Online Dispute Resolution

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I. Introduction

The end of the twentieth century will have been the stage for a première that might come to be considered a high point in the contemporary history of law. In January 2000, for the first time ever, parties located in the four corners of the earth resolved international legal disputes completely online. They did not meet, but exchanged documents, comments and evidence under the vigilant “eye” of an arbitrator appointed by an institution that was itself located in a different country. We are of course referring to domain name disputes arbitrated under the aegis of the dispute resolution policy and rules\(^1\) of the Internet Corporation for Assigned Names and Numbers (ICANN), and administered by eResolution. The latter was the first organization to offer a completely online resolution service for domain name disputes. The innovative and original nature of this approach to law cannot be overemphasized. In March 2000, another organization, SquareTrade\(^2\), launched a pilot project offering online mediation services for disputes among users of eBay\(^3\) auction services. The SquareTrade system has resolved over 100,000 disputes so far\(^4\). Today, using the Internet to settle or at least to assist in settling disputes seems like a natural path that might still raise a few questions but generate little hesitation. It was not always this way.

One of the very first experiments in this area, the CyberTribunal project by the Centre de recherche en droit public (CRDP) at the University of Montréal, initially generated a great deal of scepticism in the international legal community. The project was launched in 1996 to offer consumers completely online mediation and arbitration services to resolve disputes between them and online sellers. At the time, most lawyers could not imagine how technology could be used to conduct either legal (such as arbitration of domain name disputes) or para-legal proceedings (such as mediation) without the physical presence of the parties. Their presence seemed necessary at all steps in the proceedings. In the legal imagination, the behavioural grammar of disputes required that the parties or their

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1 See [http://www.icann.org/udrp/](http://www.icann.org/udrp/) (last visited on February 1, 2005).
2 SquareTrade, [http://www.squaretrade.com](http://www.squaretrade.com) (last visited on February 1, 2005).
4 See [http://www.squaretrade.com/](http://www.squaretrade.com/) Click on “About us” (last visited on February 1, 2005).
lawyers see each other. We will come back to this. Such reticence and doubt clearly did not stop the initiators of the project.

The university framework was well suited to conducting experiments and testing whether there were good reasons for the reservations. The CyberTribunal project also fit in with the CRDP’s research on information technology law. Indeed, research in that area is what gave rise to the idea of a cybertribunal. Work on information technology law, from EDI (Electronic Data Interchange) to electronic commerce, rapidly led to the idea of computer-assisted dispute resolution mechanisms. The Internet gives rise to profound questions concerning jurisdiction, applicable law and means for enforcing obligations. How can greater legal certainty be provided for transactions involving information on the Internet? The Internet is a locus of interactions that, whether or not they are contractual, all involve the transfer of information. The transactions take the familiar forms of electronic commerce (between businesses or between businesses and consumers), privacy (exchange of information subject to privacy regulations), intellectual property licensing regimes, trademark (domain names), etc. In short, a whole cluster of legal relationships are established through electronic transactions, but there is no certainty as to the legal framework. So, why not use the medium itself to solve the problems it raises? In other words, why not take advantage of the technological capabilities of communication on the network of networks to eliminate the difficulties in identifying a reliable and effective legal framework for such communication? Why not use the Internet to deal with the problems that arise there, particularly with respect to the delocalization of the parties, the distance separating the stakeholders, the intangibility of information and the resolutely international nature of electronic transactions?

The best means of helping to establish an environment of trust on the Internet had to be found, for trust is the cornerstone of increased legal certainty. It seemed that legal risk could be reduced only if recourse were possible and sanctions enforceable when parties fail to fulfil obligations generated by an electronic transaction. There being no recourse and, consequently, no sanction would undoubtedly be the height of legal uncertainty. If it proved impossible for law to reform situations detrimental

to the legal interests of Internet users, there was a strong risk that they would desert cyberspace.

CyberTribunal was based on the following postulates:

- With the spread of various information transactions on the Internet, conflicts will arise that traditional national law will not be able to handle owing to the a-territorial nature of cyberspace;
- In the open environment of cyberspace, no authority can claim to have a monopoly over establishing or enforcing rules. Parties are often able to move elsewhere to escape rules that do not suit them;
- Mediation and arbitration processes, as well as other dispute resolution methods, at least partially help to establish frameworks and processes through which rules may be applied in cyberspace;
- Appropriate dispute prevention and resolution mechanisms, based not on government regulations but on other mechanisms designed to ensure effectiveness, are a necessary component of the framework for transactions in cyberspace.

The postulates were confirmed over time. They justified the strategic choices made in the CyberTribunal project. It became clear that the best means of offering recourse to Internet users lay in alternative dispute resolution (ADR), particularly in mediation and arbitration. These flexible, a-national means were embodied in a software program that followed very simple rules: user-friendliness and transparency of rules. Users were able to employ the interface on their own to institute mediation or arbitration proceedings. Help balloons and hypertext links allowed them to employ the mechanisms to their full advantage. This took care of user-friendliness. For the rules to be transparent, users had to be able to navigate in the system and resolve disputes without having to refer to mediation and arbitration rules. The rules were therefore integrated into the system and interface to make them easier to understand and use. The CyberTribunal experiment, which ended in December 1999, proved conclusive because it successfully resolved a number of disputes through mediation. The initial hypothesis, which was that it is possible to use electronic environments to resolve disputes, was verified empirically. However, we have to acknowledge that CyberTribunal was a limited exercise owing to its experimental nature and the university context, which both imposed certain constraints and prohibited broader deployment. The validity of the concept was demonstrated, but it still had to
be adopted by the legal community if it was to be used in a more formal legal context.

Disputes over domain names, which generally pit a trademark holder against a domain name owner, provided a life-size testing ground. The dispute resolution policy and rules adopted by ICANN in October 1999 apply to all domain name owners. Implementation and enforcement of the rules and policy raise no problems because ICANN has control over all of the registrars (the companies in charge of registering names in the top-level generic suffix domains such as “.com”, “.net” and “.org”). Since domain names give rise to real disputes and ICANN has a formal dispute resolution framework, it was possible to take cyberjustice beyond the experimental stage.

On January 1, 2000, eResolution was accredited by ICANN under the policy, and thus became a certified body able to hear domain name disputes. It was the fruit of collaboration between North American university researchers to prevent the World Intellectual Property Organization (WIPO) from gaining exclusive control over the domain-name dispute resolution process. WIPO, which had written the Final Report of the First WIPO Internet Domain Name Process at the request of the American government, was entertaining dreams of a monopoly over the dispute resolution process, and had decided to put its brand new Arbitration and Mediation Center to good use, though its activities had been rather limited up to that point. Professors Michael Froomkin (University of Miami), David Post (Temple University), Ethan Katsh and Janet Rifkin (University of Massachusetts) and Karim Benyekhlef (University of Montréal) therefore decided to join forces in July 1999 to ensure competition with respect to the domain name dispute resolution process. In association with this group of university researchers, the CyberTribunal experimental system was employed by a private company, in which the authors of the present work participated, to build a software module integrating ICANN’s policy. As an accredited body, and thanks to its network of arbitrators, eResolution contributed to the online resolution of over 500 cases from around 60 countries in two years of operation.

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7 Also see the website run by professors Froomkin and Post: http://www.icannwatch.org/ (last visited on February 1, 2005).
operation. This proved that the communication technologies offered by the Internet could help to resolve transborder disputes.

In the eyes of many, the CyberTribunal experiment and eResolution experiments with electronic dispute resolution mechanisms confirmed the feasibility and utility of employing information and communications technologies to establish an atmosphere of trust on the Internet. Indeed, this was so clear that at the end of 2000 and beginning of 2001, a multitude of websites sprang up claiming to offer online dispute resolution services. The buoyant stockmarket at the time partially explains the surprising surge in the number of such services, though unfortunately they too often lacked credibility. Indeed, this glut forces us to define what is really meant by “online dispute resolution (ODR)”. Cyberjustice is another concept that has to be defined. What do these terms really cover? It is important to distinguish between initiatives that are part of the innovative current and those that are more or less shams. We will come back to this often in the present work. For now, suffice it to say that there are three features characteristic of cyberjustice: first, a software application that automates certain functions, models the relevant procedural framework (rules concerning domain names, for example) and offers an interface from which all the steps of a procedure can be performed and all evidence stored, transmitted and managed; second, permanent online technical support; and third, a network of neutral third parties recognized for their expertise in the relevant area. These essential features are used in online negotiation, mediation, conciliation and arbitration. Other features are of course added when the government decides to invest in cyberjustice by offering e-filing and case management systems.

The ECODIR (Electronic Consumer Dispute Resolution) project, sponsored by the European Commission, was also the result of work by the University of Montréal’s Centre de recherche en droit public (CRDP). ECODIR was a consortium of European (Université de Namur, CNRS and the University College Dublin) and Canadian (CRDP and eResolution) partners, the goal of which was to offer an electronic platform to European consumers so that they could resolve disputes with cybersellers. A negotiation and mediation platform was made available to the parties in October 2001. This was a first in Europe.

Perhaps this brief summary of cyberjustice’s first years fails to portray the sudden acceleration and passage from almost total scepticism to virtually unlimited faith, from confirmed reticence to wholehearted endorsement. Of
course, questions remain, but they will be answered by the development of cyberjustice on both the domestic and international levels. In particular, there is the question of the consumer’s ability to take advantage of arbitration. However, it is surprising to see the rapid acceptance of the principle of remote dispute resolution by almost all of the major stakeholders in cyberspace. As we will see, governments, international organizations, business associations and consumers’ advocates now fully acknowledge the need to use ODR to establish an environment of trust on the Internet and facilitate the exercise of parties’ rights in electronic transactions.

The reservations that are expressed most often, and which still remain in the minds of many lawyers, are related to the physical presence of the parties during the proceedings. In the case of domain name disputes, for example, the proceedings took place in the parties’ absence. The parties met neither each other nor the arbitrator in person. Obviously, they could contact each other by email, fax or even telephone, if required. However, communication passed first through a website reserved for the case and which the parties, arbitrator and case administrator could access using a password. The parties could use the site to file complaints and responses, contact each other, the arbitrator and the case administrator, upload evidence, suggest settlements, manage their respective files, etc. Conducting the proceedings in the parties’ absence is not, contrary to what one might think, an essential feature of cyberjustice. They can meet, if required. This does not detract from cyberjustice because putting even part of a procedure online saves an enormous amount of time and money. Yet, why is physical presence a recurring theme among those who seem to fear the establishment of cyberjustice? Beyond immediate and contingent arguments, such as the importance of cross-examination in the common law, a plausible explanation lies in the deep ritualization of the legal process in general. If the parties are absent, there is a loss of theatricality, and this troubles some lawyers. Law remains today “one of the most ritualized functions of social life”\(^8\). One need only visit a courtroom or read a judgment to find a very special and often repetitive style.

The claims to rationality made by members of the legal profession do nothing to eliminate the ritual features of law. Ritualization is at the very
heart of the institution; it is an integral part of it and often provides a justification for the judicial act itself. Thus, “the act of judging requires its own space”. Justice must be conducted in a consecrated location, which plays an important role in the staging of justice. The Western legal tradition has its roots in medieval justice, which sought peace, not truth, and since churches carry peace, it was not unusual for justice to be rendered in such sacred places. This better explains the legal liturgy that even today demands a specific spatial configuration so that the actors can speak the law and carry it out with greater authority. Through its sacramental nature, the location therefore actively participates in reconciling the parties and resolving their dispute. Since rituals also play the role of social glue in that they are “remarkable machines for producing social unity”, they require a public forum where a large audience can “see” justice in action and thereby contribute to the authority of the judgment. Dispute resolution takes on a public dimension so that the actions of justice can be made visible to the community. “Seeing” justice supposes a virtually physical link between those who seek it, those who render it and those who observe. Yet, justice is often represented as a woman with her eyes blindfolded because the “judge’s regard is only an appearance; he or she does not express a subjective consciousness” but rather a collective mind. Judges must therefore have dual personalities because they have to forget themselves as subjects and base their judgments on their mind’s eye. The other actors on the legal stage must “see” justice in action in accordance with the principle that justice must not only be done but also be seen to be done. Consequently,

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12 Id., p. 211.
13 C. Gauvard and R. Jacob, Supra, Note 8, p. 7 [our translation].
14 N. Offenstadt, Supra, Note 11, p. 228.
15 A. Garapon, Supra, Note 9, p. 234. See also Garapon-Essai, Supra, Note 9, p. 29.
16 Id., p. 232 [our translation].
17 Id., p. 232.
18 Id., p. 233.
the argument is that ADR mechanisms cannot escape ritualization because their purpose, particularly that of mediation, is primarily to reconcile the parties, and the behavioural grammar of reconciliation requires a physical meeting\textsuperscript{19}. Here again, the symbolism of physical contact controls reconciliation and peace\textsuperscript{20}. Do not justice and peace embrace each other\textsuperscript{21}?

Such quasi-atavistic rituals still live on in the legal imagination, and even the most modern rituals undeniably have their roots in the medieval ideas that founded justice in the western world. This probably partially explains the attachment to forms and formalities, which are, all things considered, often devoid of any practical rationality but operate so deeply in the collective psyche that they appear unavoidable and necessary. Thus, the relation between form and norm appear “essential to the experience of justice”\textsuperscript{22}. Technology leads to a disenchantment with and trivialization of ritual. Yet, ritual, particularly through its symbolic aspect, contributes to the social order. The challenge for cyberjustice is thus to re-invent appropriate rituals that are, of course, based on those of the past, or at least to adapt rituals to new technology so that the concurrence and therefore authority that they cast on the thing they adorn appear consubstantial with the exercise of justice. Cyberjustice cannot be exempt from rituals that assure continuity with the more traditional rituals of law. As Paul Ricoeur writes, “performing a ritual means doing something with power”\textsuperscript{23}. It is this power, impregnated with ritual, that ensures the authority of law.

This book has a number of goals. The first is to demystify cyberjustice. What does it really mean? What does it presuppose? We will have to explain exactly what information and communication technologies bring to the administration of justice. We will try to describe the nuts and bolts of online dispute resolution. This will lead us to the most accurate description possible of the experiments conducted in this area, particularly those with the greatest credibility. Indeed, there are many areas in which cyberjustice can be used, but so far few have received concrete, sustained attention. Such attention could usefully be turned to the strong potential of ODR, which merits

\begin{enumerate}
\item Id., p. 236.
\item N. Offenstadt, Supra, Note 11, p. 217.
\item “Pax et Iustitia osculatae sunt”, id., p. 201.
\item Garapon-Essai, Supra, Note 9, p. 43.
\end{enumerate}
The strictly legal aspects of the phenomenon should also be discussed. How can state law, a perfect example of public power, be reconciled with cyberjustice, which sometimes takes the path of private forces? What are the legal obstacles to deploying ODR? Finally, the reader is invited to learn about the first *sui generis* online arbitration system: the domain name dispute resolution application developed by eResolution. This initiation should complete the demystification of cyberjustice.

Traditional civil and commercial law is becoming less accessible because often it is too expensive and imposes unreasonable time frames. On the Internet, a wide range of products and services are available to consumers and companies, but there is no truly adequate legal certainty. In both cases, recourse to information and communications technologies must provide remedies for these problems. Cyberjustice certainly does not dream of dematerializing all aspects of legal proceedings. However, it can increase access to justice and ensure greater legal certainty on the Internet by reducing the cost and time required to settle disputes. Of course, the legal community’s *ethos* remains to be changed so that it can be adapted to new practices. Given the rapid transformations in public and private stakeholders’ views on ODR in recent years, there is good reason to think that lawyers, though they are still hesitant, will adapt their practices relatively quickly. The principle of cyberjustice has been established, and it is difficult to imagine taking a step backward. The many shortcomings of justice in Europe and North America today should be partially alleviated by electronic mechanisms that take much of the administrative and procedural work off the hands of judges and lawyers so that they can spend more time judging and arguing cases, which are after all their primary tasks.
II. Modernization of justice

In recent years, justice has become a veritable industry. The skyrocketing volume of litigation can be explained partly by population growth, increased trade and more crime, as well as by greater regulation of human relations.

These factors make it easy to see why the number of disputes before the courts continues to grow. These new realities translate not only into an increase in the number of disputes but also into longer case processing times in courts and a proportional increase in the cost of ensuring proper administration. The situation is such that some organizations, such as the United States Chamber of Commerce’s Institute for Legal Reform\(^\text{24}\), have adopted a mandate to try to control the burgeoning growth in litigation. In the United States alone, over 10 million new cases are brought before the courts each year\(^\text{25}\). In France, over 2 200 000 decisions were rendered in civil and commercial matters\(^\text{26}\) and over 116 000 cases were heard by French administrative tribunals in 1999\(^\text{27}\). In the United States, the costs related to the administration of justice are estimated at over US$200 billion\(^\text{28}\). The resulting congestion in the courts and growing costs have to be dealt with, and there seem to be two solutions available.

The first solution involves ADR. More and more stakeholders are realizing that there is a wide range of alternatives to the courts when it comes to solving conflicts efficiently, and that some of them even complement court proceedings. As Nabil Antaki notes, the apparent monopoly of state courts is now a thing of the past:

> Today, we are far from the time when legal recourse was considered the only way to guarantee rights and provide sufficient certainty and predictability. At that time, alternative methods were viewed with


\(^{25}\) The most pessimistic believe instead that a case is brought every two seconds. See US Chamber Institute for Legal Reform, “America’s Class Action Crisis”, source: http://www.legalreformnow.com/ (last visited February 1, 2005 ; article no longer available online).


suspicion. It was claimed that they offered cheap justice and were unhealthy competition for the public legal system. This concept is outmoded. Several years ago we entered an era when a diversity of forums and procedures and a wide range of notions of law and justice are allowed [...] The new forms of justice are now just as recognized and legitimate as traditional justice.29

In all areas of economic activity, there has been a major upswing in the use of ADR, such as negotiation, mediation and arbitration. In 1997, Cornell University, in collaboration with the Foundation for Prevention and Early Resolution of Conflict (PERC), published a study30 noting the growing recourse to ADR as a way to significantly reduce litigation costs. The researchers also predicted that the use of ADR would grow considerably in the years to come31.

Today, more and more organizations are being established to study, promote and raise awareness of the advantages of using ADR32. In Europe, a number of organizations recommend the resolution of commercial disputes by mediation and arbitration. These institutions include, in particular, the Centre de Médiation et d’Arbitrage de Paris (CMAP)33, an association created by the Paris Chamber of Commerce and Industry in partnership with the Tribunal de Commerce de Paris, the Association française d’Arbitrage, the Barreau de Paris, the Comité National Français de la Chambre de Commerce Internationale and the Conseil supérieur de l’Ordre des Experts-Comptables. In 2001, in collaboration with Belgian34, English35, Dutch36 and

31 Id.
32 There are many organizations in the world that share this mission. Among the most well known are the International Court of Arbitration of the International Chamber of Commerce (ICC), established in 1919 and the American Arbitration Association (AAA), founded in 1926.
35 Centre for Effective Dispute Resolution (CEDR), http://www.cedr.co.uk/ (last visited on February 1, 2005).
Italian mediation centres, CMAP published a report on areas where mediation is used in Europe. The report inspired the European Commission’s 2002 Green Paper on alternative dispute resolution in civil and commercial law.

