would be admissible in evidence. In the UK, the Electronic Communications Act 2000 simply provides that an electronic signature backed up by a certificate is admissible in evidence to prove the authenticity or integrity of a communication. However, the Electronic Communications Act 2000 does not provide that such an electronic signature must have the same evidential value as a hand-written signature in all cases.

The question therefore is whether a court would accept an electronic signature as probative evidence that this is the award, which the arbitrators have adopted. This is difficult to predict in the abstract as such an assessment depends on the circumstances of the case. Thus, under English law it is likely that English courts will decide on a case-by-case basis, taking into account the circumstances of each case, to assess the evidential weight they will attribute to an electronic signature. It should be pointed out that there are still technological issues which must be solved before electronic signatures provide good authentication evidence. One of the questions arising is, for example, what steps does the certification authority take in order to verify the identity of the signatory when issuing the certificate linking the private key to the signatory. Also, since the private key is contained in a device, such as a smartcard or a computer hard disk, any person having access to the device can misuse the private key, akin to a seal or rubber stamp. Thus it is important that this device is kept safe and secure. And finally, the question arises how quickly can certificates be revoked once the holder of the private key has lost control over it. Recognition and acceptance of electronic signatures as authentication evidence will depend on the resolution of these technical issues.

The EU institutions have addressed the issue of electronic signatures to encourage the development of e-commerce. The Electronic Signatures Directive establishes certain standards and requirements for electronic signatures, distinguishing between two categories of electronic signatures: advanced electronic signatures and simple electronic signatures. The Directive provides that Member States shall ensure that advanced electronic signatures

(a) "satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data; and
(b) are admissible as evidence in legal proceedings."[65]

All EU Member States are under an obligation to ensure that those advanced electronic signatures, complying with all the standards set out in the Directive, fulfil the formal requirement of a signature. As has been mentioned above this question of form is not an issue under English law, as a signature has primarily evidential value. The EU Member

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[63] Section 7 (1) Electronic Communications Act 2000
[65] Article 5 (1) of the Directive
[66] For further discussion see Chris Reed, Internet Law (Butterworths 2000), at p.171
States must also ensure that electronic signatures are admissible as evidence in legal proceedings. However this does not address the issue of evidential weight.\footnote{and cannot do so, as the law of evidence is not a competence of the EU}

In conclusion, where a signature is required for the award, an electronic signature could fulfil this formal requirement under English law, at least. However under English law there might be an issue about the evidential weight of such a signature. To the extent that the electronic signature fulfils the highest quality standards it might have sufficient probative value, on the other hand, as explained above, some of the technical issues relating to electronic signatures have not been solved. Of course, if English law applies, the parties might agree to use electronic signatures, as permitted by the 1996 Act, but this may cause the same evidential issues. One party may later allege that the award has not been properly signed. Issues regarding the form of the award and regarding evidential weight may also arise in other jurisdiction. Therefore while these issues have not been settled, it might be safer for the arbitrators to draw up the award on paper and sign it by hand, even if this means circulating the award in paper form. Other authors also support the idea that it is desirable that the award is signed manually on paper.\footnote{Katsh/Rifkin, above, p. 140; Arsic, above, p.219; Hill , above}

Next, the award must be notified and delivered to the parties.

\subsection*{2.2.10 Notification and delivery of the award to the parties}

Here, the question arises in what form must the award be sent to the parties. As can be expected, under the \textit{1996 Act} the parties are free to agree on the requirements as to notification of the award.\footnote{Section 55 (1)} Provided appropriate security protects confidentiality\footnote{See above}, the parties may well agree that the award is to be notified by email or uploaded on a secure platform accessible to them. On the other hand, if the parties have not agreed how the award is to be notified, the award must be notified by service on the parties of copies of the award.\footnote{Section 55 (2)} Service is defined in the \textit{1996 Act} as including any form of communication in writing.\footnote{Section 76 (6)} As was said above, it is most likely that email fulfils the formal requirement of writing. Some awards, in fact most awards are complied with without enforcement. Where this is not the case, the next step will be enforcement.