In the United States, in order to promote the use of negotiation, mediation and arbitration by the legal community, the CPR Institute for Dispute Resolution developed a pledge for companies that commits them to using ADR before taking the traditional legal path. Currently, over 4 000 organizations have pledged to do so, including AT&T, Daimler Chrysler, General Motors, IBM, Microsoft, PricewaterhouseCoopers and Time Warner. Similar pledges also bind over 1 500 law firms and many corporations in banking and insurance.

There thus seems to be a real movement toward ADR and a consensus on the advantages that it has over a judicial system that is becoming less and less accessible owing to growing costs and delays. The advantages of alternative mechanisms are numerous: they decongest the courts and reduce the cost to society of administering justice while providing the parties with substantial savings in time and money because of the flexibility of the procedures. Indeed, that flexibility gives the parties greater control over the process.

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40 CPR Institute for Dispute Resolution, [www.cpradr.org](http://www.cpradr.org) (last visited February 1, 2005).
41 See the “CPR Corporate ADR Pledge”, Id.
42 See the “CPR Law Firm Pledge”, Id.
43 See the “CPR Banking Industry Dispute Resolution Commitment”, Id.
44 See the “CPR Insurance Industry Dispute Resolution Commitment” and the “CPR Inter-Insurer dispute resolution commitment for disputes relating to the September 11”, 2001 disaster, Id.
45 As Schiffer notes: “All ADR methods are based upon the parties themselves controlling the timing of the resolution process. ADR is not subject to the burdens of bureaucracy [...] If litigation is commenced the court proceedings will take several
Moreover, with the emergence of new technologies, alternative mechanisms are bound to become even faster, cheaper and more efficient, thereby widening the gap between so-called private justice and the judicial system. Though long confined to the physical world, negotiation, mediation and arbitration must now demonstrate the flexibility, malleability, speed, facility and low cost that have always justified their existence and made them a success. In other words, it now seems primordial to adapt these much-touted institutions to electronic environments so that they can maintain all of the qualities that have made them the preferred means of resolving international trade disputes. Indeed, electronic environments are especially fertile ground for these types of ADR. In addition to the advantages they offer in terms of speed and reduced cost, the malleability and flexibility of ADR mechanisms lend themselves very well to handling phenomena such as delocalization of the parties, internationalization of transactions and circulation of information in electronic environments. ODR adds efficiency by enabling the parties to find a solution to their conflict employing, by assumption, the same medium that they used to carry out the transaction. Since they also do not have to travel, they save much time and money.

In cases where recourse to the courts cannot be avoided46, a second solution, namely, automation of various stages of the judicial process, makes it possible to increase the efficiency and speed of dispute management by the courts. As early as 1992, Henry Perrit noted that government use of new information technologies would increase the efficiency of the process, citizen participation and procedural guarantees47. Thus, using an electronic network, it is possible to facilitate the electronic management of cases before the courts so that all involved in the proceedings can communicate with one

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another, exchange information, consult files, make decisions and notify the
others of those decisions, etc.

In light of the above, we will now give a brief presentation of the various
disputes in both the physical world and cyberspace that could be handled
better if resolution procedures were partly automated. This is of course only
an overview, but it should allow us to grasp all the potential of Internet
technologies for dispute resolution.

A. Areas of application

In business, disputes are unfortunately inevitable. Clearly, economic
development depends on the availability of effective dispute resolution
mechanisms. Indeed, the presence of clear rules and a well-defined,
predictable legal framework are important factors for the growth of business
no matter the area. Access to dispute resolution mechanisms is part of the
road to legal certainty, which also leads to clarity and predictability.
Electronic commerce certainly seems to be an area where the need for ODR
is most urgent\footnote{Access to justice is in turn a strong promoter of e-confidence. Many e-commerce
managers, for instance, state that an effective dispute resolution system is a marketing
tool, a part of good customer service. ODR, in this sense, is meant to establish
customer trust in e-commerce. […] An appropriate dispute resolution system helps to
build trust and confidence in a commercial activity.” Thomas Schultz, Gabrielle
Kaufmann-Kohler, Dirk Langer, Vincent Bonnet, Supra, Note 46.}. The delocalization of the parties, international nature of
transactions, and difficulty in identifying competent fora explain the
necessity of providing flexible online mechanisms that are adapted to
electronic environments so as to meet the need for legal certainty.

In the offline world, ODR could be used in the private sector. As we will
see, economic activities generates a large number of disputes that are often
difficult to manage because of the small amounts of money involved.
Technology could certainly facilitate effective processing and resolution of
this type of dispute but, naturally, ODR would not presuppose the
elimination of more traditional means of resolution.

However, we should first describe some of the technological initiatives
taken in the judicial sector, properly speaking. Indeed, it is clear that the
judicial system has also undergone many technological changes. Here too,
Internet technologies have been used to facilitate the process of putting various steps of the judicial process online.

(1) The public sector

In this section, we will study how some tribunals and government agencies are trying to use integrated justice information systems (IJISs) to find solutions to difficulties in managing disputes. To begin with, a distinction must be made between the way technology is used in IJISs and ODR. In the former case, information and communication technologies are used to create applications based on classical judicial processes and the various administrative steps related to the judicial system, and to put them online. In ODR, technologies are used to create software that reproduces negotiation, mediation, conciliation, arbitration and any other form of ADR (for example, evaluation by a neutral expert), and put them online. In both cases, the goal is to improve dispute management by reducing the cost and time required.

Armed with this distinction, let us look briefly at IJIS initiatives.

Increasingly, courts of justice, administrative tribunals and government agencies are finding that prohibitive costs and an overload of cases pending have significantly limited access to justice. By integrating electronic forms into the management of civil and administrative proceedings, organizations can remedy these problems by speeding up the whole process, making file management more efficient and reducing the cost to the parties.

Implementing IJISs will certainly be the biggest undertaking in the North American legal community in the next few years. It should be noted that in both Canada and the United States, the judicial system is unified, in the sense that there is no judicial category based on substantive law. Thus, the same tribunal can be seized with civil, criminal, administrative, tax and constitutional cases. This kind of judicial system probably lends itself to greater electronic integration, notably because of the caseload.

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49 According to a study by the Gartner Group, in the United States, local and national government expenditures related to government electronic management initiatives will go from $1.9 billion US in 2001 to $6.5 billion in 2005. See Bluecrane, “Winning Sectors In The Public Sector Market”, ITAA Webcast, October 30, 2001, source: [http://www.itaa.org](http://www.itaa.org) (last visited on February 1, 2005; study no longer available online).
In Canada and the United States, there are many initiatives involving automation, in the broad sense, of justice. The initiatives can be grouped into two main areas: case flow management and case management systems. However, IJISs, as their proponents define them, cover both areas. In 1999, the National Criminal Justice Association (NCJA) in the United States proposed the following definition of IJISs:

As it is used in this document, the term “integrated justice system” encompasses interagency, interdisciplinary and intergovernmental information systems that access, collect, use, and disseminate critical information at key decision points throughout the justice process, including building or enhancing capacities to automatically query regional statewide and national databases and to report key transactions regarding people and cases to local, regional, statewide and national systems. Generally, the term is employed in describing justice information systems that eliminate duplicate data entry, provide access to information that is not otherwise available, and ensure the timely sharing of critical information.

The definition proposed by the NCJA gives the term very broad scope. Essentially, it covers all actors in the judicial process: government agencies, police forces, correctional services, parole boards, local, provincial and state agencies, courts, bailiffs, judges, lawyers, etc. The purpose is to facilitate the construction of an electronic network that would allow all stakeholders to communicate with one another, exchange information, consult files and render and notify decisions; in short, it facilitates the electronic management of the chain of information in court cases.

The route taken by a police report in Canadian law illustrates the chain of information. A police officer writes an investigative report concerning an offence and sends it to the Crown prosecutor. The prosecutor uses the report to decide whether charges will be laid. When the accused appears in court, the investigative report is used to decide whether he or she will be released during the proceedings or whether a psychiatric examination is required. The same document is also used by an officer of the Department of the Solicitor-General to prepare a presentence report, if applicable, and by the judge when determining the sentence. If the accused is found guilty, the investigative report is used to determine to which category of detention centre or

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penitentiary he or she should be sent. Finally, the parole board eventually
studies the same investigative report. It is clear that networking all of the
stakeholders can facilitate the transmission of information.

The term also covers case management systems. The term e-filing is also
sometimes used, but it does not cover all of the functionalities presupposed
by a case management system. In a way, e-filing is a subset of such a
system, which can be defined as the automation and networking of judicial
procedures, in the proper sense of the word. Thus, information is also put on
the network, but the systems mainly facilitate the management of procedures
(applications, requests, statements, etc.) and interaction among stakeholders
in a case. The goals are of course to speed up the process and reduce costs.
However, it is also possible to contemplate remote appearance, remote
examination of requests and preliminary and interlocutory applications
without the physical presence of those who submitted them, electronic
notification of procedures or even of certain decisions (procedure
management), and management of court cases, rolls, hearings, evidence, the
court calendar, digital recordings, internal resources and execution of the
financial aspects (deposit, bail, etc.).

E-filing systems allow documents to be sent through protected lines of
communication. Parties involved in judicial proceedings use e-filing to
exchange documents, such as answers to examination, complementary
answers and discovery. They are different from the preceding systems in that
their purpose is not to manage all of the factors related to a court case, such
as rolls and hearings. Unlike case management systems, e-filing systems do
not cover case management. They are only one part of a larger whole that
makes up court management. This distinction is probably doomed to
disappear, but we mention it here because e-filing was the first system set up
in many American courts. It made it possible for parties to file online
applications and exhibits that were already in digital form. E-filing systems
are now integrated into and merged with more ambitious case management
systems that are themselves part of IJISs.

In Canada, the federal government is in the process of setting up the
Canadian Public Safety Information Network (CPSIN), which will serve “as
the basis for a modern, national information network linking the various
sources of information to the criminal justice practitioners”51. It should be

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51 Solicitor General of Canada, Steering Committee on Integrated Justice Information,
noted that the network targets stakeholders in the criminal sector only. This is because of constitutional considerations, since the federal courts have exclusive jurisdiction over criminal law and procedure whereas the provinces have jurisdiction over property and civil law, and the administration of justice.

Thus, in Quebec\textsuperscript{52}, the provincial government set up its own IJIS for data pertaining to civil, youth and criminal cases. Here, criminal cases are included because, while criminal law and procedure fall under federal jurisdiction, administration of justice is the responsibility of the provinces. This means that there is a risk of some duplication.

In the United States, the situation is even more complex and the risk of duplication is even greater owing to the country’s constitutional structure and the large number of stakeholders (the federal administration plus 50 state authorities). There is, however, an initiative similar to Canada’s, which is designed to integrate and centralize criminal justice information activities. It is the Global Criminal Justice Information Network Initiative (GLOBAL), which should gain greater importance following the events of September 11, 2001\textsuperscript{53}.

At the federal level, the authority responsible for automating and networking the courts is the Judicial Conference Committee. Thus, judges themselves determine the forms of electronic access to judicial information (case management). That judges should have such autonomy is not surprising if we bear in mind that, in the United States, administration is part of what makes up judicial independence (for federal judges). The primary technological tool created by the Judicial Conference Committee is the index of cases entitled “Public Access to Court Electronic Records” (PACER)\textsuperscript{54}.

\begin{footnotesize}

\begin{itemize}
\item[54] “The courts plan to provide public access to electronic files, both at the courthouse and beyond the courthouse, through the Internet. The primary method to obtain
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Federal courts are also in the process of deploying a Case Management/Electronic Case Files system (CM/ECF). It should enable parties involved in proceedings under federal jurisdiction to use electronic networks to institute an action, produce evidence, file preliminary and interlocutory applications, file documents, exchange information with the judge presiding and the other party, etc. This system is already fairly well established in bankruptcy courts, and more than forty district courts have also implemented it.

(2) The private sector

The private sector is not foreign to cyberjustice technologies. Indeed, it should be noted that it was in a largely privatized context, that of domain names (Internet addresses), that cyberjustice was deployed for the first time. Owing to its characteristically flexible standards, the private sector is fertile ground for experimenting with and implementing ODR mechanisms. Indeed, in a number of areas, private sector activities generate many conflicts that, owing to cost considerations, are often not settled in the classical judicial system. Many stakeholders in the private sector use ADR.

Likewise, traditional mediation and arbitration organizations could be called upon to manage a large number of disputes arising in cyberspace or resulting from information transactions. The often international nature of such transactions naturally puts such organizations in a position to administer

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these cases. However, they must still adapt their cost structure and approach to dispute management.

In all cases, it seems clear that the private sector would benefit by automating negotiation, mediation, conciliation and arbitration procedures. The transition to electronic environments in dispute resolution should facilitate the handling of disputes by making it less expensive, faster and therefore more effective.

(a) Traditional mediation and arbitration organizations

Today, arbitration and mediation are increasingly used to settle disputes, so traditional mediation and arbitration organizations manage a growing number of national and international disputes every year. Over time, these organizations have developed unparalleled expertise in dealing with the disputes submitted to them. However, they increasingly acknowledge that it has become necessary to put mediation and arbitration procedures online in order to speed up the dispute resolution process, reduce costs and thereby become more efficient in handling cases, the number of which continues to grow each year. It should also be noted that today international arbitration is still reserved for big business, which is of course because until very recently international trade was mainly the domain of a few large companies. Today, with globalization and the development of electronic commerce, small and medium-sized enterprises are becoming significant players in international trade. Thus, they need to be able to take advantage of ADR, which requires adapting its cost structure, in particular, to the financial means of small and medium-sized enterprises. This can be done by putting dispute resolution procedures online, which would significantly reduce the cost of representation and travel, and thereby make mediation and arbitration services more accessible to small and medium-sized enterprises.

In 1999, there were nearly 300 traditional ADR organizations in the European Community. Moreover, despite the fact that statistics on this phenomenon are scant, it is a reasonable estimate that there are currently around 1,500 mediation and arbitration organizations in the United States.

These organizations handle a large number of cases every year. The American Arbitration Association (AAA)\(^58\), which is the largest mediation and arbitration organization in the United States, handled over 218,000 cases in 2001\(^59\). Judicial Arbitration and Mediation Services (JAMS) manages an average of over 10,000 cases annually. The number of cases recently tripled because of an increase in class actions\(^60\). Within the AAA, the International Centre for Dispute Resolution (ICDR) administered 649 international arbitration requests in 2001, involving claims worth a total of over US$10 billion\(^61\).

Moreover, in 2003, the International Court of Arbitration of the International Chamber of Commerce (ICC) handled 580 arbitration applications concerning international trade disputes\(^62\). Over 50% of the cases involved more than US$1 million.

The numbers all indicate a trend toward increasingly frequent use of ADR. The flow will certainly become a flood if recourse to ODR spreads.

\(^{58}\) American Arbitration Association, \url{http://www.adr.org/} (last visited on February 1, 2005).


\(^{61}\) “Over $10 billion in claims and counterclaims were filed, and 43% of the cases involved claims over $1 million or were for undisclosed amounts, which are typically among the very largest claims”. International Centre for Dispute Resolution, “ICDR Becomes World’s Largest International Commercial Arbitration Institution”, Press Release, May 16, 2002, available at: \url{http://www.adr.org/sp.asp?id=21977} (last visited on February 1, 2005).

(b) Labour disputes

Disputes between employers and employees or unions are inevitable. In Canada, approximately 7,500 grievances go to arbitration each year. In 1998, the United States Federal Mediation and Conciliation Service (FMCS) recorded 53,978 mediation requests concerning labour relations disputes. It should be noted that this accounts for only a small portion of the real number of grievances because, more often than not, they are resolved in private and not heard in public. It should also be noted that in unionized companies in North America, disputes between employers and employees are managed and resolved on the basis of collective agreements. A collective agreement normally provides that, in compliance with the law, disputes, which are called “grievances”, must be resolved by an arbitrator appointed by both parties. The grievance procedure is usually entirely private and excludes, in principle, any intervention by the courts, except in cases of gross abuse or excess of jurisdiction. The procedure begins with informal negotiations between the parties, and this is often sufficient to settle the dispute.

The following table illustrates the number of days lost per 1,000 employees from 1995 to 1999 because of labour disputes in various European countries, all industries and economic sectors combined:

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63. Note that this figure does not take into account the significant number of procedures preceding a grievance, which could account for nearly 80% of the total number of disputes.


Here again, the numbers show how many disputes there are in the workplace. Because of the dangers that such disputes (whether they are individual or collective) present for social cohesion and economic growth, mechanisms have to be established to facilitate representation, consultation, participation, co-operation, conciliation, negotiation and, finally, arbitration of grievances. It is in the best interest of all to resolve this type of dispute as quickly as possible. ODR can facilitate and accelerate the resolution process.

Disputes can take many forms within a single company. In particular, they can concern relations between employees (harassment, abuse of authority, etc.), employee-employer relations (appraisals, promotions, labour law issues) and interdepartmental relations.

(c) The financial sector

In this section, the term “financial sector” covers banking, securities and insurance.

Given the diversity of their activities and services, stakeholders in banking have to manage a certain number of disputes. Aside from the potential labour disputes with employees that we covered above in general terms, disputes can arise in two main areas: personal and commercial banking.

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Studies and reports on the banking sector show that 75-94% of the disputes and claims handled in banking involve individuals. The services concerned include banking and insurance (personal accounts, credit cards, insurance products, telephone and online banking, personal loans, mortgages, etc.) as well as investment (discount trading, financial and investment advice, etc.).

Stakeholders in banking also offer a range of commercial services that can give rise to disputes. These services include banking and insurance services (corporate payment cards, corporate account services, commercial insurance products, acquisition cards (debit cards), interbank services, international transactions, etc.) and investment services, including brokerage and advice.

Banking requires effective mechanisms to resolve the disputes that it generates. This need is acknowledged by all stakeholders in the banking community. As early as 1995, many Canadian banks tried to meet this need by establishing ombudsmen to handle complaints that could not be resolved through their usual processes. In 2001, 1,519 complaints were brought before the various ombudsmen.

In 1996, the Canadian Bankers Association (CBA) created another body before which consumers and small enterprises can appeal decisions rendered by the banks’ internal ombudsmen: the Canadian Banking Ombudsman (CBO). Currently, 12 Canadian banks are participating in the program. Note that the CBO’s services are provided to complainants free of charge since the participating banks fund the scheme. According to its 1999 Annual Report, the CBO recorded 1,083 inquiries and complaints from individuals.

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67 For example, according to a study conducted by the Luxembourg Commission de Surveillance du Secteur Financier, an organization with the mission of carrying out prudential supervision of lending institutions, other professionals in the financial sector, group investment organizations, pension funds, stock exchanges, payment systems and securities transaction systems, 132 of the 140 applications for mediation in 2001 were filed by individuals. See Commission de Surveillance du Secteur Financier du Luxembourg, Rapport Annuel 2001, Chapter 7, “Les réclamations de la clientèle”, available at: http://www.cssf.lu/fr/publications/presentation_docs.html?theme_num=5&cat_num=7 (last visited on February 1, 2005).


70 Canadian Banking Ombudsman, http://www.obsi.ca (last visited on February 1, 2005). Note that the name of this organization has changed in 2002 for Ombudsman for Banking Services and Investments.
and small enterprises. The following year, this number had increased to 1,179. In the United Kingdom, the Financial Ombudsman Service handled over 6,150 complaints in 2001 in the banking sector alone. This was a 15% increase in volume over the preceding year.\footnote{Financial Ombudsman Service, “Resolving Banking-Related Disputes”, 2001, available at: http://www.financial-ombudsman.org.uk/publications/assessment-guide/first-annual-report/resolving-banking-related-disputes.htm (last visited February 1, 2005).}

Like banking, security brokerage could also benefit from ODR. In the United States, the New York Stock Exchange (NYSE) and the National Association of Stock Dealers (NASD) have both established procedures based on arbitration. In 1997, the two groups managed 8% and 90%, respectively, of all arbitration in the securities sector\footnote{United States Securities and Exchange Commission, Office of the Inspector General, “Oversight of Self-Regulatory Organization Arbitration”, 1999, available at: http://www.sec.gov/about/oig/oigauditlist.htm - 1999 (last visited on February 1, 2005).}, in other words, 5,997 cases. Between 2000 and 2002, the NASD received over 20,000 arbitration applications and over 2,200 requests for mediation\footnote{National Association of Stock Dealers, “Dispute Resolution Statistics”, available at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=516&ssSourceNodeid=12 (last visited on February 1, 2005).}. In the United Kingdom in 2001, the Financial Ombudsman Service administered over 18,633 applications in the securities sector, which was a 43% increase, year over year\footnote{Financial Ombudsman Service, “Resolving Investment-Related Disputes”, 2001, available at: http://www.financial-ombudsman.org.uk/first-annual-report/resolving-investment-related-disputes.htm (last visited on February 1, 2005).}. In short, the figures show that the number of disputes continues to grow, but the mechanisms for handling and resolving disputes are not changing or adapting to take the increase into account. Automation of the procedures for resolving these types of conflict is clearly one possible solution.

In the insurance industry, the number of claims is also growing every year\footnote{The 20 largest insurance companies in the United States spent US$34 billion to manage the claims in 1998. See the comments by Anthony Barsamian, Federal Trade Commission and Department of Commerce, “Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions”, June 6–7 2000, available at: http://www.ftc.gov/bcp/aldisresolution/ (last visited on February 1, 2005).}, and in every area (life, property and civil liability). This makes it difficult for insurers to process claims effectively and in a timely manner.
In 1997, there were over 3 300 insurance companies in the United States in the life, health and property insurance sectors alone. The companies handle a large volume of inquiries and claims each year, and would certainly benefit from automation of their procedures. This is also echoed in Europe, where JURIDICA, a French legal aid insurance company that belongs to the AXA Group, receives 100 000 telephone calls and manages over 20 000 cases annually. In the United Kingdom, the Financial Ombudsman Service handled over 6 500 insurance cases in 2001.

There are other areas in the private sector where ODR could be used to manage the growing number of disputes more simply, economically and quickly. Aside from some very special cases, parties have no interest in bringing disputes before the courts because of the disproportionate cost of doing so, compared with the amount of money at stake. Yet, clients need be able to argue their points of view without incurring costs that are unreasonable given the nature of the claim or having to wait an excessively long time. ODR is therefore needed to make up for the shortcomings of a judicial system that is increasingly complex and difficult to manage.

(3) Cyberspace

On information highways, the number of situations resulting in disputes between web users, access providers, service suppliers and businesses in general is large and constantly growing. For example, a consumer and a seller offering products on the Internet may disagree about their respective responsibilities. A chat room participant may say something that injures the reputation of another. Disputes can also arise when software bought through a website does not work on the purchaser’s computer and the cyberseller refuses to co-operate. Many such examples can be given.

In this section, we will limit our study to two types of conflicts occurring in cyberspace. First, we will discuss disputes concerning intellectual property, specifically domain names. This is undoubtedly the area of litigation with

76 National Association of Insurance Commissioners (NAIC), http://www.naic.org (last visited on February 1, 2005)
77 JURIDICA, http://www.juridica.ch/ (last visited on February 1, 2005).
the highest visibility in cyberspace. Second, we will look at disputes specific to online trade.

(a) Domain names

A number of factors can explain the speculative nature of the market for domain names, such as the low cost of registering a domain name, compared with the investment in time and money required to establish a trademark in the physical world. This, along with the relative rarity of domain names, contributed to the growth of the Internet but also the highly publicized controversy surrounding its system for assigning addresses.

However, it seems that the “first come first served” registration policy of the vast majority of domain name registrars is at the root of the notorious friction between domain name owners and trademark holders. The policy allows a domain name incorporating a trademark to be held by an entity other than the trademark owner.

In order to get a better picture of what is at stake in this Internet address system, we have to begin by defining the concept of “domain name”. Then we will describe the history of the infrastructure established to resolve related disputes effectively.

On the Internet, every domain name is associated with an IP address79, which makes it possible to identify the location of the computer hosting the corresponding website on the Internet. The domain-name system allows the holder to be identified in a more personalized and user-friendly way, using an alphanumerical system. The domain name is neither more nor less that a mnemonic version of the numerical address.

The domain name system has a hierarchical structure. At the summit are the top-level domain names corresponding to the last part, or suffix, of a web address, for example, “.com” or “.fr” (for France). Top-level domain names are either generic (gTLD) or geographical (ccTLD), depending on whether they designate an area of commercial activity (.com) or a country (.fr).

79 “IP” means “Internet Protocol”, which is a number made up of a series of four numbers (octets), for example, 132.204.133.38.
The second level refers to the main distinctive element of the domain name. It is made up of an alphanumerical set that most often has a meaning, for example, www.A SPECIFIC COMPANY.com.

The bottom level is the identifier for the communications protocol, for example, “www” (World Wide Web) indicates that the address in question leads to a web page.

Initially used only to identify players in a scientific, university and governmental network, by 1995 the domain name system was already 97% commercial, according to registration applications. It was at that time that Network Solutions Inc. (NSI), a private United States company providing technical services to the National Science Foundation, was mandated to govern domain name registration in a largely independent manner. In September 1995, in exchange for a commitment (now revoked) to pay a percentage of the revenues into a special public fund, NSI received permission from its favourite client, the National Science Foundation, to bill holders directly for each registration. As mentioned above, there is no need to prove that one owns a trademark or intellectual property in order to obtain a domain name. Registration is on a first-come, first-served basis.

*De facto*, this enables anyone to register a domain name corresponding to a protected trademark or service mark, and to make unlimited international use of it. Trademark holders generally have no recourse except through a maze of prohibitively expensive transborder procedures. This is a little annoying when the registration holder is in good faith, but much more so when the holder is not, in other words, when the domain name was registered with the sole purpose of selling it at a profit to the holder of the

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81 The fund in question is the Internet Intellectual Infrastructure Fund, which was created to compensate government investment in maintaining and improving the “intellectual infrastructure of the Internet”. Contributions were maintained until April 1, 1998. See National Science Foundation, Office of Legislative and Public Affairs, “NSF and NSF End Internet Intellectual Infrastructure Fund Portion of Domain Name Registration Fees”, source: [http://www.nsf.gov/index.jsp](http://www.nsf.gov/index.jsp) (last visited on February 1, 2005; article no longer available online).
corresponding trademark. This later came to be known as “cybersquatting”\(^82\).

In November 1996, wishing to counteract this phenomenon and aware of the considerable legal risk to which it was exposed, NSI set up a dispute resolution policy through its contract of adhesion. The policy simply provides for suspension of registration (by litigation or agreement) of any domain name that a third party can show corresponds to a trademark owned by the third party and registered before the domain name\(^83\). This policy, which was established a little hastily with the primary goal of protecting the registrar from any claims, has significant defects\(^84\).

For example, it in no way addresses the problem raised in cases where the registration holder can also lay claim to a right to the domain name. Of course, there can be a number of rights and therefore several holders of the same trademark or name. The courts, to which the parties are forced to turn in spite of themselves, are rarely known for their speed. The resulting delays, far from being reduced in this type of case by recourse to a number of jurisdictions, naturally have major economic consequences. Note that so long as the dispute is not resolved, no party can use the domain name in question.

The freeze on registration of the domain name and on its subsequent use, coupled with the justice system’s often prohibitive delays and fees, gave some people the idea of treating the situation like a hostage taking and demanding a “ransom” for freeing (or unfreezing) the domain name in question. This practice, namely, that of invoking a protective mechanism in bad faith in order to try to remove a domain name from its holder, was later christened “Reverse Domain Name Hijacking”. We will come back to this.

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\(^82\) In 1994, the journalist Joshua Quittner exposed this major weakness by registering “McDonalds.com”. He openly boasted of his exploit in the American press.

\(^83\) Up until late 2002, this policy, which is no longer in effect, could be read in its entirety on the site of the Faculty of Law, New York University. Source: [http://www.nyls.edu](http://www.nyls.edu) (last visited on February 1, 2005; the “Network Solution’s Domain Name Dispute Resolution Policy, 3rd Revision” is no longer available online).

\(^84\) Concerning this policy’s weaknesses, see Carl Oppedahl, “Remedies in Domain Name Lawsuits: How is a Domain Name like a Cow?”, (1997) 15 *Marshall J. Computer & Info.* L. 437.
At the time, Internet addresses were governed by the Internet Assigned Numbers Authority (IANA), which belongs to the Information Science Institute at the University of California. In 1996, the IANA, in collaboration with a non-governmental organization (The Internet Society) set up an Internet Ad Hoc Committee (IAHC) to make changes to a domain name system that had proven unable to keep up with unbridled commercialization. In February 1997, the IAHC published a document entitled the *Generic Top Level Domain Memorandum of Understanding* (gTLD-MoU), which took stock of the conflicts between existing trademark protection systems and the address system as it was operated. The purpose of this initiative was to remedy weaknesses by creating a dispute resolution system for domain names using mediation, optional arbitration and a so-called “administrative” procedure based on ad hoc Administrative Domain Name Challenge Panels. The system, which was designed and implemented at the request and with the help of the World Intellectual Property Organization (WIPO), was meant to provide an effective and affordable means of resolving disputes without replacing or overriding the competency of national courts, or users’ rights to have recourse to them.

For a number of reasons largely independent of the proposed dispute resolution system, the gTLD-MoU has not been as successful as anticipated; it was very quickly rejected by an American government that was concerned with keeping a distance from governance of the system even though it recognized the weaknesses of a privatized system. A new process was therefore initiated in early 1998 by the National Telecommunications and Information Agency (NTIA), which falls under the United States Department of Commerce. The process was designed to put an end to NSI’s monopoly over the registration of unreserved domain names with generic top-level suffixes (gTLDs), e.g., .com, .net and org. This led to the October 1998 formation of the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization that essentially takes over IANA’s responsibilities.

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87 *Id.*
ICANN’s mandate is to co-ordinate the technological administration of the Internet. While discussion of this mandate is outside the scope of this study, note that it has three main foci: the domain name system, IP addresses (numerical address system) and communications protocols. The NTIA has also mandated WIPO to develop a domain name dispute resolution system for ICANN.

Basing its approach on the initial recommendations in the gTLD-MoU, which it had helped to write, WIPO launched an international consultation process. Member states, inter-governmental organizations, professional associations and Internet stakeholders were consulted over a nine-month period. A final report was filed on April 30, 1999: the Final Report of the WIPO Internet Domain Name Process (the WIPO Final Report), in which WIPO suggested that ICANN set up a uniform policy for processing domain name disputes. Following a second consultation period and some amendments, the Uniform Domain Name Dispute Resolution Policy (the Policy) was adopted by ICANN on August 26, 1999. The Policy was later completed by the October 24, 1999 adoption of the Rules for Uniform Domain Name Dispute Resolution Policy (the Rules), which set out the procedural details of the system as a whole (the UDRP procedure). These documents assign the task of resolving disputes concerning domain-name registration to dispute resolution institutions certified by ICANN, namely:

- WIPO, certified on December 1, 1999;
- The National Arbitration Forum (NAF), certified on December 23, 1999;
- eResolution, certified on January 1, 2000, but ceased resolving domain name disputes on November 30, 2001;
- The CPR Institute for Dispute Resolution, certified on May 22, 2000;
- The Asian Domain Name Dispute Resolution Centre (ADNDRC), certified on December 3, 2001, but handling domain name disputes since February 28, 2002.

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89 Uniform Domain Name Dispute Resolution Policy, available at: http://www.icann.org/udrp/ - udrp (last visited on February 1, 2005).
90 Rules for Uniform Domain Name Dispute Resolution Policy, id.
91 See Internet Corporation for Assigned Names and Numbers, “Approved Providers for Uniform Domain-Name Dispute-Resolution Policy”, id.
The first award was rendered on January 19, 2000 by United States counsel Scott Donahey for WIPO in World Wrestling Federation Entertainment, Inc. v. Michael Bosman. The UDRP procedure encompasses everything required for effective implementation of an ODR system. First and foremost, it is an evidence-based procedure that does not involve hearings. At a time when videoconferencing is still a novelty, a document-based system provides the ideal opportunity to test an online system for managing dispute resolution processes. Second, the UDRP procedure has the rare dual advantage of relatively simple subject matter but very broad international deployment. On one hand, potential results are limited to the cancellation or transfer of a domain name registration because the often more complex issues relating to evidence and assessment of damages have been set aside from the beginning. On the other hand, the international nature of a large proportion of the cases makes it possible to do field studies of problems specific to international proceedings, such as those pertaining to language and applicable standards. Finally, as mentioned above, the procedure’s self-enforcing nature eliminates all problems related to implementing and executing decisions.

The only dispute resolution provider that has taken advantage of the opportunity to transform the UDRP procedure into a veritable online process was eResolution. As we will see in the second part of this book, the technology set up by this service provider enabled the parties, decision-makers and case administrators to do online what others did on paper. This included registering cases, filing complaints, filing responses, uploading and consulting exhibits and evidence, exchanging correspondence and conveying decisions. Parties could upload non-digital documents at their convenience using the fax-server made available to them. Decision-makers could consult and take action on all of their cases remotely. All exchanges took place in a secure environment that required a user name and password for access and where information and documents were organized and arranged in

93 Though it contains certain limited accommodations for using electronic means of communication, the latest version of the procedure is not specifically designed to be conducted electronically.
accordance with the parties’ specific needs. Overall, the system received very good reviews from users\textsuperscript{94}.

Seeing the usefulness of such a system, two of the three other UDRP dispute resolution service providers, namely WIPO and NAF, devoted some effort to promoting the use of electronic means in their procedures. This essentially amounted to facilitated use of email and the possibility for the parties to complete HTML forms. It is interesting to note that in the cases handled by eResolution using a real online process, the respondent rate of participation in UDRP procedures was systematically and significantly higher\textsuperscript{95}. One of the reasons given for this statistical difference is that the online system makes it easier to prepare and submit a response\textsuperscript{96}. Whether or not this is the case, it is certain that use of electronic means of communication and remote records management in the UDRP procedure will only increase.

Overall, the dispute resolution mechanism established by ICANN is proving very popular and, from the point of view of trademark holders, highly effective. Since the system was introduced, over 4 000 cases involving over 7 000 domain names have been processed using the UDRP procedure, and the flow is not even beginning to diminish\textsuperscript{97}. This is because 2002 marked the deployment of seven new suffixes that were approved by the ICANN board on November 16, 2000. When it conducted its second consultation process on Internet domain names and the new suffixes were mentioned\textsuperscript{98},

\begin{footnotesize}
94 As mentioned above, eResolution ceased domain name-related activities on November 30, 2001.
96 \textit{Id.}
97 “The statistical data available from ICANN and other sources show that the UDRP is used very frequently in practice. Since the first decision handed down by a WIPO Panel in December 1999, more than 4 000 cases involving over 7 000 domain names have been handled, and there is no sign of major decline. To the contrary, it is expected that the figures will rise again in proportion to further ccTLDs joining the system and, even more important, in connection with the roll-out of new generic TLDs like .biz, .info, etc.” Annette Kur, “UDRP—A Study by the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law”, Max-Planck-Institute, Munich, 2002, available at: \url{http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf} (last visited on February 1, 2005).
98 .aero (for the aeronautics industry), .biz (for businesses), .coop (for co-operatives), .info (for various activities), .museum (for museums), .name (for domain names
WIPO recommended the adoption of the UDRP procedure for all domains with unreserved generic top-level suffixes (gTLDs), and for all country code top-level domains (ccTLDs) corresponding to countries and territories. On March 25, 2002, the European Union approved the establishment of a top-level domain “.eu”, which will probably be subject to a dispute resolution procedure based on the UDRP procedure. We will devote a whole chapter to the operation of the procedure in the second part of this book.

(b) Electronic commerce

The lack of trust in electronic markets in particular, and in the Internet in general, is one of the greatest obstacles to the growth of electronic commerce. From a legal point of view, there are many risks related to online business.

Delocalization and internationalization of relations, the lack of consistently applied legal regulations in cyberspace, difficulties in having decisions executed in foreign jurisdictions, the slow pace of legal systems, the cost of court proceedings, and the inability of traditional courts to deal effectively with conflicts arising out of Internet use cause many companies to hesitate before venturing into electronic commerce. Indeed, why take the risk of entering a commercial space where effective recourse is non-existent if a problem arises?

based on surnames) et .pro (for professionals). See http://www.icann.org/tlds/ (last visited on February 1, 2005).


Electronic commerce is international in theory, and rapidly becoming so in reality. Domestic law and national courts are increasingly perceived as external to the realities of international trade. The growing recourse to international arbitration and a-national legal principles is incontestable proof of this. At the same time, the “immanent” normative systems are considered insufficient because they are incomplete and sometimes too generic. Today, as economic stakeholders search for law and justice that is equitable and adapted to their activities, they have no choice but to turn to mechanisms that utilize and challenge the freedom to contract.

Business-to-business (B2B) trade

If we are to believe the fantastic figures put forth by many consulting firms, electronic commerce will soon be the source of an impressive number of contractual agreements and, therefore, potential conflicts. Indeed, it is difficult to see how such an astronomical number of transactions could be free of misunderstanding. Some degree of legal security must therefore be provided, and this involves a number of components, particularly mechanisms for identifying persons, signing documents, and establishing the integrity and non-repudiation of documents. Over and above these components, it seems logical to offer those who sign electronic contracts the possibility of recourse in the same medium when disputes arise. Establishing ODR mechanisms can calm the fears linked with the emergence of disputes in transborder exchanges and thereby contribute to the development of

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103 On these topics, see in particular Serge Parisien and Pierre Trudel, *L‘identification et la certification dans le commerce électronique (Droit, sécurité, audit et technologies)*, Cowansville: Editions Yvon Blais, 1996.

104 “A global alternative dispute resolution system is necessary to encourage cross-border electronic commerce”. Carly Fiorina, CEO, Hewlett-Packard, Global Business Dialogue on e-Commerce Conference, Miami, September 26, 2000, source: [http://www.gbde.org](http://www.gbde.org) (last visited on February 1, 2005; article no longer available online).
electronic commerce by giving stakeholders complete peace of mind in a well-defined legal framework.

However, before even attempting to define the legal framework, it is important to identify some of the components of B2B trade. The notion covers a number of distinct situations, each of which has the potential to generate different conflicts.

First, on a purely terminological level, it seems more appropriate to examine B2B or electronic business (ebusiness), which has a much broader scope than electronic commerce (ecommerce). Tim Richardson defines ebusiness as follows:

Electronic business transactions involving money are “eCommerce” activities. However, there is much more to eBusiness than selling products: what about marketing, procurement, and customer education? Even to sell on-line successfully, much more is required than merely having a website that accepts credit cards. We need to have a web site that people want to visit, accurate catalogue information and good logistics. The term “eBusiness” was introduced as a deliberate attempt to say to people: “Your first understanding of eCommerce was too narrow. To be successful, we need to think more broadly.”