\subsection*{2.2.11 Next step: enforcement- originals or certified copies must be produced}

For the enforcement of the award it will be necessary to produce an original or copy of the arbitration agreement and of the award. For enforcement under section 66 (1) of the \textit{1996 Act} it will be necessary to exhibit the arbitration agreement and the original award or a copy thereof to the affidavit supporting the application for leave to enforce.\footnote{Practice Direction 49G on Arbitrations Part III 31.6 (1) (a)} Since the Practice Direction simply states that a copy of either document is sufficient, a print out of an electronic record is sufficient (where the agreement or the award is in electronic form). However the wording is different for the enforcement of foreign awards under the \textit{New
York Convention (in any Signatory State). For enforcement of New York Convention awards the duly authenticated original or a duly certified copy of the award and the original or a duly certified copy of the arbitration agreement must be produced. Thus, here a certificate that the print out on paper is a true and complete copy of the original must be given. Since any alterations of an electronic text may not be easily detected this certificate can only be given where proper methods to record the electronic document have been used. This conclusion would be supported by Article 8 of the 1996 UNCITRAL Model Law on Electronic Commerce. This provides "where the law requires information to be presented … in its original form that requirement is met if there exists a reliable assurance as to the integrity of the information … and is capable of being displayed. As to the criteria of integrity, Article 8 (3) stipulates that integrity shall be assessed on whether the information has remained complete and unaltered …". Whether or not this can be detected depends on the recording method used.

2.3 Conclusion

It is perhaps trite to say that parties to off-line and online transactions should consider dispute resolution from the outset. As has been seen, some formal legal requirements may be in conflict with electronic form, albeit the law is changing in this area. Furthermore, the parties should agree and set out a Communications Protocol.

The next section will look at consumer ODR procedure- it is in this context that due process issues should be discussed.

3. Online Dispute Resolution in Business to Consumer E-commerce Transactions

A large number of ODR efforts are concerned with the resolution of consumer disputes arising from e-commerce transactions conducted on the Internet. Such processes and the issues they raise, shall be discussed in this section.

3.1 The nature of consumer disputes arising from electronic commerce

E-commerce by its very nature results in an increasing number of distance (or even cross-border) interactions and thus, disputes between parties located far from each other. Litigating and enforcing such disputes through the courts can be disproportionately expensive for smaller claims due to added costs (such as hiring local lawyers, travel and translation costs). This means that only redress for the larger claims can be obtained in this way. By contrast, at present, e-commerce transactions undertaken by consumers are often small value, covering items such as books, music, software and other consumer goods, albeit this may change in the future if consumers feel confident to buy higher value goods such as cars or financial services over the Internet. Thus, at least for the time being, for most consumer e-commerce disputes the cost of legal redress by litigation is not proportionate to the value of the claim. Therefore, for such claims cost-effective ODR schemes are the only viable means of redress. A lack of trust in this area may mean that consumers do not engage in e-commerce.

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74 Sections 101 and 102 (1) of the 1996 Act and also Practice Direction 49G on Arbitrations Part III 31.6 (1) (b), see also New York Convention, Article IV (1)

75 See section 2.2.2 above
Another problem specific to cross-border transactions is the difficulty of determining the appropriate forum. There is an inevitable conflict between the forum of the claimant and the respondent. Being located in no particular geographical area, ODR mechanisms can provide a forum equally convenient and accessible to either party.76

Furthermore, and especially for international consumer dispute resolution, cultural and linguistic differences must be taken into account. Although the consumer buys "on the Internet" he may have the same expectation as to quality of service and consumer protection as he has when buying in his local real world shop. This is a factor to be considered when discussing consumer ODR. Finally, another factor making consumer disputes different from other disputes is the (real or perceived) unequal bargaining power of consumers when compared to the seller of products and services. A balancing of bargaining power is particularly necessary, where the supplier relies on standard terms and conditions and where, as is usually the case, the supplier demands pre-payment. Because of this latter factor, in many instances the claimant will be the consumer. To the extent that ODR provides affordable and effective dispute resolution mechanisms, it may contribute to achieve the aim of creating trust in e-commerce and viable redress for consumers.