Thus, we will begin with a brief discussion of electronic data interchange (EDI), followed by a few comments on electronic procurement (eprocurement). We will complete this section with a study of virtual marketplaces.

First, note that EDI technology, which some authors call a precursor of ebusiness, is not really a form of ebusiness because it does not depend on the Internet. EDI “permits the direct transfer of specific data between computers in the form of structured messages complying with a predefined set of syntactic rules.” The transfers instead employ a value added

network (VAN). EDI’s effectiveness depends on the use of predetermined messages and protocols\textsuperscript{108}.

A VAN ensures the security of EDI transactions because it is private\textsuperscript{109} and direct. This is why some companies still refuse to use the Internet for EDI transactions\textsuperscript{110}. The Internet cannot provide the same level of security as a VAN to which only the partners have access.

Eprocurement enables users who are registered with a company to look for buyers or sellers of goods and services using Internet tools, such as an extranet or virtual marketplaces\textsuperscript{111}. What distinguishes an eprocurement site from virtual marketplaces, which we will look at below, is that the former is controlled by one or more purchasers and not by a “neutral” third party. Unlike virtual marketplaces, eprocurement sites also involve a limited number of sellers and/or buyers. Thus, they are considered private systems.

Virtual marketplaces are one of the most prominent forms of ebusiness\textsuperscript{112}. Generally, they consist of a portal devoted to a specific sector of activity that links buyers and suppliers electronically to facilitate commercial exchanges between them. It is a three-way relation between buyers, sellers and a “neutral” third party operating the market place. The infrastructure is referred to as the “butterfly model”\textsuperscript{113}, as the following diagram illustrates:

\begin{itemize}
\item \textsuperscript{108} Office québécois de la langue française, *Le grand dictionnaire terminologique*, \url{http://www.granddictionnaire.com/} (last visited on February 1, 2005). In North America, the protocol is ANSI X12, and in Europe EDIFACT/ONU.
\item \textsuperscript{109} It is usually managed by a third party. See: V. Lapierre, *Op.cit.*, Note 108, p. 89.
\item \textsuperscript{110} Web EDI makes it possible for “partners equipped with only a microcomputer and a modem or Numeris card to carry out electronic exchanges using the EDI platforms of the other partners. Electronic input forms accessible from a simple Web navigator thus allow small partners to enter information manually into the information system of the community leader (administrator or business)” [our translation]. PricewaterhouseCoopers, “Le commerce électronique interentreprises - Son impact dans le secteur automobile”, report written for the Direction Générale de l'Industrie, des Technologies de l'Information et des Postes (DIGITIP), 2001, available at: \url{http://www.telecom.gouv.fr/documents/autom/mobile.pdf} (last visited on February 1, 2005).
\item \textsuperscript{111} *Id.*
\item \textsuperscript{112} These are often referred to by other names, such as cybermarkets, electronic marketplaces, online marketplaces, etc.
\item \textsuperscript{113} Commission of the European Communities, “Commission staff working paper on B2B Internet trading platforms: Opportunities and barriers for SME’s – a first
The model enables businesses to make major savings by significantly reducing the cost of production and supply.

Virtual marketplaces can be vertical or horizontal. A marketplace is called vertical when it serves a specific sector of the economy. For example, the Covisint market\(^\text{114}\) is vertical; it is a joint initiative of the American automobile giants Ford, Daimler Chrysler and General Motors that has been joined by a number of other car makers, such as the French companies, Renault S.A. and Peugeot, and the Japanese company Nissan. At present, over 11 500 client companies use the portal.

In contrast, horizontal marketplaces involve a number of sectors. An example of this is the Oracle Exchange initiative\(^\text{115}\), which offers catalogues of office supplies, computer equipment, industrial supplies, etc.

Virtual marketplaces can also be divided into four other categories. First, there are marketplaces where goods and services are exchanged rather than bought and sold; these are essentially cases of electronic barter\(^\text{116}\).

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\(^{115}\) Oracle Exchange Marketplace, [http://www.oracle.com](http://www.oracle.com) (last visited on February 1, 2005).

\(^{116}\) An example is Barter It Online, [www.barteritonline.com](http://www.barteritonline.com) (last visited on February 1, 2005).
Second, there are marketplaces that reproduce the dynamics of the stock market in that the price of goods and services fluctuates according to bids by buyers and sellers.\footnote{An example is Broker Forum, \url{www.brokerforum.com} (last visited February 1, 2005).}

Third, there are auction sites, the largest of which is certainly eBay. On a site operated by a third party, a seller posts an item for sale under certain conditions (price, deadline, etc.). Interested buyers have only to bid on it.\footnote{eBay, \url{http://www.ebay.com} (last visited February 1, 2005).}

Finally, fourth, there are catalogue sites, which offer a wide range of products from a number of suppliers and sophisticated search engines for consulting the catalogue.\footnote{For a list of sites offering this kind of service, see Source Guides, \url{http://www.sourceguides.com} (last visited February 1, 2005).}

During the 1999-2001 ebusiness boom, the number of virtual marketplaces grew rapidly. In 1999-2000, the number of marketplaces shot up from 332 to over 1,000 worldwide.\footnote{Commission of the European Communities, supra note 113, p. 10.} During the same period, the number of European marketplaces quadrupled, going from 54 in 1999 to 230 in 2000.\footnote{Id.}

Currently, a conservative estimate is that there are nearly 1,000 virtual marketplaces in Europe and North America. Geographically, they are distributed as follows:\footnote{As the authors of the study Note, “These numbers have to be treated with some caution, though. The number of active e-marketplaces is difficult to assess, mainly for three reasons: First of all, many e-marketplaces changed their business model in 2001 and became software companies, portals or service providers for private e-marketplaces. They might keep their e-marketplace as a showcase, although it is no longer their core source of revenue. Secondly, due to the still ongoing economic slowdown many dot.coms ceased to exist and many traditional players closed down loss-making subsidiaries. This process is not yet finished and cannot always be identified accurately, as web sites might remain alive even months after they effectively ceased to be operational. Both effects lead to an exaggeration of the number of active e-marketplaces. On the other hand, e-marketplaces are industry-specific and are typically only announced within the industry, especially if they are smaller. This leads to the effect that e-marketplace directories typically do not have information about all e-marketplaces existing. Overall, the first two effects probably}
While the notion of B2B electronic commerce is broad and covers a number of different models, lack of trust is clearly obstacle in all sectors\textsuperscript{126}. It is widely acknowledged that the establishment of ODR mechanisms can help to create the atmosphere of trust required for the development of electronic trade. In Europe, a recent Commission working document explains this as follows:

\textit{Alternative Dispute Resolution Systems, preferably on-line, can help to promote trust by ensuring quick and effective resolution of disputes. Although free choice of jurisdiction for cross border disputes is legally permitted for B2B on-line transactions, court litigation is often costly and time consuming. Alternatives to court litigation, such as arbitration and mediation schemes, are well established in the area of B2B disputes. Their main advantage is that, in general, they are faster, more flexible and less costly than court proceedings. Therefore the voluntary acceptance by business to submit disputes to arbitration or mediation mechanisms has the dominate currently, so that the number of active B2B e-marketplaces has to be put somewhat lower and will decrease further – at least for a while.” Id., p. 11.}

\textsuperscript{123} Id., Appendix 1.
\textsuperscript{125} These are the figures at August 19, 2002. Source: \url{www.emarketservices.com} (last visited on February 1, 2005 ; report no longer available online).
\textsuperscript{126} “The Eurostat e-commerce survey confirms that the lack of trust is one of the most important barriers to the take up of e-commerce. In particular, enterprises cited that the most important barriers for e-purchasing are uncertainties about contracts, delivery and guarantees (23 %) and uncertainties about payments (21 %). For on-line selling, the perceived lack of trust on the side of the customer ranks as second most important barrier, as regards payments (20 %) and contract terms of delivery and guarantees (17 %)”, Commission of the European Communities, \textit{Supra}, Note 113, p. 20.
potential to remove uncertainties and to enhance business trust in electronic transactions.\textsuperscript{127}

Moreover, as Schiffer notes, ADR also helps to maintain business relations. While he uses an example involving EDI, this feature applies to all areas of electronic commerce.

\textit{In a competitive environment the continuation of the supplier-customer relationship and the maintenance of good will is vital. This is true whether the relationship is built upon the supply of goods or services. An EDI supplier of goods will wish to continue his relationship with the customer because he will want to be able to successfully offer to the customer new EDI products as they are developed. An EDI customer will want an EDI supplier to whom he can comfortably turn when looking to buy new products. A similar situation applies to the provision of EDI-related services. Very few EDI users will be able to do without an ongoing service relationship and to hold this relationship the parties must be able to resolve their difficulties in a prompt and mutually satisfactory manner. Through ADR this can be achieved.}\textsuperscript{128}

B2B electronic commerce has a number of facets, but there is one constant: the growing number of transactions is likely to also lead to an increase in disputes. Therefore, electronic solutions for resolving disputes should be developed to meet the specific needs of each type of electronic marketplace. In other words, ODR mechanisms have to be tailored to the characteristics of the marketplace in question so that the proposed means of dispute resolution match the commercial practices. This will increase the effectiveness of the ODR mechanisms deployed in each market.

Electronic commerce between businesses and consumers (B2C)

With the emergence of virtual marketplaces, the dynamics of transactions between consumers and sellers has undergone a dramatic change. For the consumer, electronic commerce makes it possible to deal with any seller on the planet no matter what the time of day or location. While the advantages of this new way of doing business are clear, the change also gives rise to problems for the consumer. Online, consumers no longer meet the persons with whom they are dealing and cannot assess the quality of products before buying them. At best, they have to make decisions based on summary

\textsuperscript{127} \textit{Id.}, p. 21.

\textsuperscript{128} R. Schiffer, \textit{supra}, note 46, p. 179.
descriptions and pictures. The reduced ability to compare naturally translates into a loss of confidence. Furthermore, with respect to competent jurisdiction issues in transborder transactions, the distance separating the parties and differences in language and culture quickly make it clear that consumer recourse to national courts is not a viable, or even desirable, solution.

Yet in cyberspace, as in the physical world, consumers cannot avoid disputes. According to a study conducted in 2001 by Consumers International, an association of 263 consumer protection organizations operating in 119 countries, buying in cyberspace remains perilous for consumers. The researchers noted that “all too often things can go wrong when consumers shop on the net. This is of particular concern when consumers lose out financially (for example, paying for goods that never arrive, or not receiving a refund for returned goods)”129. In order to reduce risk, the study “urges governments and business to establish proper alternative dispute resolution in accordance with the policy recommendations in Disputes in Cyberspace”130. Thus, establishing effective means for resolving disputes between consumers and cybersellers is one of the keys to success for B2C electronic commerce131. Indeed, there is a consensus among a number of governments, international agencies, non-profit organizations and economic stakeholders concerning the need to establish ODR mechanisms to increase the level of consumer confidence in cyberspace transactions. As Consumers International puts it:

_The lack of effective consumer redress when the parties are in different countries is a major barrier to consumer confidence in dealing with all but the most well-known and trusted brands. All parties (businesses, consumers, and governments) recognize that, in order to facilitate the continued growth of electronic commerce, consumer confidence and trust in it must be improved, and that in order to improve consumer confidence,_

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130 Id.

the problem of consumer redress in the event of crossborder disputes must be resolved.\textsuperscript{132}

We will come back to this consensus in greater detail when we discuss the guidelines developed by stakeholders to ensure effective deployment of ADR for disputes occurring online. For now, we will simply note that all of the main stakeholders acknowledge that establishing ODR is primordial to ensuring that consumers can enter into contracts in cyberspace with complete peace of mind. As Orna Rabinovich-Einy notes: “Offering links to reputable external ODR services will, in time, become an industry standard among major commercial websites as a means of assuring customer satisfaction and confidence”\textsuperscript{133}.

B. Forms of alternative dispute resolution (ADR)

Courts of justice everywhere in the world are facing growing problems when trying to meet the needs of the market. ADR solutions to these problems, whether they are initiated privately or publicly, have a common goal: to solve disputes simply, quickly, efficiently and at a cost proportional to the stakes. Note also that using online or traditional ADR provides the parties to a conflict with greater guarantees of confidentiality. As we have seen, more and more stakeholders avoid referring disputes to the courts and favour the use of ADR.

In the new economy, where more and more transactions are completed in cyberspace, ADR seems natural. The rapidity with which transactions are performed (one of the many advantages of electronic commerce) also requires that disputes should be resolved with the same speed. We cannot assume that those operating in cyberspace will have the patience to wait for what can sometimes add up to several years to resolve disputes by traditional means.

\textsuperscript{132} Consumers International, Office for Developed and Transition Economies, “Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes”, p. 6, available at: \url{http://www.consumersinternational.org/document_store/Doc517.pdf} (last visited on February 1, 2005). A number of guidelines have been developed to ensure the effectiveness and accessibility of such mechanisms. We will come back to this in the section on deploying alternative dispute resolution methods in cyberspace.

In this part, we will examine the three main forms of ADR: (1) negotiation, (2) mediation and (3) arbitration. Then we will see that (4) automating the procedures makes it easier to combine all three forms of ADR.

(1) Negotiation

In its simplest form, negotiation involves an exchange of views and proposals when a dispute opposes parties who wish to settle out of court. Unlike mediation or arbitration, negotiation does not involve the intervention of a third party. Finding a mutually acceptable solution to the dispute lies entirely in the hands of the parties. The negotiation process is confidential and completely voluntary; generally, the parties can withdraw at any point.

There are a number of reasons why negotiation is becoming more important in the age of electronic commerce. First, negotiation between parties is facilitated by the rapid means of communication that are now available. If the parties do not have to travel to hold a “last chance meeting” to try to come to an agreement, it is much more likely that the meeting will take place. Second, the phenomenon that is generally known as the “trust deficit” with respect to legal problems in transborder trade increases the parties’ interest in finding solutions that avoid recourse to law and legal processes. Third, the technological tools now available to the parties to a dispute open the way to a new range of “assisted” negotiation tools without having to seek the intervention of a third party. Finally, integrated ODR programs now make it possible to add a negotiation stage, which used to be completely informal, before the mediation or arbitration process begins. We will briefly examine assisted negotiation tools, which could breathe new life into negotiation as a way of resolving disputes.

Formerly confined to an exchange of correspondence or one or more meetings between the parties, it is now easier for direct negotiation to include tools that facilitate the identification of basis for agreement. The most common example is that of blind bidding tools, which are numerous in the United States. They enable the parties to engage in a series of simultaneous “blind” bids after first agreeing on a zone of agreement that both find satisfactory. The software tool in question records the parameters of the settlement desired by the parties (if the difference between the two simultaneous bids is US$1 000 or less, for example, the settlement is the median of the two bids), and then records the successive bids until the preset parameters are reached. Finally, it generates the text of an agreement to
which the parties agreed ahead of time. Obviously, the tool is useful only for resolving disputes over an amount where the claim is not contested in any other way, for example, it is used widely in insurance disputes\textsuperscript{134}. Blind bidding is a good illustration of the potential that technological tools have to add a “third party” aspect to negotiation (in this case, an intelligent inbox for bids by each party) to facilitate the meeting of minds. Another example is that of the dynamic table of bids and counterbids offered by the ECODIR system. ECODIR’s negotiation software sorts the parties’ legally relevant correspondence so that bids and counterbids can lead to an agreement as quickly as possible. Here again, the software environment plays a structuring role to promote the meeting of minds. There is reason to believe that these applications will only keep getting better, thereby increasing the prominence of assisted negotiation as a key means of resolving disputes.

\textbf{(2) Mediation}

Mediation can be defined as a process by which two people agree to submit their dispute to a neutral third party, the mediator, who uses various methods and techniques to try to guide the parties toward an out-of-court settlement. Managing the mediation process can also be collegial, in other words, performed by a number of individuals.

While it is impossible to force a recalcitrant co-contractor to put real effort into mediation, it is widely accepted that including an optional mediation clause in a contract is still useful. Given the power relations often involved in negotiations to resolve a dispute, a mediation clause allows one party to suggest mediation without having the suggestion interpreted as an admission that the legal arguments for its position are weak. The mediation clause can also have a restrictive effect when it is a prior condition that must be met in order to have recourse to a court of law or arbitration. The classical example of such a mediation clause is one that bases the restriction on a prior condition that is especially easy for a court to establish: compliance with a deadline. This type of contractual mechanism makes the dispute inadmissible to the courts or arbitration before the expiry of a cooling off period during which contractual provisions commit the parties to using mediation. This type of mechanism is widespread in instruments providing for private dispute resolution among states and investors, such as those of the International Centre for Settlement of Investment Disputes (ICSID), and

\textsuperscript{134} See for example Cybersettle, \url{http://www.cybersettle.com/} (last visited on February 1, 2005). These tools are explored in greater detail in Part II.
in legal instruments required by the World Bank in some of the infrastructure contracts that it finances. It can also be seen in a growing number of commercial contracts. As noted above, mediation can also be part of a multi-step process beginning with negotiation and flowing through mediation to arbitration, as required.

However, mediation’s major advantage over more formal mechanisms is undoubtedly that it offers the parties the possibility of exploring solutions that a purely judicial approach would prohibit. Unlike a judge’s or arbitrator’s analysis, which focuses on the past and is confined to the parties’ rights, the mediator looks at a much broader set of factors, and takes into account the interests at stake at the time of the dispute and the solution’s impact on the future. For example, a judge has to grant reimbursement of the price paid for a defective product if the plaintiff has a right to it. A mediator, who takes the parties’ rights into account but is not confined to examining rights alone, is free to explore a more advantageous alternative solution for the parties, for example, replacement of the defective product by one of greater value to the plaintiff but less costly to the respondent than reimbursement.

It is important to note that the mediator does not have the power to impose or render a decision. After comparing the parties’ points of view, identifying with them their points of agreement and disagreement, and taking into account the interests of each side, the mediator can suggest a solution but not impose it. In general, a mediator orients and structures the discussions and tries to optimize communication so as to enable the parties to come to a satisfactory solution on their own. In most cases, the mediator is free to hear the parties together or separately. Separate, i.e., caucus, meetings usually increase the chances that mediation will be successful because the parties then convey information that they would not dare to reveal to the other party, thereby enabling the mediator to find possible middle ground that the

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135 The model contracts that are required are often those of the International Federation of Consulting Engineers (FIDIC), which provide for recourse to arbitration after a certain period designed to promote negotiation or mediation. These model contracts also prescribe recourse to a dispute review board, but we do not have the space to discuss this here.

136 A good illustration of the various clauses that are possible in this context is the range suggested by the International Chamber of Commerce, which recently adopted a new ADR procedure. See: http://www.iccwbo.org/index_adr.asp (last visited on February 1, 2005).
parties might not have suspected was there if left to their own devices. Caucus meetings are very sensitive undertakings and require some reserve on the part of the mediator because the basis for agreement has to be woven out of confidential information. However, in cases where the dispute resolution system allows the mediator to become an arbitrator if mediation fails, it is very inadvisable for the mediator (who may also be called a conciliator) to meet with the parties separately. Under the law of many countries, such a process would contravene the principles of fair hearing, and could nullify any arbitration award on the grounds that it violates public order. The principle of fair hearing is entrenched worldwide, and prevents an individual invested with judicial functions from hearing one party without allowing the other party to respond to the representations. The perspective of compulsory execution therefore brings us to the question of the legal nature of the agreement that is generally the goal of mediation.

Once the process is completed, the mediator generally has to write a report on the success or failure of the mediation. In case of failure, the parties are basically back where they started, though they are better informed about each other’s positions. In case of success, the transactional agreement is universally acknowledged, at least as a contract binding the parties and opening the way to ordinary recourse in case of violation. However, the contract has a special status in some civil law countries, where it is considered a transaction, i.e., a special contract the purpose of which is to resolve a dispute. The special status is translated by a virtually automatic recognition that transforms the transaction into a judgment for all intents and purposes. Yet, transactional agreements are far from having this status everywhere, and despite recent efforts by the United Nations Commission on International Trade Law (UNCITRAL), there is still no universal regime for compulsory execution of international transactional agreements.

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137 The award is subject to judicial review of the arbitration procedure if cancellation proceedings are instituted under national law or in a country where compulsory execution is sought under the enforcement procedure set out, generally, in compliance with the criteria in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
UNCITRAL’s Model Law on International Commercial Conciliation\textsuperscript{138} suggested four solutions designed to make agreements between parties compulsory and executory.

The first solution simply set out the principle of the executory nature of the agreement, and left it up to the legislators of each jurisdiction incorporating the law to define the conditions of execution. The second solution was the least effective because it in no way distinguished the transactional agreement from the contract at the origin of the dispute resolved by the agreement, and applied the principles of the general regime for contract execution to the transactional agreement. The second solution did not authorize compulsory execution unless the person seeking execution has represented his or her rights before a judge, which is the very process that mediation was supposed to avoid. The third possibility advanced within the framework of the efforts that led to the model law was to submit the agreement, in cases that lend themselves to such an approach, to an arbitral tribunal required to render an arbitration award that was described as containing “agreed terms”. This solution is based on Article 30 of the 1985 UNCITRAL Model Law on International Commercial Arbitration\textsuperscript{139}, which provides that:

\begin{enumerate}
\item If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
\item An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.
\end{enumerate}

The fourth and last solution suggested in the model law was to consider the agreement itself as an arbitral award for the purpose of recognizing its enforceability\textsuperscript{140}, which is close to the civil law regime for transactions, but goes further by trying to give the transactional agreement the benefit of the well-established international regime of arbitral awards. This would have

\textsuperscript{138} The draft guide for incorporating the law into national legislation is available at: \url{http://www.uncitral.org/english/texts/arbitration/ml-conc-e.pdf} (last visited on February 1, 2005).
\textsuperscript{140} See articles 30, 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration.
made it possible to simplify and accelerate the execution of such agreements and impose mediation as a key means of resolving international disputes. However, the final wording of the model law is unfortunately much weaker with respect to execution. The draft provisions concerning enforcement are so reduced in the final text that they are mere shadows of the broad ambitions that initially inspired the work that went into having the model law adopted. Article 14, which is the only one that concerns enforcement in the final version adopted in June 2002, reads as follows:

Article 14. Enforceability of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable… [the enacting state may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

When it applies the procedure for enforcing settlement agreements, the enacting state can consider the possibility of a compulsory procedure.

The discussion that led to this formulation shows a flagrant lack of consensus on the notion of an enforceable act. The model law does little more than perpetuate a degree of confusion and maintain national solutions to a problem that is in grave need of international remedies. It remains to be seen how many countries will adopt a system for recognizing settlement agreements. In the meantime, the dispute resolution mechanism that is most easily enforced at the international level undoubtedly remains arbitration in law as set out in the New York Convention.

(3) Arbitration

Arbitration is a process in which a dispute is submitted to an independent, private tribunal that renders a decision after having allowed the parties to make the necessary representations and present relevant pieces of evidence to support their points of view. As in the case of mediation, arbitration is sometimes very advantageous for parties that are in conflict but nonetheless wish to pursue their contractual relationship and maintain the confidentiality of the proceedings. It should be noted that arbitration is generally more flexible and much less formal than court proceedings, but results in a decision that is as binding as a judgment and for which enforcement is greatly facilitated internationally.

Parties can provide for recourse to arbitration right when they sign the contract that unites them. This is done through an arbitration clause such that
all disputes arising out of their contractual relationship are subject to arbitration in accordance with the conditions set out in the clause or in legislation. Of course, it is also possible to provide for recourse to arbitration after the contract is signed using an adjunct, in other words, an additional legal instrument modifying the initial contract. Finally, the parties can also initiate the arbitration process after a dispute has arisen by signing an arbitral compromise, but this rarely occurs because it is generally difficult to come to an agreement after a dispute has occurred, even when what is at issue is how to resolve the dispute. In each of these cases, it will no longer be possible to bring the dispute before the courts, except if there is a criminal offence involved, for example. An arbitration agreement involves renouncing the right to regular recourse before the courts.

The renunciation is binding if the arbitration in question is ad hoc or institutional. In ad hoc arbitration, the procedure is in principle expedited directly by the arbitrator or arbitrators outside of any institutional framework. The primary disadvantage of ad hoc arbitration is that if a disagreement or obstacle arises with respect to the establishment of the arbitral tribunal, the parties have no recourse aside from the courts of the country where the tribunal is located (if the country can be clearly identified). In such cases, the national court acts as a judge supporting the arbitral procedure and intervenes upon request in accordance with the modalities and time frames set out in the rules regulating that procedure. In the case of an international transaction, recourse to a court most often contradicts the parties’ desire to avoid “national” procedures and actors in order to maintain neutrality, confidentiality and efficiency. The best way to avoid intervention by the courts as much as possible is to employ institutional arbitration, which provides a framework that can establish an arbitral tribunal and activate the process despite any disagreements or problems that arise. Thus, the institution can appoint arbitrators, make decisions on disqualification, see to the smooth operation of the procedure and the meeting of deadlines, set arbitrator compensation (which is a very tricky undertaking when the parties deal directly with the arbitrator without going through an institution) and set parameters for the award, as required and in accordance with pre-established conditions. Online arbitration is most often institutional, but could also take ad hoc forms in cases where the arbitral tribunal uses an Application Service Provider (ASP) document management system but controls the procedure itself.
The arbitrator, who is invested with authority through the parties’ consent, hears the parties’ claims in compliance with established rules of procedure\(^{141}\) and, after deliberation, renders a decision, known as an arbitration award, that is binding on the parties and can be enforced in all countries that have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)\(^{142}\). The Convention provides the backdrop for all normative initiatives in arbitration, and requires the courts of the some 125 signatory states to acknowledge written arbitration agreements, declare themselves incompetent to hear disputes that are subject to arbitration clauses, and enforce awards in accordance with criteria set out in its provisions. The advantages of arbitration for international transactions are largely due to this multilateral treaty, which has no equal with respect to ensuring the exclusive jurisdiction of national tribunals and obtaining enforcement abroad of resulting judicial decisions. As the primary means of managing international trade disputes and as a model for private justice, international commercial arbitration also owes its success to accelerated modernization and harmonization of national legislation on arbitration, which are fruit of the success of the UNCITRAL Model Law on International Commercial Arbitration (1985)\(^{143}\).

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\(^{141}\) In the case of institutional arbitration, the rules of procedure are generally set out in the institution’s arbitration rules, which become applicable when the provisions of the contract between the parties refer to the institution in question. For example, the model clause of the leading international arbitration organization, the International Court of Arbitration of the International Chamber of Commerce, is as follows: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules”. See: http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt (last visited on February 1, 2005).


\(^{143}\) Legislative texts inspired by the UNCITRAL Model Law on International Commercial Arbitration have been adopted in the following countries and territories: Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Greece, Guatemala, the Hong Kong Special Administrative Region, Hungary, India, the Islamic Republic of Iran, Ireland, Kenya, Lithuania, the Macao Special Administrative Region, Madagascar, Malta, Mexico, Nigeria, New Zealand, Oman, Peru, the Russian Federation, Singapore, Sri Lanka, Tunisia, the Ukraine, the United Kingdom of Great Britain and Northern Ireland (Scotland), the United States of America (California, Connecticut, Oregon and Texas) and Zimbabwe. Note that the
The New York Convention commits the states in question to recognizing and enforcing foreign arbitral awards in accordance with a regime that essentially restricts their legal authority to the protection of public order, in other words, protection of the core values that would justify state intervention in the most liberalized system. This is precisely the model that we believe could be established for transborder administration of justice in areas that cannot be classified as purely commercial. It is a model of justice that takes into account the need for countries to withdraw in order to achieve greater efficiency and tailor the process more to the circumstances and needs of trade while providing some control over collective principles and values that, initially, do not seem to lend themselves to regulation by private initiative and market forces alone.

Further development of the international commercial arbitration model of transborder private justice seems probable over the long term, but remains today a prospect for the future. In this book, we will restrict our discussion of the legal aspects of ADR to showing how arbitration for consumer disputes is limited by national public order legislation that remains to be harmonized at the international level.

(4) Combination of procedures

As we have already seen, negotiation, mediation and arbitration mechanisms can be combined. It is easy to design a system that begins by providing the parties with an online negotiation tool so that they can resolve their dispute without the intervention of a third party. If that does not prove successful, the parties can then get a third party to help them resolve the dispute; this is the mediation stage. If that too fails, the parties can submit the dispute to an arbitrator with the power to adjudicate the dispute and render a binding award.

The following diagram illustrates the parties’ degree of control over resolution of the dispute, depending on which method is used:

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UNCITRAL’s work is a very special source of normative creation that will not be discussed here.
The further they move away from negotiation, the less the parties control the dispute resolution process. In the negotiation stage, the parties have complete control over resolution of the dispute. In the mediation stage, a third party is introduced into the process, and even though the mediator does not have the power to impose a solution, his or her suggestions can become compulsory if the parties agree to them. Finally, in the arbitration stage, a third party imposes a solution that can be binding on the parties.

Illustration of an online dispute resolution process combining negotiation, mediation and arbitration

S-1 - The parties describe the dispute and exchange offers using an automated negotiation tool.

S-2 - If the negotiation process fails, a mediator is appointed to the case to help the parties to find a solution. The parties can withdraw at any time.

S-3 - If the mediation process fails, an arbitrator is appointed to the case. The procedure and award are binding on the parties.
This type of stage-based process is at the foundation of the ECODIR (Electronic COnsumer DIspute Resolution) system to which we will return in greater detail. Its flexibility is very useful in international disputes involving consumers because it makes it possible to use the full range of out-of-court dispute resolution methods while taking advantage of arbitration where permitted. Where arbitration of consumer disputes is prohibited or subject to strict conditions, the arbitrator’s award can be treated simply as a final recommendation that is not binding on the parties, or binding only on the seller. Thus, nothing stands in the way of deploying such a process internationally, even if the result could have a different legal status depending on where the consumer lives. The issue of status naturally brings us to the legal issues raised by transborder electronic commerce and possible solutions.

C. Legal issues

Clearly, the legal framework for relationships established over the Internet raises major problems that are exacerbated by distance and uncertainty, and continue to present obstacles to the development of transborder electronic commerce. Initially, it might seem that the difficulties could largely be solved through the establishment of dispute resolution mechanisms tailored to transborder electronic transactions. In this context, using information technologies seems perfectly natural. Since by hypothesis such disputes have their source in transactions conducted in electronic environments, it seems logical to use the same environments to resolve the conflicts and ensure that the parties’ legal and economic interests are protected. As has already been proven by current practices, recourse to ADR appears to be a particularly promising avenue when deployed online. This is a major development in mediation and arbitration, but it would be wrong to overlook the fact that such mechanisms have been set up in a veritable legal minefield requiring a high degree of caution. The legal issues in question involve competent forum, applicable law and, in corollary, the ability to choose.

(1) Competent forum and applicable law

Among current topics in the small world of cyberspace law, competent forum and applicable law are certainly the most controversial. This is understandable because these two issues form the premises of any legal analysis of the phenomenon we are studying here. Thus, when copyright is infringed or there is a failure to meet contractual obligations in cyberspace, the first step in a sound legal process is to ask where valid recourse can be
sought, and the second is to identify the applicable law if a foreign element is involved, which is generally the case in cyberspace.\footnote{144}{Private international law is a set of rules governing cases where there is a foreign element. See Gérald Goldstein and Ethel Groffier, \textit{Droit international privé} (Volume I), Cowansville, Editions Yvon Blais: 1998, p. 4.}

Of course, private international law is the first option in this kind of situation. There are competent forum and applicable law provisions in the statutes of all states.\footnote{145}{“Traditionnellement en droit international privé, on distingue les questions de droit applicable et celles concernant la compétence des tribunaux. Il arrive, bien entendu, que le critère de rattachement utilisé pour la règle de conflit de lois et pour la règle de compétence juridictionnelle soit le même. Toutefois, il n’en va pas toujours ainsi et les raisons qui militent pour la distinction des deux séries de règles demeurent encore pertinentes aujourd’hui” [Our translation: “Traditionally in private international law, a distinction is made between applicable law and court jurisdiction issues. Of course, sometimes the same criteria of appurtenance are used as the rule to decide between conflicting laws and to decide which court has jurisdiction. However, this is not always the case and the reasons in favour of distinguishing between two series of rules still remain relevant today.”]: Catherine Kessedjian, “Aspects juridiques du e-trading: règlement des différend et droit applicable”, in Luc Thevenoz and Christian Bouet, Eds., \textit{Journée 2000 de droit bancaire et financier}, Bern, Editions Staempfli: 2001, p. 68.}

Yet there is no doubt that one of the purposes of private international law, as deployed in national legislation, is to apply to information transactions involving consumers. There are therefore local rules that can provide answers to these questions, and quite a number of international agreements also provide partial solutions. Private international law is a sophisticated construct with theoretical foundations that seem rather complex for resolving disputes resulting from electronic transactions involving consumers. Yet there is no doubt that one of the purposes of private international law, as deployed in national legislation, is to apply to information transactions involving a foreign element. The time is now past when it was possible to claim that cyberspace is a special place where national laws do not apply.\footnote{146}{See in particular David R. Johnson and David G. Post, “Law and Borders — The Rise of Law in Cyberspace”, (1996) 48 \textit{Stanford L.R.} 1367.}

However, the assertion that classical legal solutions do indeed apply does not attenuate the much-repeated difficulties related to delocalization and fluidity, in other words, to the fact that information on the Internet cannot be seized. In addition, public order considerations must be incorporated into the analysis because consumers are involved in what has become a worldwide market.

The best way of describing the problem that the impossibility of seizing information on the Internet poses with respect to identifying competent
forum and applicable law is perhaps to suggest solutions. First, consider a signal broadcast into cyberspace and beyond by a seller website. In the typical case of a transborder retail trade relation, the seller is located in the signal’s “forum state” and the buyer in the “target state”, in other words, the state where the website’s signal is received. Ever since electronic commerce began, national laws have wavered and oscillated between two diametrically opposed solutions to the problem of competent jurisdiction and applicable law. We will call these solutions the “forum state system” and the “target state system”. The forum state system assigns competency to the forum state’s courts and applies the forum state’s legislation in all disputes arising out of Internet transactions. The target state system assigns competency to the target state’s courts and applies the target state’s law in all such disputes. It should be noted that the two archetypes are used for descriptive purposes here and do not portray the real law of any nation. However, the archetypes do provide a relatively good picture of the polarization of international discussions that in Europe have resulted in the adoption of the Brussels Regulation, which we will look at later, and the Hague Conference on Private International Law’s attempts to harmonize regimes through the Judgment Convention, which we will come back to briefly. The point of the Judgment Convention is to maximize consistency among the various solutions offered by the private international law of the jurisdictions in question. No multilateral instrument currently provides a truly international solution.

As described in a recent text for the Permanent Bureau of the Hague Conference, the forum state system is generally supported by the business community, which places the emphasis on the “risk of having to protect against proceedings in a wide range of jurisdictions without being able to restrict the field of such claims to a given jurisdiction because an Internet site is published worldwide and it is virtually impossible to identify the consumer’s location with certainty”\textsuperscript{147}. In contrast, the target state system is preferred by consumer advocates because it tends to provide “consumers with more extensive protection by allowing buyers to institute proceedings in their own countries and therefore, probably, take advantage of their own laws, which give consumers protection similar to that they would have if they made a retail purchase at a store in their neighbourhood”\textsuperscript{148}. What the text quoted here does not say is that the debate’s polarization between the

\textsuperscript{147} A. Haines, \textit{Supra}, Note 102, par. 8 [our translation].
\textsuperscript{148} Id., par. 8 [our translation].
business and consumer advocate communities reflects a more political divide between the United States and Europe.

The debate surrounding recourse for consumers wishing to exercise their rights against cybersellers located abroad has far to go before reaching a degree of maturity that would allow us to present the essential components in detail. Admittedly, great confusion reigns in this area; we will simply make a few observations on trends.

(a) In the United States

In order to understand the situation in the United States with respect to competent jurisdiction and applicable law, we first have to look at the case law and remember that the federal structure of the United States legal system raises problems at the national level that in most other countries are found only with respect to truly international transactions. The regime developed by United States courts to handle domestic interjurisdictional disputes is naturally pertinent when disputes involving other countries are in question. To our knowledge, the case law does not contain examples specifically and directly concerning disputes involving consumers and cybersellers. This is not surprising, given the small amounts of money involved in such disputes and the high cost of legal proceedings in the United States. However, there is case law concerning jurisdiction over the Internet which, until proof to the contrary, we can presume is applicable to consumer cases. Note that many of the decisions actually concern domain name disputes and illustrate the tension between forum and target state legislation.

Case law on domain name disputes has formed the basis for a test to distinguish between active and passive sites. The test was first set out in the Zippo decision, in 1997. Until then, some case law considered that accessibility of a website from a given country was sufficient to entail the competence of that country’s court. This approach was of course criticized for giving jurisdiction over all websites to courts in every country where consumers can access the sites. In short, the Web would be subject to all the

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courts on the planet Earth, which is a particularly thorny problem with respect to liability in tort. Assigning jurisdiction only on the basis of whether the website could be consulted carried the risk of impeding the development of seller websites, and it also highlighted, in a rather embarrassing manner, a degree of judicial ignorance of technological developments and consequences.

In Zippo, the District Court of Pennsylvania moved away from this approach by favouring an examination of the specific activities of the website in question. This strategy drew much attention from commentators, and was routinely followed by the courts for around two years. However, while this test was very attractive because it both broke with an approach that was completely inappropriate for electronic environments and took current technology into account, it already no longer fits the medium it was designed to domesticate. A major study on the topic, which was based almost exclusively on United States case law, explains that the approach in Zippo, while alluring, was stated in a technological environment that has since undergone much change. The distinction between active and passive sites has already been ravaged by time, or rather by technological progress. Indeed, this is especially because what is in question is actually a

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152 “With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site, which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” Zippo, supra, note 150, p. 1124.

153 “…it is important to note that the standards for what constitutes an active or passive Web site are constantly shifting. When the test was developed in 1997, an active Web site might have featured little more than an email link and some basic
spectrum of passive and active sites. Between the two extremes, there is a nebulous area: “First, most websites are neither completely passive nor completely active. Instead, they fall into an intermediary category that requires the court to weigh the evidence in order to decide whether the site is more active than passive, or vice versa”\textsuperscript{154}. The \textit{Zippo} approach is therefore no longer the consensus. Current trends increasingly favour an analysis that focuses less on the features of the site in question, and more on its effects and impact in the target jurisdiction\textsuperscript{155}.