3.2 Overview over different types of ODR mechanisms offered

The first experiments in extra-judicial ODR were made during 1996/1997 in the US and Canada.77 Most of these were initially university projects evolving into commercial ventures. In Europe, governments and most notably the European Commission have strongly advocated the use of ODR systems for consumer disputes.78 Recent years have also seen a considerable amount of private entrepreneurial activity. In addition, traditional off-line ADR providers79 are focusing on the possibilities raised by online technology. At the beginning of 2002 the author counted about 30 consumer ODR schemes in existence. There is an enormous variety in the emerging picture of ODR providers with varying experimentation and different degrees of formality. Various procedures are used. The following is to give an overview over the methods used:

- **Arbitration**

76 see further Veijo Heiskanen, "Dispute Resolution in International Electronic Commerce", 16 Journal of International Arbitration 29-44 (1999)

77 See for example the Virtual Magistrate (arbitration, Chicago-Kent College of Law, see <www.vmag.org> and the Online Ombuds Office (mediation, University of Massachusetts) out of which developed the Squaretrade venture, see <www.squaretrade.com> last visited on 23. July 2003 and the Cybertribunal (University of Montreal), out of which later developed E-Resolution, a commercial venture, albeit well-known, ceased operations in December 2001


79 See, for example the consumer schemes set up by the UK Chartered Institute of Arbitrators: for FORD, ABTA travel agents and Webtrader (e-commerce), or the E-Mediator scheme set up by Consensus Mediation, also the National Arbitration Forum and the American Arbitration Association have set up consumer schemes.
Documents-only arbitration has been used for a considerable time to solve consumer disputes. Consumer documents-only arbitration being largely a fact-finding process, based on the written submissions of the parties, lends itself to ODR. However, although the online medium is very suitable to documents only arbitration, online consumer arbitration—as opposed to online mediation (and other forms of ADR) is not very common.

One problem is to secure the agreement of the other party, usually the business, to binding arbitration after the dispute has arisen. However, in some schemes, the e-commerce provider subscribes to an ODR scheme (including online arbitration) in advance and markets this fact to its customers in order to enhance trust and branding. For such e-commerce providers ODR is part of the customer services they offer to the consumer.

While such a commitment can be enforced against the subscribing supplier, it may not be binding on the consumer. It should be noted, that in most European jurisdictions, an arbitration clause contained in standard contract terms and binding the consumer to submit a dispute to arbitration is likely to be viewed as unfair. For this reason, a standard arbitration clause cannot be enforced against a consumer. Thus, the arbitration clause would only be binding on the business, but optional for the consumer.

By contrast, in the US, consumer arbitration clauses are usually enforceable. The US courts will only refuse to enforce a binding arbitration clause against a consumer where it would be unconscionable to do so. This would be the case if enforcing the arbitration clause deprived the consumer of access to a forum to vindicate his rights. For example, the courts have held in several decisions that an arbitration agreement in a consumer contract that forces the consumer to incur excessive arbitration fees is unconscionable. For example, in the much-cited case of Brower v Gateway Inc involving the purchase of a computer and related software products, the arbitration agreement stipulated arbitration before the ICC. The ICC advance fee for the claim was the amount of US$ 4,000, of which US$ 2,000 were non-refundable. The New York Appellate Court held that the arbitration agreement was unenforceable and remanded the case back to a lower court to encourage the parties to find an appropriate arbitration procedure for their small claims dispute.

In the US, the American Arbitration Association has introduced specific fee schedules for consumer disputes. Likewise the National Arbitration Forum has a special small claims fee.

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80 See also Martin Odams De Zylva, “Effective Means of Resolving Distance Selling Disputes”, 67 Arbitration 230-239 (August 2001)
81 See Katsh/Rifkin, p.56
82 Brower v Gateway2000 Inc 676 N.Y.S. 2d 569, 572 (1998); Green Tree Financial v Randolph, 121 S.Ct. 513, 522 (2000) (in this case the Court was not convinced that the petitioner would in fact incur such costs and therefore held that the arbitration clause was enforceable); Knepp v Credit Acceptance Corp. 229 B.R. 821, 838 (1999) and Patterson v ITT Consumer Fin. Corp. 18 Cal. Rptr. 2d 563, 565-567 (1993)
83 Brower v Gateway2000 Inc ibid
85 For claims under US$ 15,000- see http://www.arb-forum.com/arbitration/NAF/Code_linked/apdx_c.htm
As the US cases demonstrate, the fees for consumer arbitration must be proportionate to the value of the claim. Since arbitration requires the intervention of a qualified and experienced human decision-maker, but consumer claims are mostly of small value, this may be difficult to achieve. For this reason, too, arbitration may not be the first choice for small and medium value consumer disputes.

However, under some schemes, online arbitration is used as the last resort layer of a scaled approach to ODR. In such schemes the parties start with negotiation and if this fails they move on to mediation and only if this fails will they resort to arbitration.