Of course, if the new approach is adopted, it will not make things any easier for cybersellers because it does not provide the foreseeability and predictability that they so value. It has even been recommended to seller sites that they should aim only at states where they plan to offer their products and services\textsuperscript{156}. This is called “targeting”. As we will see later, it has been justly noted “that this approach is not convenient because it forces operators to choose in advance the countries where they want to do business, and therefore to not take full advantage of the web’s potential”\textsuperscript{157} and so “targeting is in direct contradiction with the very essence of the web”\textsuperscript{158}. It also appears that the technological means for targeting are not yet infallible\textsuperscript{159}. Plainly, it is difficult to predict what tomorrow holds in this respect and, in any case, we hope that in the future United States courts will take international developments into account.

\textsuperscript{154} Id., p. 34.
\textsuperscript{156} Id., p. 36. See also the American Bar Association Report, “Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet”, July 2000, source: http://www.abanet.org (last visited on February 1, 2005; report no longer available online).
\textsuperscript{157} C. Kessedjian, \textit{Supra}, Note 145, p. 71 [our translation].
\textsuperscript{158} Id., p. 6. [our translation].
\textsuperscript{159} The technology is the subject of an in-depth expert analysis in Yahoo François Wallon, Vinton Cerf and Ben Laurie, UEJF and Licra \textit{v. Yahoo! Inc. and Yahoo France}, available at: http://www.cdt.org/speech/international/001120yahoofrance.pdf (last visited on February 1, 2005).
(b) In Europe

Generally, the legal situation in Europe with respect to jurisdiction has the indisputable advantage of some clarity, and gives a major role to the target country in both contract law and tort. The Council Regulation of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation)\textsuperscript{160} essentially restates the solutions set out in the Brussels Convention on the same issues. In contract law, the place of execution of the obligation that forms the basis of the claim is decisive\textsuperscript{161}. When goods are in question, the place of execution is the delivery location; when services are at issue, the place of execution is the location where they are provided\textsuperscript{162}. In delictual or quasi-delictual cases, the location where the injurious event occurred or could occur is decisive\textsuperscript{163}. With respect to applicable law, the Rome Convention on the Law Applicable to Contractual Obligations provides that the contract is governed by the law of the country with which it is most closely linked\textsuperscript{164}. For these purposes, “it shall be presumed that the contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence”\textsuperscript{165}. In the typical case of the sale of a product, the law of the forum state would apply.

However, in the end, these regulations are not very relevant because, as the legal instruments cited note, they are regulations of private international law that, while they do have the advantage of being harmonized at the international level, are applicable to contracts only in cases where the parties have not agreed on the competent court and applicable law. They supplement the parties’ will. What we are especially interested in here are situations where the parties establish contractual relations over the Internet and can therefore by hypothesis easily come to an agreement on the competent court and applicable law. For sellers conducting transborder business on the Internet, the solution to the problem of competent court and

\textsuperscript{161} Id., Article 5(1).
\textsuperscript{162} Id.
\textsuperscript{163} Id., Article 5(3).
\textsuperscript{165} Id., Article 4(2).
applicable law is therefore fairly clear. It consists in paying special attention to these problems when the contract is being written and including choice of forum and choice of applicable law clauses. In cases where the parties want to completely avoid recourse to courts of law, the choice of forum clause can be replaced by an arbitration clause, which has the effect of renouncing the right to recourse to the courts and a commitment to instead submit all disputes to arbitration. An arbitration clause is much more effective than a choice of forum clause because when the forum chosen is outside the European Union, courts often set it aside, sometimes unpredictably.

Things become singularly complicated when one of the parties to a contract entered into over the Internet is a consumer. The rules of private international law that guide the search for a competent court and applicable law are then no longer supplementary but imperative. Given globalization of trade, the European position, which has a major impact on the form taken by consumer regulations and practices worldwide, is to not provide for any significant accommodation for consumer rights as they have been largely harmonized throughout the Union. However, as we will see, the Europeans also encourage the development and implementation of extra-judicial methods for resolving disputes in order to encourage the development of electronic commerce.

The primary difficulty with implementing new recourse for consumers therefore comes essentially from the omnipresence of public order considerations and imperative regulations that states consider components of core values, the protection of which will always justify intervention. In transborder consumption in dematerialized environments, the question of competent forum and applicable law thus amounts to the abilities to choose the forum and law, and to use arbitration, both of which are strictly governed under European law.

**2. Ability to choose the forum and law, and to use arbitration in consumer cases**

In consumer affairs, which are now international, the debate surrounding limits on the ability to choose the forum and law has become polarized, as has the debate over forum and target state principles. Consumer advocates and business associations hold positions at opposite ends of the former continuum, and Europe and the United States are on opposite extremes of the latter. In short, business circles hope that sellers will be able to include clauses on the forum and law in transborder cyberconsumer contracts, arguing that any restriction on that ability will impede the development of
electronic commerce. Consumer advocates, however, argue that imposing a foreign court or law through choice of forum clauses in contracts of adhesion would be in practice equivalent to negating the rights of the consumer.

First, before there even was an Internet, the Rome Convention provided in substance that “…a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence”\textsuperscript{166}. The application of this to consumer contracts signed in a remote manner using telecommunications such as the Internet was confirmed by the 1997 Directive on the protection of consumers in respect of distance contracts\textsuperscript{167}. This seems to mean that, with respect to Internet transactions, consumers are protected by the law of their own countries, no matter where the seller is located, what representations were made to the seller, or the general conditions on the transaction.

With respect to forum, the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\textsuperscript{168} reiterates the arguments of the Brussels Convention on consumption\textsuperscript{169} by allowing consumers to choose the court of their domicile or that of the member state where the seller is domiciled, and prohibiting the latter from seizing a jurisdiction other than that of the member state where the consumer is domiciled\textsuperscript{170}. The Regulation prohibits choice of forum clauses that, prior to any dispute, derogate from the above-mentioned provision in any way, aside from permitting the consumer to seize additional jurisdictions\textsuperscript{171}. This applies particularly when the contract in question is signed with “…a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that

\textsuperscript{166} Id., Article 5.
\textsuperscript{169} Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ No L 299 of 31/12/1972 (72/454/CEE), sections 3 & 4.
\textsuperscript{171} Id., Article 17. The prohibition does not apply to clauses “…entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State”.
Member State or to several States including that Member State, and the contract falls within the scope of such activities\textsuperscript{172}.

European authorities are aware that this regime could act as an obstacle to the development of electronic commerce. Thus, the Council issued a statement asking the Commission to prepare a report in which “especially attention should be paid to the application of the provisions of the Regulation relating to consumers and small and medium-sized undertakings, in particular with respect to electronic commerce” and therefore asked the Commission to, “where appropriate, propose amendments to the Regulation before the expiry of the period referred to in Article 73 of the Regulation”. In this case, in any event, the Commission plans to “pursue current initiatives on alternative consumer dispute settlement schemes… it will take stock of the situation and review the relevant provisions of the regulation”\textsuperscript{173}.

Clearly, the European Union’s target-state position on consumer disputes came under heavy criticism from the business community\textsuperscript{174}. However, the Directive on electronic commerce\textsuperscript{175} gives precedence to the forum-state approach with respect to the regime governing services for the information society: control has to be “at the source of the activity in order to ensure an

\begin{footnotesize}
\begin{enumerate}
\item Id., Article 15. The Commission tried to remove all ambiguity as to the scope of this provision in response to a proposed amendment by the Parliament (Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Legislation in preparation, Document 500PC0689). In the reasons it gave for rejecting the Parliament’s proposal, the Commission wrote: “…the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled”, which is clearly in line with the Council’s statement according to which “…the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor that will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor”.
\item Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Legislation in preparation, Document 500PC0689.
\item A. Haines, supra, note 102, par.12.
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effective protection of public interest objectives". The Directive therefore seems essential to European balance in the debate over jurisdiction. Yet, it at least seems to leave intact the level of protection otherwise guaranteed to European consumers. According to Article 1(3), the Directive “complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services”. Clarity is sometimes the enemy of consensus!

With respect to the ability to use arbitration, there is no formal status for provisions limiting the ability to choose the jurisdiction in consumer disputes. As surprising as it might seem, the possibility of arbitration in consumer law remains to this day clouded in a fog that we have few means of dispersing.

When analysing the ability to employ arbitration in consumer disputes, we naturally turn to the Council Directive on unfair terms in consumer contracts. It provides for the nullity of unfair clauses and includes an “indicative and non-exhaustive list of the terms which may be regarded as unfair” in a standard contract. Point (q) of the list covers clauses that have the effect of “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”.

The exact scope of this nebulous provision remains highly uncertain, which at the minimum forces prudent economic stakeholders to give it an interpretation by analogy that is in line with the spirit of the clearer and more restrictive provisions that govern the ability to choose the jurisdiction in

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176 Id., Whereas no 22.
178 The law is clear in only a few countries. In Finland, arbitration of consumer disputes is prohibited by the Consumer Protection Act of 1978, Chapter 11, section 1(d). In Spain (Article 31 of Act No. 26/1984) and Portugal, arbitration of such disputes is statutory. For information on Portugal, see Isabel Mendes Cabecadas, “Le Centre d’Arbitrage des Litiges de Consommation de Lisbonne”, Revue européenne de droit de la consommation, 39 (1999) 393.
court cases\textsuperscript{180}. From a purely logical point of view, it is difficult to see why this would be otherwise in arbitral jurisdiction, unless perhaps a careful analysis weighed the practical advantages of arbitration for all the parties. In \textit{Océano}\textsuperscript{181}, the Court of Justice for the European Communities analysed the circumstances surrounding the signature of a choice of forum clause and the consequences of the clause on the equilibrium of the parties’ obligations under the Directive. What is remarkable in the decision, in which the choice of forum clause was judged invalid, is that the specific analysis of the case probably would have validated a sufficiently balanced arbitration clause\textsuperscript{182}. However, given the economic stakes, such a hypothesis does not provide stakeholders with enough reassurance to warrant gambling on arbitration to resolve consumer disputes\textsuperscript{183}.

\textsuperscript{180} “Consumer dispute resolution procedures cannot be designed to replace court procedures. Therefore use of such procedures may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.” In \textit{Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes}, O.J. No. L 115 of 17/04/1998, known as the “Bonino Recommendation” available at: \url{http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/L_115/L_11519980417en00310034.pdf} (last visited on February 1, 2005).

\textsuperscript{181} Court of Justice of the European Communities, 27/06/00, \textit{Océano Grupo Editorial v. Rocio Murciano Quintero}, consolidated cases C-240/98 to C-244/98.

\textsuperscript{182} In the same sense, it could be possible to exclude arbitration of consumer disputes from the “internal” regime using specific provisions on “international” arbitration in effect in some European countries, such as France. Before the directive was adopted, a Paris Court of Appeal decision validated an arbitration clause in a consumer contract concerning “the interests of international trade” on the basis of this argument. (Revue trimestrielle de droit commercial, (1995) 401). See in particular Eric Loquin, “L’arbitrage des litiges du droit de la consommation”, in Filali Osman (Ed.), \textit{Vers un Code Européen de la Consommation}, Brussels, Editions Bruylant, 1998, 357, p. 372.

\textsuperscript{183} As Catherine Kessedjian said, “si une clause de règlement des différends n’est pas, en elle-même, nulle et de nulle effet, dans les rapports entre professionnel et consommateur, elle est sujette à tant de restrictions qu’il est périlleux pour un professionnel d’insérer une telle clause, sauf à ce que celle-ci donne directement compétence au tribunal du domicile ou de la résidence habituelle du consommateur.” [Our translation: While a dispute resolution clause is not in itself null and void, in business to consumer relations it is subject to so many restrictions that it is perilous for a business to insert such a clause unless it gives jurisdiction directly to the court of the state where the consumer is domiciled or habitually resides.] In “Les clauses d’élection de for et d’arbitrage – en l’absence de clause ou en cas d’invalidité de celle-ci, comment se détermine la compétence des tribunaux?” Catherine Kessedjian,
At the other extreme of the above-mentioned debates, United States law has been more flexible in setting up legal conditions that could promote the development of B2C electronic commerce. In the United States, the ability to choose is greater\textsuperscript{184} and arbitration clauses that are not unfair are widespread and considered valid\textsuperscript{185}.

However, detailed analysis of United States law will not take us very far because when what is in question is a planet-wide network and mandatory law, it is generally the smallest or largest denominator that rules. In other words, a seller or business wishing to offer goods or services across the whole network is forced to comply with the mandatory provisions of the state where the consumer is protected to the greatest extent. As Kessedjian points out, it will always be possible for cybersellers to limit their offer of products and services to certain countries using technical means or by refusing to contract\textsuperscript{186}, but is this desirable?

\textit{However, these techniques directly contradict the web’s principle of ubiquity and are much more costly than a simple site that can be accessed from anywhere in the world, without differentiation. Here, the legislator is}

\textsuperscript{184} Speech given at a conference held by the International Chamber of Commerce Institute of World Business Law, October 29, 1998.
\textsuperscript{186} See, for example, the United States Supreme Court decision in \textit{Green Tree Financial Corp.-Alabama et al. v. Randolf}, (December 11, 2000). More generally, see Mark E. Budnitz, “Developments in Consumer Arbitration Case Law”, available at: \url{http://law.gsu.edu/mbudnitz/arbsumryjune01.pdf} (last visited on February 1, 2005).

The technological means mentioned here were studied in depth in the Yahoo case, F. Wallon, V. Cerf and B. Lauries, \textit{supra}, note 159. With respect to refusal to contract, all the cyberseller has to do is ask the consumer to reveal his or her place of domicile or residence, and then decide whether or not to sign the contract. Physical delivery of a product makes it possible to check the consumer’s statements, but this is impossible if the merchandise is delivered online. In the latter case, the cyberseller is at the mercy of the consumer’s statements, particularly when the service is rendered in a country where there are criminal consequences flowing from conditions that refer to “absolute” responsibility, in other words, responsibility that is independent of the guilty party’s intent.
confronted with a choice that is dictated in part by an economic policy shaped by interests that are too well known to be reviewed here.  

Since being able to choose the forum and law, and to commit to arbitration prior to the emergence of a dispute are key conditions for the development of private legal initiatives, there is very little scope for competition between standards.

European authorities are well aware of the problem and have decided to promote the use of extrajudicial mechanisms to resolve consumer disputes, as can be seen from the Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market and the Council resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes. Unfortunately, it is difficult to see how a European network will help progress to be made on an international scale. Moreover, the question of the state’s role in deploying ADR, such as with respect to binding mechanisms, remains wholly unanswered. On one hand, the idea of a public system of accreditation for consumer dispute resolution centres or mechanisms remains on the agenda despite protests from the private sector; on the other hand, there is still no satisfactory answer to the question of whether use can be made of mechanisms that are a priori binding.

On the multilateral level, the Hague Conference on Private International Law has done major work outside of the European Union. The Conference has already presented a preliminary draft of a convention on jurisdiction and foreign judgments in civil and commercial cases. In principle, the draft

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The Online Dispute Resolution

convention covers electronic commerce, even though there seem to be great differences between member countries on the issue of competent forum, as well as other disagreements over the views expressed in the document.

It indeed seems that the Conference of the Hague is embroiled in the above-mentioned debate over the principle of consumer protection, according to which consumers should be able to bring cybersellers before the court of the former’s state (often with the consequence of application of the law of the consumer’s state). As we noted above, this is a principle of public order. The United States is among the countries that are opposed to including in the Convention a provision consecrating the automatic application of the target-country principle whenever one of the parties is a consumer.

(3) A non-judicial avenue?

Given the legal problems and normative uncertainty discussed above, the only remaining avenue for speedy development of new international dispute

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192 Id., p. 5.

resolution mechanisms must exclude any contractual system that is *a priori* binding on consumers. While it is often possible to oblige consumers to avail themselves of a specific court or require them to commit to a specific mechanism (such as arbitration) after disputes arise, the question that remains is whether this possibility is not purely theoretical in most cases.

We have to acknowledge that identifying the competent forum and applicable law is a very complex exercise when it comes to the Internet and electronic commerce. It is so complex that the many zealous international bodies working on the issue have so far been unable to come up with solutions that are universally endorsed. However, in the end, whether the solution is based on an interpretation of existing rules or the adoption of supplementary regulations, will we not still find ourselves with the problem of practical application? Let’s see what is involved.

Suppose that we have solved all the problems with identifying the competent court and applicable law. Who will believe that a consumer will institute an action before a court, whether it is local or *a fortiori* foreign, for a $250 electronic transaction that has gone wrong? The same applies when a small or medium-sized enterprise that has entered into a transaction over the Internet with a foreign party now believes, for whatever reason, that it has been cheated. The amounts of money at stake, coupled with the cost and time of judicial recourse, will make short work of the jurist’s wishful thinking.

The same goes for arbitration. Suppose that a consumer has validly committed to arbitration through, for example, an arbitration agreement signed after the dispute arose. Suppose also that the consumer obtains a valid arbitral award after online arbitration in which the costs have been kept to a strict minimum. Suppose, finally, that the New York Convention on the

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194 Mechanisms that bind the consumer after a dispute has arisen seem possible. Interestingly, the Bonino Recommendation (*supra*, note 180) concerns procedures that “no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution”, clearly admitting that “the decisions taken by out-of-court bodies may be binding on the parties”. This could be a reference to statutory arbitration, such as in Spain and Portugal, or, more plausibly, to an arbitration agreement signed after a dispute has arisen. For an example of an *a posteriori* arbitration mechanism in which the consumer does not commit to arbitration (and thereby renounce recourse before the courts) until after a dispute has arisen, see the Canadian Motor Vehicle Arbitration Plan at: [http://www.camvap.ca](http://www.camvap.ca) (last visited on February 1, 2005).
Recognition and Enforcement of Foreign Arbitral Awards makes it possible to execute the award in the cyberseller’s country. Once again, the consumer is forced to commit means, for example, to retain the services of a lawyer in the country of execution, that necessarily exceed the value of the initial transaction. In the vast majority of cases, the investment will be disproportionate to the resulting award, which is generally quite uncertain.

Given the now widely acknowledged imbalance between the cost of judicial proceedings, even when they are designed for small disputes, the cost of executing a judicial decision or arbitral award, and the small amounts at stake in consumer disputes\textsuperscript{195}, it would seem that the way is clear for a focus on deploying non-binding (at least for the consumer) extra-judicial dispute resolution mechanisms offered and delivered online.

The organization, funding and effectiveness of such mechanisms are left to a certain extent to creative and self-regulatory market forces, which have been relatively weak given the above-mentioned constraints. In addition to the slow pace of legislative change and the normative confusion that could last for some time, the state’s role in deploying these mechanisms still seems uncertain. Part of its role is to engage in international consultation to promote the emergence of guidelines for resolving consumer disputes\textsuperscript{196}. As we will see in greater detail, it is an open question whether the laws of the market left to themselves can develop a market for private justice in line with the principles of fundamental justice that the state wishes to protect. In international commercial arbitration not involving consumer issues, the state continues to play a limited but fundamental protective role that could very well be applied elsewhere because it maintains some of the state’s traditional role as defender of public order while ensuring maximum flexibility.


For our purposes here, note that deploying mechanisms that are not binding on consumers at any point in the contractual relation can both overcome legal reservations and target customer satisfaction. The only question that remains unanswered is whether the benefits of such mechanisms in terms of increased consumer confidence are sufficient, in pure market terms, to ensure their funding and stability. Outside of consumer issues, such as in transborder electronic commerce between businesses, appropriate dispute resolution is governed by the well-established system of international commercial arbitration. It remains to be seen whether there are real obstacles to conducting arbitration in an electronic environment.