- **Evaluation (non-binding)**

Like arbitration, online evaluation is an ODR technique involving the neutral making a decision on the basis of the written submissions and documentary evidence provided by the parties. However in the case of evaluation this decision takes the form of a non-binding recommendation. This factor may make it easier to secure the participation of the other side after a dispute has arisen.

- **Mock Trials**

Mock trials (also: summary jury trials) are an ODR technique whereby a jury of peers makes a non-binding determination of the issues via a web-based platform. Thus the neutral is replaced by a number of volunteers (Internet users) acting as if they were an online jury in a civil trial. All communications take place via the website, see iCourthouse ([www.i-courthouse.com](http://www.i-courthouse.com)).

- **Mediation**

Online mediation seems to be the primary ODR method for small consumer disputes. There are four reasons for this primacy of online mediation. First, the process is flexible. The mediator essentially uses his skill to help the parties to communicate and reach their own solution. This high degree of party control means that the parties are likely to feel comfortable with the online procedure. Secondly, the fact that participation is voluntary means that the parties are more willing to participate as they do not compromise their position. Thirdly, redress is not limited to monetary awards. Online mediation allows the parties to find creative solutions to their dispute. By way of example, an adequate response to a consumer complaint could be a substantial discount from a future purchase or something similar. Finally, some consumer disputes, especially those arising from small value e-commerce transactions, are more a matter of customer services than a matter of conflicting rights. Frequently, the question in dispute will be purely factual and in some cases also trivial, so that a gesture of good will can solve the dispute. One of the disadvantages of online mediation is the lack of teeth of the non-binding procedure. To a large extent the effectiveness of the procedure depends on the business’ wish to maintain good customer relationships. For some, not all consumers this might be the only instance in which they buy from this supplier. Thus if, as is sometimes argued, the success of mediation as a dispute resolution technique depends on the continuity of the relationship

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86 See Katsh/Rifkin, pp. 140-142

87 As Cara Cherry Lisco, Director of SquareTrade has pointed out most e-commerce consumer disputes can be solved by negotiation between the trader and the consumer, as many disputes are a matter of customer care services, Joint Conference of the OECD, HCOPIL, ICC, The Hague, 11. and 12. December 2000.
between the parties, online mediation may not be effective in one-off consumer disputes. Another issue with online mediation is that the involvement of a human mediator means that the procedure may be too expensive for very small value claims as generally speaking, the fees start in the range of US$ 20-200.

- **Automated Settlement Systems**

Automated Settlement Systems are a highly innovative form of ODR, suitable for monetary claims (i.e. where liability is not disputed, but only the amount of compensation is at stake, such as certain insurance cases). Automated Settlement Systems may also be used as a negotiation tool as part of another dispute resolution procedure. The process involves the parties making successive blind bids. This means that the bids are not disclosed to the other party. Once the bids are within a certain range of each other (e.g. 30%), settlement will automatically be reached, for the median amount. The process is driven by software so that no human third party is directly involved and is therefore particular cost-effective. The software keeps offers confidential until they come within the range. Communication tools such as email and web-based platforms support the settlement process.

- **Complaints Assistance**

Complaints Assistance provides the parties with tools allowing for effective communication. At a minimum, it allows a consumer to make a complaint and communicate a demand for redress to the respondent. Complaints Assistance also involves the provision of general assistance such as the provision of information (such as legal advice) for the purpose of self-help.

- **Credit card charge back**

Although credit card charge back mechanisms are not strictly speaking dispute resolution mechanisms, in the consumer context they fulfil this function and do so in an effective manner. A credit card charge back is a procedure set up by the credit card issuer allowing the consumer to cancel the payment of the purchase price effected by a credit card. If the bank considers the consumer's complaint justified, it will re-credit the consumer's account with the amount of the price and the business will not obtain payment. This in effect puts the credit card issuer in a position of a third party neutral arbitrating a dispute between the consumer and the business. The credit card issuer will investigate the consumer's complaint and assess the evidence for fraud or non-delivery. Thus it acts as an adjudicator between the parties. Many countries regulate when charge back mechanisms should be available to consumers.  

3.3 **Online Dispute Resolution and confidence in consumer e-commerce**

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88 See e.g. the *UK Consumer Credit Act 1974*, ss. 75 and 84, covering fraudulent use and defective goods, *Distance Selling Directive 1997/7/EC*, Article 8 covering fraudulent use of the credit card. It is not clear whether this protection applies where the supplier is located outside the UK jurisdiction.
Some of the ODR services mentioned above are independent in the sense that any claimant can use them to seek redress. In other words, these schemes offer their services to claimants regardless of how the dispute has arisen and regardless of whether the respondent supplier is a member of that scheme. The main advantage of such schemes is their open access. On the other hand, this open access entails several disadvantages. The first one is funding. If the service is not financed by membership fees but by the users of the service, the ODR service may be too costly for small consumer claims. The other main disadvantage relates to enforcement- if the respondent business is not a member of the ODR scheme it is harder to bring pressure to enforce any decision or settlement resulting from ODR. Thus independent schemes are less effective than membership schemes.

Therefore one very important factor for the effectiveness of consumer ODR services is the establishment of membership or so-called trustmark schemes. Governments and stakeholders involved in consumer e-commerce alike have declared it as a priority to enhance consumer confidence in shopping "on the Internet". The intangible nature and anonymity of the Internet, coupled with the insecurity regarding payment mechanisms and problems of cross-border redress make trust building measures necessary and trustmark schemes support this aim by making redress more effective. Therefore, consumer associations, trade associations, government and also the private sector have established trustmark schemes.

Under such schemes, the supplier undertakes to co-operate in the dispute resolution process offered by a particular ODR provider whose services the supplier subscribes to as a member of the scheme.

In addition some trustmark schemes comprise a Code of Conduct. Such a Code imposes certain obligations and guarantees of good practice on the supplier, such as to disclose the supplier's identity (including contact details) on its website or to deliver within a certain time or not to abuse the inexperience of children in its marketing (and many more). Thus, under some schemes the supplier undertakes additionally to comply with certain standards of good practice set out in the Code.

In consideration of such undertakings, the ODR provider licenses the supplier to use a logo (or "trustmark", also called a "seal" or "label") on its website. This trustmark signifies to the consumer that the supplier has undertaken to take part in a dispute resolution process.


scheme (and, as the case may be that it adheres to a Code of Conduct). In this way, the trustmark is intended to increase consumer confidence and enhance the supplier's branding. The supplier pays a fee covering membership in the scheme and the licence for the use of the trustmark. This fee also covers the costs of the dispute resolution process, so that the use of ODR is free (or at very low cost) to the consumer. Businesses not complying with their obligations under the scheme ultimately risk losing membership of the scheme and the licence to use the trustmark. Therefore there is added pressure to comply.

At present the ODR services offered by such trustmark schemes are mainly limited to mediation. The ODR provider may additionally offer insurance ("money back guarantee") where ODR fails. This means that an insurance company vets and backs the e-commerce provider, further enhancing trust in the service.

Finally, Internet marketplaces frequently provide dispute resolution services. Generally speaking, consumer marketplaces (portals, Internet auction, Internet shopping malls etc) are aggregate websites, grouping together suppliers of various goods and services. They sometimes provide ancillary services such as dispute prevention mechanisms and dispute resolution. In the consumer context, an example for a virtual marketplace is an Internet auction site, where consumers can search and bid for items sold by business and private sellers. For the purposes of dispute prevention, auction sites such as Yahoo! or E-bay provide for rating systems- each buyer is invited to give the seller a rating and to register any feedback. This rating and feedback is made available to subsequent buyers on the auction site. Furthermore, marketplaces may offer escrow or insurance services ("money back guarantee") protecting against non-delivery or non-payment. All of these measures will help to avoid disputes in the first place and enhance consumer confidence.

Furthermore, marketplaces create a common context for transactions governed by their own pertinent set of rules (Code of Conduct, etiquette, business practices) providing for standards to be observed by the parties in this particular context. Such rules may provide for the applicable law in the resolution of any disputes. As to dispute resolution mechanisms used, as a minimum, most marketplaces provide for Complaints Assistance. Some offer additionally online mediation and arbitration.

In fact, some marketplaces have subscribed to one of the trustmark dispute resolution schemes described above for this aspect of their service provision. Vice versa some of the trustmark schemes mentioned above are set up as a portal- the consumer enters the portal via the trustmark scheme's website. This website offers a catalogue of Internet

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92 See e.g. Trusted Shops (<www.trustedshops.de/en/home/index.html> last visited on 23. July 2003
95 Escrow services hold the payment in trust until delivery (or other performance) is confirmed. Therefore escrow services protect a party from loss in the event that the contractual obligations are not fulfilled.
96 See further: Ethan Katsh, Janet Rifkin, Alan Gaitenby, "E-commerce, E-Disputes and E-Dispute Resolution: In the Shadow of eBay Law", 15 Ohio State Journal on Dispute Resolution, 705-734 (2000)
97 Professor Ethan Katsh has coined the expression in the "shadow of e-Bay law", see further: Katsh/Rifkin/Gaitenby, above
98 see E-bay and Squaretrade, for example
shops, akin to a safe virtual shopping mall, all of which have undertaken to comply with the trustmark scheme.