(4) Formalities of classical arbitration and the electronic environment

On the face of it, the legal infrastructure that forms the basis for international arbitration can handle the change to electronic communications fairly easily. Therefore, we need not spend too much time on the technological issues involved in the change, which we will cover by looking briefly at each stage of an arbitral process.

(a) Writings

The first key issue concerns the validity of an arbitration agreement concluded using electronic means. The problem lies in the formalities sometimes imposed by national and international texts on the validity or evidence of an arbitration agreement or clause. The law of a number of countries requires a writing in order for the legal effect of an arbitration agreement to be acknowledged. At the international level, the New York Convention also seems to require a written document for recognition of an arbitration agreement. What does this mean for the validity of an arbitration agreement signed online? Clearly, states will adapt their formal rules to the new requirements of electronic commerce more or less easily and at different speeds. In many countries, adaptation will require legislation, and therefore involve the delays characteristic of that approach. In other countries, it is likely that the courts will continue to take the initiative by interpreting texts flexibly so that the notion of a writing includes dematerialized texts. Flexible interpretation of the New York Convention

is recommended so that dematerialized texts can be included as writings without having to send that international agreement, which has become virtually universal, back to the drawing board\textsuperscript{198}.

(b) Service of documents

The second issue concerns service of documents. Once again, this is a relatively minor obstacle to digitizing arbitration proceedings. With the agreement of the parties, there is no problem in serving documents electronically. It is true that email evidence of transmission and receipt, like electronic signature, is an issue that has yet to be resolved in a satisfactory manner. However, the tools of protected internal messaging, which are now available from reliable ODR centres, solve the problem very well. The same applies to problems with the confidentiality of exchanges.

(c) Hearings

The third issue concerns hearings. Here, a distinction can be made between the location of hearings, including those at which testimonial and documentary evidence is taken, and the location of arbitration. Video conferencing is already used frequently in international arbitration, not only for preliminary meetings, but also to take testimonial evidence and hear oral arguments. Thanks to the Internet, it has become widespread and reduced costs dramatically. In this case, the human factor is the obstacle, and it should not be taken lightly because an atmosphere of trust is often established at in-person meetings. However, it remains that a key component of arbitration involves the exchange of mail and documents among the parties and the arbitrator. This can be done electronically. We should also not forget that an arbitral award can be rendered based on evidence, without any hearings, if the circumstances are appropriate and the parties are in agreement. With all due respect for some arbitrators who have great confidence in the beneficial effect of their contribution and presence, evidence-based arbitration nonetheless often seems to satisfy the parties, and after all, though we sometimes tend to forget, they are the primary


stakeholders. What is really needed is a balance between the means invested in the procedure and what is at stake.

Management of written evidence is also relevant here. In most legal environments, the parties have free access to the evidence, and digitization is not a problem unless the authenticity of the documents is challenged, which is generally quite rare. With respect to procedure, note that the current trend is to establish a fictional location for arbitral proceedings such that neither the parties nor the arbitrators are required to travel. Obviously, this greatly facilitates the legal supervision of completely dematerialized proceedings. It also enables the parties to simply include a clause in their contract that establishes a fictional location for arbitration. The location might have certain legal consequences, but in principle neither they nor the arbitrators will ever have to go there to resolve the dispute.

(d) Awards

Establishment of the award is also an aspect of the procedure that could be an obstacle to online arbitration. At a sufficiently high level of analysis, this problem can be solved largely in the same way as the problems with arbitration and negotiation clauses.

A number of states have legislation requiring that the award be in the form of a writing. Similarly, while the New York Convention does not explicitly require that the award be rendered in written form, it nonetheless refers to an “original” and to an “authentic copy” with respect to enforcement and recognition by the courts. Finally, one more difficulty has to be mentioned: the award has to be signed. As in the case of the arbitration agreement, we hope that harmonization of technical standards and flexible interpretation of existing texts will suffice to quickly persuade stakeholders of the enforceability of dematerialized awards. Indeed, online arbitration has not waited for this\textsuperscript{199}.

\textsuperscript{199} The accommodations required by prudence are very modest: the parties simply have to be sent a paper copy duly signed by the arbitrators of an award already delivered online.
(e) Validity of electronic signature

Traditionally, the parties’ signatures indicate their will to enter into a contractual relationship. Until recently, the signature was handwritten. In recent years, however, many different techniques have been developed to recreate in digital form the functions seen as distinctive of handwritten signatures.

A number of countries have already recognized electronic signature as a technological solution to problems with identifying stakeholders on the Internet. On December 13, 1999, the European Parliament and Council adopted the Directive on a Community framework for electronic signatures, which establishes all of the elements required to ensure that the new approach will be recognized in law. The Directive provides that legal systems cannot set aside an electronic signature solely because it is electronic. If the signature and the electronic certificate issued by a certification service (whose job it is to confirm the identity of the author and the integrity of the document) meet a certain number of specifications, the electronic signature will be considered to have the same value as a handwritten signature. In principle, member states were to adopt the legislation, regulations and administrative provisions, and comply with the Directive by July 19, 2001.

On July 5, 2001, the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law on electronic signatures. Article 6(1) of the law provides that:

"Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in light of all the circumstances, including any relevant agreement."

Note that a test of the signature’s reliability is found in the third paragraph of the same article, according to which an electronic signature will be considered reliable if it meets the following conditions:

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200 The countries include Germany, Italy, France, some US states and, in Canada, the province of Quebec.
• The signature creation data are, within the context in which they are used, linked to the signatory and no other person;
• The signature creation data were, at the time of signing, under the control of the signatory and of no other person;
• Any alteration to the electronic signature, made after the time of signing, is detectable; and
• Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable202.

We hope UNCITRAL’s initiative will be successful, but in any case, the issue of electronic signature does not seem likely to be a serious obstacle to the development of arbitration by electronic means.

D. The deployment of ADR in cyberspace

(1) Guidelines

Given the growing need for an effective regulatory framework, a number of organizations and governments have developed recommendations and guidelines designed to be taken into account in the establishment of ODR. The Organization for Economic Co-operation and Development (OECD) was among the first to recognize the importance of international standards in the governance of transborder electronic commerce transactions. In 1997, the OECD was already pointing out the need for greater co-ordination in this area, not only among governments but also in the private sector203.

Soon afterwards, the European Union and the United States issued a joint statement encouraging greater dialogue between the public and private spheres in order to establish a sufficiently predictable legal and commercial

framework for the Internet. At the same time, they acknowledged the role of governments in protecting the public interest, particularly with respect to consumer protection, and the role of self-regulatory mechanisms such as codes of conduct and other guidelines.

The OECD was already involved in collaborative work between the public and private spheres in 1998. In 1999, this resulted in the adoption of its Guidelines for Consumer Protection in the Context of Electronic Commerce. The Guidelines provide that “consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden” and that “businesses, consumer representatives and governments should work together to... develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms.” The OECD’s Guidelines were then adopted by the G8 in the Okinawa charter on the global information society, which says that extra-judicial dispute resolution mechanisms are a way of solving problems related to consumer recourse in cyberspace and that the “private sector plays a leading role in the development of information and communications networks in the information society... [b]ut it is up to governments to create a predictable, transparent and non-discriminatory policy and regulatory environment necessary for the information society.” The European Union and the United States renewed their support for the OECD’s guidelines at the 2000 Summit. The joint statement issued at that time explicitly recognized the advantages of ADR, particularly when the service was provided online, and

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206 Id., article VI B.


208 Id., article 7.

acknowledged the importance of promoting the development of such mechanisms\textsuperscript{210}. A series of basic principles for the effective and equitable deployment of ADR was also acknowledged: impartiality, accessibility, low cost or free of charge for consumers, transparency and speed\textsuperscript{211}.

At the same time, at the end of 2000, the Hague Conference on Private International Law, International Chamber of Commerce and OECD convoked the key stakeholders in forms of ADR to the Hague for an international co-operation meeting. The meeting revealed that a consensus was emerging in favour of maintaining the following principles in the deployment of ADR for consumers: independence, impartiality, accessibility, transparency, rapidity and services free of charge or low cost for consumers\textsuperscript{212}. Two other criteria were also hotly debated at the meeting: the voluntary nature of the procedure and the binding nature of the award. No consensus was achieved on the two latter criteria simply because they flow directly from the interface between ADR and the complex, multifaceted legal framework of consumer protection that we have reviewed.

In the meantime, a number of stakeholders have published principles, guidelines and recommendations for the deployment of ODR. The following table summarizes the key international initiatives by various public and private stakeholders. They show the emergence of an international consensus that is quite remarkable, given that the subject matter is only a few years old.

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} The conference report, entitled “Building Trust in the Online Environment: Business to Consumer Dispute Resolution”, is available at: http://www.olis.oecd.org/olis/2001doc.nsf/43bb6130e5e86e5fc12569fa005d004c/c1256985004c66e3c1256a33005b80a1/$FILE/JT00106356.DOC (last visited on February 1, 2005).
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215 Federal Trade Commission, supra, note 196.


The most recent such initiative is by the American Bar Association (ABA). While it is the work of an American association, specifically of a working group composed uniquely of United States citizens, the initiative is nonetheless based on a very broad international consultation and therefore has to be taken seriously. In August 2002, the ABA published its recommendations on best practices for ODR service providers.224
The purpose of the recommendations is to inform both ADR service providers and potential users, such as consumers and sellers. The recent recommendations have the advantage that they take a certain distance from the phenomenon in question. In particular, they take into account the fact that the market for ODR is not as strong as long claimed. Consequently, they remain independent with respect to both implementation and sanction. Instead, the recommendations are “flexible” guides for service providers and a point of reference for users. This approach has the advantage of injecting some content into principles on which there is already an international consensus, and presenting users with the relevant issues in the areas where a consensus has not been achieved. As we have seen, the areas where there is no general agreement essentially concern the interface between the proposed mechanism and the range of rights that the consumer has depending on his or her location.

With a commendable degree of realism that takes into account the stage of development of the phenomenon, the recommendations promote a modest list of components that are considered essential for an ADR service provider to disclose:

- Contact and organizational information, including a physical address, an e-mail address and the jurisdiction of incorporation or registration to do business;
- Terms and conditions and disclaimers;
- Explanation of services/ADR processes provided and, for each: applicable rules and procedures, nature, binding character for each party, other legal consequences of the outcome and explanation of further possible avenues of legal action;
- Identification of any legal services (advice, counselling, advocacy) affiliation or activity and identification of the method employed to separate neutral services from legal services and to avoid conflicts of interest;
- Affirmation that the ODR proceedings will meet basic standards of due process, including adequate notice to the parties, and opportunity for the parties to be heard, the right to be represented and to consult legal counsel at any stage of the proceedings and, in the case of arbitration, an objective decision based on the information on record;
• Any prerequisite for accessing the service, such as membership or geographical location or residence;
• Any minimum value for the dispute to be submitted for resolution.\textsuperscript{225}

The list is provided as a guide to the issues that a more detailed code of conduct could cover. At this stage in the development of the market for ADR, it is clearly too early to be concerned with how the principles will be implemented, other than through the pressure exerted by publication of the above-mentioned principles and guidelines.

The ABA also recommends the creation of an international body that would act as an information centre for consumers and promote ODR so as to increase consumer confidence in electronic commerce. The idea is attractive since our theory is that the lack of trust on the Internet is essentially due to a lack of communication. ODR is no exception to the rule and, like law, depends on effective communication. The idea of a world information centre for ADR is therefore very welcome because the current patchwork of transborder consumer law leaves little hope for the accessibility of relevant information, particularly if the stakeholder is a small or medium-sized enterprise or a consumer\textsuperscript{226}. For such a project to have any chance of success, however, it will have to secure the support of an organization with greater international legitimacy that the ABA.

\textsuperscript{225} \textit{Id.}; see “Minimum Basic Disclosures”.
\textsuperscript{226} The website published by the Consumers International Regional Office for Asia and the Pacific (CIROAP) is very informative, and provides a summary of consumer protection law in 15 countries in the region (Asia-Pacific Consumer Law (APCL)). See: \url{http://www.consumersinternational.org/HomePage.asp?regionid=154&langid=1} (last visited on February 1, 2005). It has become urgent to take an initiative of this form on the international level. For a fairly broad but static inventory of legal provisions directly concerning ADR with respect to privacy and consumer protection, see the Organization for Economic Co-operation and Development, “Legal provisions related to business-to-consumer alternative dispute resolution in relation to privacy and consumer protection”, DSTI/ICCP/REG/CP(2002)/1/FINAL, July 2002, available at: \url{http://www.olis.oecd.org/olis/2002doc.nsf/43bb6130e5e86e5fe12569fa005d004c/0fc9930e6e0c98bec1256b900565f0c/$FILE/JT00129724.PDF} (last visited on February 1, 2005).
(2) Funding

While it is widely acknowledged that using ADR is less costly than recourse to traditional judicial apparatus\(^2^{27}\), the delivery of such services still involves costs that it should not be underestimated. They fall into three categories: hardware and software infrastructure, secretariat costs related to case administration, and the fees and expenses of mediators and arbitrators.

When choosing the appropriate business model, service providers cannot ignore some of the principles that we have just examined. First, to meet the requirement of accessibility with respect to cost, the proceedings must be in proportion to the amounts at stake, the nature of the dispute and the deadline by which the solution must be found. Today, leaving aside the issue of hardware and software infrastructure, service providers are funded in accordance with one of the three following business models: sharing of costs by both parties, costs paid by only one party, or outside funding. When the costs are shared by the parties, note that the proportion paid by each side can vary from one provider to the next, although it seems that most of those using this business model divide the costs equally between the parties\(^2^{28}\). In some cases, the complainant may also be required to pay a fee to register the case. This is logical since when the proceedings are initiated, the respondent is not aware of the complaint and, even when so informed, can choose not to respond. However, this model can present some problems with respect to consumer access to proceedings if the cost is disproportionate to the amount in dispute.

When one of the parties pays all of the costs, the seller or insurer is generally asked to pay for the whole proceedings through annual fees or through a fee

\(^2^{27}\) Time and money are saved because the parties can participate in the dispute resolution process through their computers. They do not have to travel to meet the opposing party or appear in court.

for processing a set number of cases\textsuperscript{229}. This raises concerns about the provider’s independence and impartiality. Since the process is funded by the business, the consumer could naturally see it as skewed in the seller’s favour. The provider could solve this problem by adopting measures to make the process transparent, such as strict procedures for selecting neutral arbitrators and mediators.

Even though some providers offer their services to consumers free of charge\textsuperscript{230}, it is important to note that nothing prevents ODR providers from asking consumers to pay for some of the costs related to the proceedings. Indeed, every service provider faces a major challenge when determining the costs related to the procedures offered. While trying to keep costs to a minimum, the provider has to reconcile consumer access to procedures with the financial viability of the undertaking.

Of course, the best way to guarantee the provider’s independence and impartiality, and reduce the cost to the consumer involves outside sources of funding, which is difficult to imagine over the long term without a significant commitment from the public sector. Such a commitment would be natural in so far as consumer disputes are the only real obstacles for providers when designing business models with a minimum of sustainability. This problem is not the result of a feature of the market but of public interest in protection traditionally guaranteed by the public sector and not by market mechanisms.

Until now, governments have somewhat avoided the issue by relying on self-regulatory mechanisms. The current situation in ODR suggests that we should re-examine the virtues of leaving the market alone to regulate this kind of service delivery. We will not discuss this issue here because a very similar observation can be made concerning all of the products and services belonging to what might be called the “trust market”: labels, certification, cyberconsumer insurance, privacy protection software, etc. It is a market

\textsuperscript{229} Id. The following providers favoured this model: AllSettle.Com (the insurer pays the costs), BBBOnline (the sellers pay an annual membership fee), FordJourney (Ford pays for the arbitrator’s services), iCourthouse (the law firms pay annual membership fees), OnlineDisputes (annual membership fees), TRUSTe (annual membership fees), WebAssured.com (annual membership fees) and Web Trader (annual membership fees).

\textsuperscript{230} As in the ECODIR project, for example. A section of this book is devoted to that project.
that has never really taken off. Greater intervention from the public sector seems inevitable, if only to create conditions such that market forces will be able to take over later.

(3) System and exchange security

Most ODR service providers post policies to inform users about what happens to information flowing through their systems. In addition to such privacy protection policies, the security and confidentiality of exchanges can be ensured by setting up a technological infrastructure that incorporates, for example:

- Protocols such as SSL\(^{231}\), S-HTTP\(^{232}\) and SET\(^{233}\) that ensure the confidentiality and authenticity of exchanges by encrypting the data;
- Firewalls that make it possible to screen the flow of information between an internal network and a public network and thereby neutralize attempts to penetrate the internal system from the public network;
- Access to an ODR platform that is protected by a password, and managed and protected by the service provider;
- Internal messaging tools so as to avoid the use of unprotected email, and the Secure Multipurpose Internet Mail Exchange Protocol (S/MIME), which makes it possible to authenticate the origin of every email while ensuring the confidentiality and integrity of its content, thereby making it very difficult for the sender to repudiate it or the addressee or a third party to forge it (electronic signature can also serve the same purposes).

Thus it is important to have tools that will provide both transmission of information and the information itself with appropriate protection. It must

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231 The Secure Socket Layer (SSL) protocol defined by Netscape uses the RSA public key algorithm. Its purpose is to ensure the authenticity, confidentiality and integrity of data exchanged.

232 Developed by Enterprise Integration Technologies (EIT), the Secure HyperText Transfer Protocol is designed to ensure secure form transmission on the Web and can therefore be used specifically for online financial transactions involving the use of credit cards.

233 Secure Electronic Transaction (SET) is a protocol designed jointly by Mastercard and Visa that, like the SSL and S-HTTP protocols, ensures a high degree of security for online financial transactions requiring the use of a credit card.
not be possible for a third party to intercept a message addressed to another, or for the parties to change the content of what they exchange.

The issue of the security of systems and exchanges is closely related to the cost of ODR service delivery because incorporating security requirements into a general service offering that is user-friendly and adapted to the specific needs of a segment of the market is impossible without software that is designed and produced specifically for ODR. Such software easily costs millions of dollars and is a big part of the problem in finding a viable business model for resolving consumer disputes. The problem is also compounded by the fact that the number of consumer disputes is in inverse proportion to the amount at stake in each case. Thus, ODR service providers seek ever-increasing automation of procedures, which requires a proportionally heavy investment in software.

(4) The strengths and weaknesses of online service delivery

The deployment of ODR services gave rise to much hope for the future of transborder justice. It essentially involves overcoming the problems that are now generally associated with traditional administration of justice. The value added by online service delivery is naturally assessed in terms of cost, time, flexibility and appropriateness for current trade practices. These advantages, along with confidentiality, are often ascribed to ADR outside of cyberspace. Delivering ADR services online therefore increases the well-known advantages of extra-judicial justice, provided of course that the transition to online delivery is smooth and does not involve any losses.

(a) Low cost and high speed

ODR is faster and less costly than either court proceedings or traditional ADR. Since the parties can adapt the process to meet their specific needs, disputes can be resolved as quickly and economically as the circumstances permit. Moreover, when a decision is executory and binding on the parties, as in the case of an arbitral award, the final nature of the award spares the parties the cost, in terms of time, money and energy, of instituting interminable appeals.