As this section has illustrated, ODR schemes in the consumer context must be seen as an important element for the realisation of consumer confidence in e-commerce.

3.4 Legal issues arising from consumer ODR- Due Process Considerations

In many instances, consumer disputes are trivial and factually straightforward, so that ODR has to be very low cost and efficient. For access to justice to be ensured, the cost of dispute resolution should be proportionate to the amount at stake. The cost factor is clearly one of the important advantages of ODR. The use of networked technology and general accessibility (i.e. avoidance of travelling costs) makes dispute resolution much cheaper. However, for consumer disputes over very small amounts even ODR (involving a human mediator or arbitrator) might be too expensive, since, obviously, skilled and experienced mediators and arbitrators will charge for their services. In these instances, simple forms of online mediation and Complaints Assistance are appropriate to solve the dispute. Highly automated complaints procedures and some form of "money back guarantee" with an insurance company backing the e-commerce provider may be the only viable solution for very small value consumer disputes (in addition to trustmark schemes mentioned above). Thus, for the determination of due process standards the procedure has to comply with, a distinction must be made between on the one hand simple, low value disputes and more factually complex or high value disputes. Whereas the former can and should be highly automated and informal, the latter should comply with stricter standards as to the criteria of due process and fairness. In higher value or complex disputes, more quality may be needed.100 Also because of the cross-border nature of the Internet, for many e-commerce disputes ODR may in fact be the only viable form of dispute resolution with no alternative. Thus, some higher value or complex consumer ODR mechanisms should comply with certain standards of due process set out in this section.

Such minimum standards are contained in two EC Commission Recommendations, the Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (98/257/EC) and the Recommendation on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (2001/310/EC). The 1998 Recommendation only applies to binding arbitration procedures, whereas the 2001 Recommendation is applicable to consensual, non-binding forms of consumer dispute resolution.

Also worth mentioning in this context is the Due Process Protocol for Mediation and Arbitration of Consumer Disputes drawn up by the American Arbitration Association.101 This Protocol sets minimum standards of due process in consumer disputes.

The following are the main issues in this respect:

- Independence and impartiality

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100 Also taking into account the right to a fair hearing in Article 6 of the European Convention on Human Rights
This is a concept at the very heart of civil justice: both the ODR service provider and the individual arbitrator/mediator must be, and must be seen to be, independent and impartial, free from any vested interests.102

For the ODR service provider, this means in particular that its funding and board structure should be neutral. In practice this might be difficult to achieve. The business usually pays directly (subscription fees, user fees for the actual dispute) or indirectly (membership fee) for the dispute resolution service, as schemes imposing significant fees on users may not be proportionate to the value at stake. Therefore, it is unavoidable that the supplier provides the funding. This factor should be compensated by additional safeguards, such as an independent third party supervising the scheme and representation of consumer interests on the board of the scheme. Unfortunately, these requirements are rarely implemented in the existing schemes.103

Furthermore, the individual arbitrators or mediators should be obliged to observe a code of professional ethics. Such a code should oblige them to disclose any personal interests and to avoid conflicts of interest. The job security and pay of third parties must be sufficient to guarantee impartiality.104 Information as to compliance with these requirements should be provided to the user.105

Finally, the allocation of third party arbitrators/mediators should be made randomly- one party should not be allowed to choose the individual arbitrator or mediator.

- Publicity and transparency

Traditionally, secrecy and confidentiality have been an important factor in favour of the parties’ choice of an out-of-court procedure. By the same token, therefore, the parties may expect that the ODR proceedings are kept confidential. To the extent that ODR enables the settlement of private disputes and no adverse public interests are involved, ODR should equally allow for secrecy and confidentiality.

However in the consumer context, there may be wider public policy concerns involved. For example, in cases of widespread business malpractice on the mass consumer e-commerce market, the public should have a right to know. Equally looking to the future, to the extent that ODR will become the dominant form of dispute resolution in e-commerce disputes, it can be argued that the law will not develop further, unless decisions are published. Obviously this argument only applies to binding online arbitration, as online mediation does not produce authoritative rulings. By way of illustration, if the issue decided in online consumer arbitration is the interpretation of a term in a widely used in an online standard form contract, as a matter of public policy, such precedent should be published. Otherwise, the “single-shot player” has no way of finding out what the law is. By contrast, the “repeat-player”, having first-hand and repeated experience of online arbitration may gain an unjustified advantage and this is unacceptable in the consumer context, with (factually) limited access to the courts and limited access to legal representation. Finally,

102 Principle I of Recommendation 98/257/EC
104 Recommendation 98/257/EC, Recommendation 2001/310/EC
105 Consumers International, above, p.25 and Recommendation 2001/310/EC
unless there is sufficient transparency through publication of results it is impossible to check the quality and impartiality of dispute resolution.\textsuperscript{106}

Nevertheless the question arises to what extent is publication of results practicable. It is to be expected that suppliers will resist the publication of results. For online mediation, because of the informality of the discussions and solutions reached, publication probably has to be limited to general statistics such as the number and kind of disputes.\textsuperscript{107} In the ideal world, in the case of consumer online arbitration, however, the decisions should be published.

In practice, most ODR providers have not implemented publication of results and, of course, there is no legal obligation on them to do so.\textsuperscript{108}

Finally, for the reason of transparency, the ODR scheme should also make clear the type of rules, standards or law (such as legal provisions, equity, codes of conduct) serving as the basis for the settlement or decision.\textsuperscript{109}

- **Language Barriers**

  Only few ODR providers have given sufficient attention to the problem of cultural and linguistic differences. At present, most ODR services on offer are conducted in English and only very few offer a bilingual or multilingual service.\textsuperscript{110}

- **Right to be heard, right to respond, fair hearing**

  The right to a fair hearing means that each party must be given an opportunity to state their case and to hear and respond to the other party's submissions.\textsuperscript{111} Online Dispute Resolution schemes usually rely on written (web-based or email) submissions by the parties. The parties should also be given a fair time in which to respond.\textsuperscript{112} To the extent that the "hearing" is conducted in writing only, signs of non-verbal communication will be lost. The inexperienced or inarticulate claimant may be disadvantaged against the professionally presented case of the respondent. This may have an impact on the fairness of the evidence and fact-finding process and is a factor the arbitrator or mediator has to take into account in consumer disputes.

3.5 **Emergence of standards for consumer ODR**


\textsuperscript{107} Recommendation 2001/310/EC

\textsuperscript{108} Consumers International, above, p.24

\textsuperscript{109} Recommendation 98/257/EC, Recommendation 2001/310/EC

\textsuperscript{110} Consumers International, above, p.22

\textsuperscript{111} Recommendation 98/257/EC

\textsuperscript{112} Recommendation 2001/310/EC
One of the questions emerging in the discussion of consumer ODR is whether and how to develop standards for consumer ODR schemes. As has been seen, existing consumer schemes raise concerns relating to consumer protection and due process, in particular concerning independence, transparency and effectiveness of the proceedings. On the other hand, the cost of the ODR procedure must be proportionate to the value of the claim. Thus, the first conclusion is that any emerging standards must balance the quality of the ODR procedure with its cost-effectiveness.

As has also been seen, the types of procedures and standards used by consumer ODR procedures vary enormously. Diverse parties have created multiple protocols and standards in a rapidly changing ODR world. This makes it hard for the parties to understand what types of procedures and protocols are being used in a particular procedure. Concomitantly the use of trustmarks has proliferated in such a way that makes it hard to discern what each trustmark stands for. Thus, it is difficult for the parties to appreciate the mechanisms and safeguards involved under each scheme.

Therefore it would be helpful if there was some kind of categorisation of the different schemes and the safeguards they provide. This could be achieved by the development of international standards and uniform criteria. The Recommendations issued by the European Commission and the AAA Due Process Protocol mentioned above may be a starting point for such an exercise.

The ABA Taskforce on Electronic Commerce is working on how to develop a global approach to common standards and an overarching framework. The ICC is also developing an inventory of different ODR schemes to make the plethora of consumer schemes more transparent.

Different standards should be developed according to the value and complexity of the claim. The main question is who will create the standards and protocols and who will enforce them. This task requires an international body in which the various stakeholders are represented. International bar associations or business organisations such as the ICC or intergovernmental organisations such as the OECD spring to mind. However equally important and unsettled is the issue of funding for such a project.

Finally another question deserves some thought: this is the question as to what is the subject matter of regulation. Are we regulating legal professional services or consumer protection? To the extent that we are dealing with questions of due process and professional ethics it seems that the regulation of legal services should be applied to consumer ODR. Some commentators, however argue that consumer ODR is primarily a consumer product and that therefore the approach should that be of consumer protection. Consumer laws on fair commercial practices and their enforcement should be applicable rather than professional legal ethics. The reasoning behind this argument is

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113 American Bar Association Task Force on E-commerce & Alternative Dispute Resolution, The reporter is Professor Anita Ramasastry. The ABA Task Force on E-commerce and ADR has released a draft of its final report and recommendations along with guidelines of best practice of ODR Service Providers, see <www.law.washington.edu/aba-eadr> last visited on 23. July 2003

114 Louise Ellen Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and the Challenge of Online Dispute Resolution", *Fordham Law Review*, [December 2001], available on Westlaw

115 ibid
that this is a more feasible approach, as the regulation of legal services is even more fragmented than that of consumer protection. Maybe the answer to this question is a typical lawyer's answer- "it depends"- namely on the value and the nature of the dispute.

4. Conclusion- ODR is more than the Emperor's New Clothes

This chapter has illustrated how beneficial ODR has become for dispute resolution. ODR techniques offer strong support for dispute resolution through mediation and arbitration. It is therefore all the more surprising that ODR has not revolutionised the conduct of ADR, as some had predicted only a few years ago. One reason for this is that there is a clash between the impersonal, faceless world of the Internet and the extremely personal world of arbitration and mediation. To this one could add that, since the main benefit of ODR is cost-savings, this benefit may not have a decisive impact on large-scale, high value arbitration. Finally, as far as e-commerce is concerned, at the beginning of 2002, the failure of many .com companies does not encourage trust in the future of e-commerce. Thus one may feel inclined to ask the question whether ODR is merely a fad with no real impact on the world or arbitration and mediation. As this chapter has demonstrated, the answer to this question is certainly negative. The main justification for this answer is that ODR techniques offer too many benefits for dispute resolution to be ignored. There is a clear need for ODR in the e-commerce environment. Another reason is that the uptake of ODR varies between the different types of disputes. On the whole, ODR is still a rapidly developing and constantly changing aspect of dispute resolution. The uptake is the lowest for commercial, large-scale arbitration. Nevertheless, as has been outlined, the use of ODR, even in large-scale arbitration, enhances efficiency and convenience and in fact some ODR techniques are already commonly used. As the dispute resolution market becomes more and more competitive, cost savings are an important factor, even in large-scale arbitration.

By contrast, in the consumer e-commerce market, ODR is already playing an important role. As has been demonstrated in the preceding section, a plethora of different schemes and initiatives with a high degree of experimentation and innovation has emerged. The slow uptake of ODR in the higher value dispute resolution sector can be explained by two factors. The first factor relates to trust and security or, in other words, security technology must be sufficiently developed to create trust in online systems and this is an area still developing as described in section 2. Furthermore, trust can only be established if IT specialists are sufficiently integrated into the legal teams involved in dispute resolution. Many of the security questions involved are too complex for lawyers to solve- the creation of trust in the system therefore depends on building communication between IT experts and lawyers. Or in other words, lawyers must be able to explain and IT experts must be able to understand the security requirements of the procedure.

The second factor for the slow uptake is the human factor. Some participants find the use of certain technology impersonal and state that such technology is inhibiting the art of a skilled arbitrator. On the other hand it could be argued that the technology can be adapted and improved to better use the arbitrator's skill and art. Vice versa, new technologies will only be accepted once their users have become sufficiently comfortable and competent in exploiting the potential of technology. Appropriate training and assistance will achieve this goal. Maybe one solution to bridge the gap between law and technology would be to provide arbitrators with IT assistants, dealing with the technical aspects of the procedure.
and bringing together the most suitable technologies from different suppliers, thus allowing the arbitrator to focus on the job in hand.\footnote{see also George Burn,“High Tech- Threat or Opportunity in Arbitration”, 6 LCIA News, 8-10 (August 2001) }\\n
In conclusion, it will simply be a matter of time before the use of ODR in mediation and arbitration will become (even) more pervasive.