The procedure can also be automated in order to streamline processing for the parties and the arbitrator. The parties can be given access to all the documents required to make progress on the case, such as FAQ (frequently asked questions), rules of procedure, forms (complaint, response, counter-
claim, etc.), deadlines, reminders and steps in the procedure. The automation reflects the requirements of simplicity, user-friendliness and flexibility that have to characterize ODR.

We compared the administrative cost of resolving disputes online with those associated with judicial proceedings and traditional ADR. Parties who chose ODR reaped savings of 35–60%. When speed was compared, ODR performed even better. It took an average of only four months to resolve a dispute online, but 18-36 months to obtain a decision through the courts or using traditional ADR.

(b) Compatibility with electronic commerce today

In order to be effective, ADR mechanisms have to keep pace and evolve in stride with the markets they serve. Every component of electronic commerce occurs online (meetings, information exchanges, negotiation and final signature). In order to provide effective resolution of the disputes that result from this kind of interaction, it is absolutely imperative that the methods used to manage the process are tailored specifically to the electronic environment. Dispute resolution mechanisms can be incorporated directly into the electronic marketplace. They not only make it possible to resolve disputes at the source, when they arise, but also to reassure the parties and create trust conducive to commercial transactions.

(c) Confidentiality of proceedings

ODR involves no public hearings and every step of the process is private. As Schiffer notes:

Litigation involves business problems, and public awareness of business problems can cause anxiety among suppliers, customers, shareholders and employees as well as encourage competitors. ADR proceedings are private. Only those invited by the parties may attend and there are no documents open to public scrutiny. Unless the parties jointly decide to publicise the existence of their dispute and its resolution, the public and the press will be completely unaware.

This is a huge advantage in commercial dispute resolution and becomes essential in disputes involving technology or intellectual property.

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(d) Flexibility

ADR allows parties to shape every aspect of the process in which they are involved. They can choose the location of meetings (if applicable), the language(s) used, the applicable rules of procedure and substance, and the person who will make the decision. The parties can also submit their dispute to a jurist with long experience and extensive knowledge in the area in question. This guarantees decisions that are fair, equitable and in perfect harmony with the rules and practices of the market. If the technological infrastructure has the capability, it is also possible for the parties and the neutral third party to add forms of communication more tailored to the circumstances, such as teleconferences, videoconferences, in-person meetings and online discussion groups.

Thus, using an electronic platform to process disputes not only saves the parties time and money, but also offers them a solution that is effective and tailored to the situation. If the parties signed a binding arbitration clause prior to the dispute or agreed to arbitration when the dispute arose, the arbitral award will be final and without appeal. Moreover, it will be binding and executory in all of the countries that have signed the 1958 New York Convention on the Recognition of Foreign Arbitral Awards. Currently, nearly 130 countries are party to the Convention. Arbitration is therefore highly effective, given the multi-jurisdictional nature of disputes related to electronic commerce.

**Strengths and Weaknesses of Online Dispute Resolution**

<table>
<thead>
<tr>
<th>Strengths</th>
<th>Weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Reduced costs</td>
<td>• Problems with software standardization and compatibility</td>
</tr>
<tr>
<td>• User-friendliness</td>
<td>• Loss of physical and visual components of in-person communication</td>
</tr>
<tr>
<td>• Speed of communication</td>
<td>• Reduced urgency of coming to an out-of-court settlement</td>
</tr>
<tr>
<td>• Effectiveness of communication (no messages left on an answering machine)</td>
<td>• Problems with dealing with consumers with low levels of literacy</td>
</tr>
<tr>
<td>• Easy and practical organization</td>
<td>• Difficulty in establishing guarantees of security and confidentiality</td>
</tr>
<tr>
<td>• Reduced tension created by in-person meetings</td>
<td>• Need to authenticate the parties</td>
</tr>
<tr>
<td>• Automatic tracking of dates and documents</td>
<td>• Risk of many frivolous complaints</td>
</tr>
<tr>
<td>• Equality of the parties before the computer screen</td>
<td>• Difficulty in maintaining a balance between cost concerns and the integrity of the process</td>
</tr>
<tr>
<td>• Use of technological advances to improve the process (e.g., affordable web conferencing, automated translation, automated transcription, real-time chat rooms, assisted negotiation, and facilitated access to relevant databases and decision-making tools).</td>
<td></td>
</tr>
</tbody>
</table>
III. Key initiatives in online dispute resolution (ODR)

Now that we have reviewed the core political, economic and legal issues raised by ODR, we will look at past and present initiatives that have given it life and nurtured it.

A. The precursors

(1) Virtual Magistrate

The fruit of collaboration between the Cyberspace Law Institute (CLI) and the National Center for Automated Information Research (NCAIR), the Virtual Magistrate online arbitration service was launched in March 1996. It was a pilot project on the delivery of a speedy and voluntary online arbitration procedure to resolve disputes involving:

• users of online systems;
• those who claim to be harmed by wrongful messages, postings, or files; and
• system operators.236

More specifically, the project’s mandate was to:

1. Establish the feasibility of using online dispute resolution for disputes that originate online;
2. Provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings;
3. Provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about online postings;

235 It should be noted that the project leaders, Henri Perritt and David Johnson, are both members of the Cyberspace Law Institute.
236 “The Virtual Magistrate Project will offer arbitration for rapid, interim resolution of disputes involving (1) users of online systems, (2) those who claim to be harmed by wrongful messages, postings, or files and (3) system operators (to the extent that complaints or demands for remedies are directed at system operators). Arbitration services will be available for computer networks anywhere in the world as long as relevant parties agree to participate”. The Virtual Magistrate Project, “Concept Paper”, July 24, 1996, available at: http://vmag.org/docs/concept.html (last visited on February 1, 2005).
4. Lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings);

5. Help to define the reasonable duties of a system operator confronted with a complaint;

6. Explore the possibility of using the Virtual Magistrate Project to resolve other disputes related to computer networks;

7. Develop a formal governing structure for an ongoing Virtual Magistrate operation.\(^{237}\)

Virtual Magistrate’s primary objective was to study the resolution of disputes between users and network operators or Internet access providers, and among users themselves. It was designed to examine the prevention of situations in which network operators had to render decisions in cases in which they were stakeholders, thereby making them simultaneously judge and party to the dispute. It was also designed to study disputes between users. Virtual Magistrate’s scope therefore did not cover all disputes pertaining to electronic commerce.

The arbitration process was conducted essentially using email. Complainants submitted disputes to Virtual Magistrate by answering a series of questions about the date of the dispute, the parties concerned and the category of dispute. Complainants also had to describe the incident and the solution sought. Next, Virtual Magistrate made a commitment to do all it could to render a decision within 72 hours of receiving the complaint. Complainants were charged a fee of $10 in order to discourage frivolous action.

Of course, as in the case of proceedings occurring in the physical world, the process was voluntary and based on the parties’ consent to submit the dispute to arbitration. A network operator could therefore agree to insert a clause in its contract with the user committing it to submitting any future dispute to Virtual Magistrate, or to obtain the user’s consent on an ad hoc basis, if a dispute arose. It was also possible for the network operator to declare itself bound by the conditions that would be set in the award by the Virtual Magistrate arbitrator.\(^{238}\) It should be noted, however, that this mechanism could be called “contractual arbitration”, in other words, a mechanism that has some binding effects but cannot produce executory

\(^{237}\) Id.

\(^{238}\) The Virtual Magistrate Project, [http://vmag.org/](http://vmag.org/) (last visited on February 1, 2005).
effects within the meaning of the legislation and treaties on recognition and execution of arbitral awards\textsuperscript{239}.

Virtual Magistrate’s scope was limited to disputes generated by messages and files with illegal content, such as counterfeit ownership of intellectual property, illegal appropriation of commercial secrets, defamation, fraud, unfair competition, posting of inappropriate (obscene or hate) material and violation of privacy.

Thus, the arbitrator had to decide whether it was reasonable for a network operator to destroy, mask or restrict access to a specific message, file or transmission. In some more extreme cases, Virtual Magistrate had to decide whether the network operator had acted appropriately in refusing specific individuals access to an electronic environment. The issues of billing and financial obligations were not studied in the project. However, it seemed possible to derive the arbitrator’s jurisdiction from the parties’ consent\textsuperscript{240}.

The arbitrators had to take into account the information available, the code governing the network in question, the contracts binding the parties and the applicable law. Note that they were not required to automatically apply the law of a given jurisdiction. Instead, they had to consider the circumstances of each case, the parties’ points of view on the applicable law and appropriate solutions, and what would happen if the dispute were referred to judicial or arbitral tribunals\textsuperscript{241}.

Virtual Magistrate’s decisions were to be posted on the Internet, specifically through the Villanova Center for Information Law and Policy server. The process itself remained confidential; only the decisions were to be made public.

Virtual Magistrate rendered only one decision. It was not very popular, probably because there were no prior agreements to use the service and its technology was generally fairly primitive since it essentially involved the exchange of non-secure email messages. Virtual Magistrate’s scope was also very limited. Disputes submitted to it had to be limited to social relations arising out of use of the Internet, and could not include economic


\textsuperscript{240} The Virtual Magistrate Project, \textit{supra}, note 238.

\textsuperscript{241} \textit{Id.}
relationships created through electronic transactions for which arbitration seems to be the most appropriate solution. Indeed, it could be that mediation is a better solution for user disputes over the distribution of offensive or inappropriate messages. The Virtual Magistrate project is nevertheless continuing under the auspices of Chicago–Kent University.

(2) Online Ombuds Office

The Online Ombuds Office project is an initiative of the Center for Information Technology and Dispute Resolution at the University of Massachusetts. Since 1996, the organization has been offering mediation services for certain disputes arising on the Internet, such as those:

- between members of discussion groups;
- concerning domain names;
- between competitors;
- between Internet access providers and their subscribers;
- concerning intellectual property.

The purpose of the project is to develop mediation services that use the advantages of cyberspace to find better ways to process disputes arising in that environment and spare stakeholders the hassle and cost of judicial proceedings.

More specifically, research has been done on the use of texts and graphics to help the parties in the resolution process that they have chosen. Settlement suggestions are sent to the parties, who use dynamic graphics and other technological tools (that can appear rather playful at first) to assess the nature, source and degree of their disagreement, and pinpoint what they wish to obtain from one another. This is an example of an experiment in using technology to assist decision-making. We will return to this briefly below.

The project is still ongoing and its initiators, Professors Ethan Katsh and Janet Rifkin, are also acting as consultants for the SquareTrade project.

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242 Center for Information Technology and Dispute Resolution at the University of Massachusetts, [http://www.odr.info](http://www.odr.info) (last visited on February 1, 2005).

243 SquareTrade, [supra](#), note 2.
(3) CyberTribunal

CyberTribunal was an experiment launched in September 1996 by the University of Montreal’s Centre de recherche en droit public (CRDP). Its purpose was to explore the feasibility of using alternative mechanisms to resolve disputes arising in electronic environments, and it resulted in a groundbreaking dispute prevention and resolution service employing mediation and arbitration.

CyberTribunal was the product of an institution located in a country with two legal traditions, where jurists are confronted with legal biculturalism to greater or lesser degrees. The dual influence of civil and common law is clearly very important in a field largely inclined to comparison and internationalism. This special aspect of Canadian law is pertinent because, while geographical borders seem to be disappearing, cultural and legal boundaries remain.

CyberTribunal’s area of activity was much broader than those of Virtual Magistrate and Online Ombuds Office even though it was limited to disputes arising in electronic environments, particularly the Internet, and did not extend to public order issues. Its services were offered in French and English.

Despite its name, CyberTribunal was not a court. Instead, its purpose was to facilitate dialogue between the parties to a dispute (mediation) and, when necessary, provide administrative and technological assistance in a decision-making process based on the parties’ consent (arbitration). Each party to a dispute had to explicitly agree to submit the dispute to CyberTribunal before or after it arose. The CyberTribunal mediators and arbitrators included jurists and non-jurists (mainly lawyers and university professors) specializing in mediation, commercial arbitration and information technology law.

CyberTribunal had electronic equipment that guaranteed the confidentiality of the process for users so that the information concerning each case was accessible only to those concerned. CyberTribunal adopted a conciliatory approach by promoting the use of mediation rather than arbitration. While

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244 The project was directed by Professor Karim Benyekhlef with the collaboration of Professor Pierre Trudel; both professors are members of the University of Montreal’s Centre de recherche en droit public.
the parties were bound by an arbitration clause, this approach allowed them to use mediation first, if they both agreed to it.

CyberTribunal’s electronic site had four modules: reception, mediation, arbitration and the Secretariat.

The reception module included a section with general information on CyberTribunal, as well as forms for opening a file. A case was initiated using a request form in which the party recorded key information, such as addresses, the nature and circumstances of the dispute, the purpose of the request and the solution sought. The form was encrypted and sent to the Secretariat, which assigned a mediator who took charge of the case. The mediator then contacted the respondent, explained the nature of the complaint and asked the respondent to participate in the process. Of course, the mediator’s task was facilitated when there was a prior agreement between the parties to the effect that any disputes arising between them were to be submitted to mediation or arbitration. Otherwise, the mediator had to persuade the respondent to participate in the exercise.

The mediation module received the parties who had agreed to participate in the process. The mediator communicated with the parties and a secure electronic environment was assigned to them in accordance with the conditions and methods established by the mediator.

The arbitration module operated in an environment incorporating functions similar to those of the mediation module. However, the process was structured by more formal rules that were based freely on the rules of procedure generally used in commercial arbitration, such as the arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC). Since simplicity, user-friendliness, speed and fairness were targeted, it was also possible to accelerate the process with the parties’ consent. The rules of procedure were incorporated into the module so that the parties could participate in the arbitration process without having to read all of them. In other words, the process was automated to as to streamline case processing for the parties and the arbitral tribunal. On the site of the case in question (in other words, the central electronic environment for the case where the parties could find all relevant information, such as procedural documents and evidence), the parties could communicate with one another and send documents in a completely secure manner.
The experiment ended in December 1999, when the main architects of the system set up a new project: eResolution, which we mentioned above. CyberTribunal helped to resolve over a hundred disputes. In addition to making unprecedented use of secure environments for electronic exchanges in dispute resolution, the project was the first ODR experiment to combine mediation and arbitration services.

B. Current initiatives

In order to study ADR mechanisms that are currently available on the Internet, we have to establish some informal definitions. This will enable us to concentrate on the few systems of interest with respect to normative models under development.

First, we have to note that almost all of the ODR initiatives that can be found through a quick search of the Internet either have no technology at all for processing disputes online or have no experience in processing real disputes. The initiatives that fall into the first category are often research projects with limited resources or publicity stunts by well-established ADR bodies. Those that fall into the second category are generally young, inexperienced ADR undertakings. It is quite difficult to determine how many such initiatives there are because the numbers fluctuate, sometimes dramatically. Moreover, the superb international “storefronts” that are so easy to establish on the Internet sometimes give false impressions that have nothing to do with reality.

Before we go on to discuss tools that enable or facilitate remote dispute resolution, we should return for a moment to the use of technology to assist decision-making. In recent years, scientific research has made considerable progress in developing expert systems able to apply a given legal rule or a complex network of case law to a multidimensional set of facts. This type of system can of course be valuable for developing mechanisms that use automation to streamline the decision-making process. As we have seen, this in no way replaces the person who renders the decision; it simply provides him or her with help designed to make the decision-making process both more efficient and more consistent. We believe that this type of system needs to be deployed widely, not only in the model context of an arbitral decision ending a dispute following an adversarial process, but also in the context of “bilateral decisions” leading to a transactional agreement after negotiation or mediation. The emergence of dematerialized space has
increased the yet untapped potential of technology use in all of the decision-making processes involved in the administration of public and private law.\textsuperscript{245}

Given the above, we should concentrate on online negotiation, mediation and arbitration mechanisms that use a sound technological infrastructure to automate certain functions, model the relevant process and provide an interface through which all steps of the procedure can be accomplished, documented and archived. Following a brief general overview of the providers of such ODR services, we will focus on a few initiatives, namely the United States company SquareTrade, the ECODIR platform and the domain name dispute resolution tool developed by eResolution.

(1) Assisted negotiation tool providers

While online negotiation services can vary from one provider to the next, they generally involve and are often limited to a “blind” negotiation process designed to determine the settlement for claims in which the substance is not challenged. In such a process, one party invites the other to negotiate a solution using a provider’s automated negotiation tool. If the other party consents to the process, then both sides agree on a zone of agreement (a set percentage or amount) for a possible settlement. For example, if the difference between two simultaneous offers is less than 20\% or $3,000, then the settlement will be the mid-point between the two offers. The parties then agree on how they will exchange simultaneous offers, such as the maximum and minimum points of departure and the minimum difference between each offer. Finally, the parties engage in a series of simultaneous offers until the zone of agreement is reached. The software identifies when this has occurred and the parties are then advised of the settlement\textsuperscript{246}. The following table

\textsuperscript{245} The example of automated blind-bidding systems, which we will discuss in greater detail below, demonstrates that even a rudimentary computer tool can be useful when the stakeholders are no longer required to travel. The usefulness of this type of tool is limited to disputes where what is at stake is liquid, in other words, where only the amount to be paid is at issue. For an inventory of the kinds of services offered, see the recent study by the Centre for International Dispute Resolution: “Research into Online Alternative Dispute Resolution: Exploration Report”, March 21, 2003, available at: http://www.justice.vic.gov.au/CA256902000FE154/Lookup/OnlineADR/$file/Research_ADR_Exploration_Report_03.pdf?xml=http://search.justice.vic.gov.au/Issysquery/ir/79f6/3/hilite (last visited on February 1, 2005).

\textsuperscript{246} Vincent Bonnet, Karine Boudaoud, Michael Gagnebin, Jürgen Harms, Thomas Schultz, “Online Dispute Resolution Systems as Web Services”, CUI - University of
illustrates the blind bidding process in a case where the parties are ready to settle at the mid-point if their respective offers differ by $3,000 or less:

<table>
<thead>
<tr>
<th>Offers</th>
<th>Party A</th>
<th>Party B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$5,000</td>
<td>$25,000</td>
</tr>
<tr>
<td></td>
<td>$8,000</td>
<td>$19,000</td>
</tr>
<tr>
<td></td>
<td>$12,000</td>
<td>$15,000</td>
</tr>
</tbody>
</table>

Settlement at $13,500

In some cases, the online negotiation process is subject to a specific timeframe or other structuring conditions (for example, in the Cybersettle process, the parties are allowed to submit only three offers each).

The following table shows the largest wholly online assisted negotiation providers as of December 14, 2002:

<table>
<thead>
<tr>
<th>Service Provider</th>
<th>Types of Conflict</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>AllSettle™</td>
<td>Insurance</td>
<td>Free for consumers. If there is a settlement, the insurer must pay a lump sum of US$200.</td>
</tr>
<tr>
<td>CyberSettle™</td>
<td>Insurance</td>
<td>Only the insurer has to pay US$75 initially. US$100–150 per party if there is a settlement (depending on the amount in question).</td>
</tr>
<tr>
<td>SettlementOnline™</td>
<td>Insurance</td>
<td>US$150 per party if there is a settlement.</td>
</tr>
<tr>
<td>WeCanSettle™</td>
<td>Commercial</td>
<td>£25–£150 per party if a settlement is reached (depending on the amount in question).</td>
</tr>
</tbody>
</table>

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247 In its 2001 report, Consumers International listed a dozen providers offering this type of service in August 2001. Since then, many of the providers have ceased or re-oriented their activities. Others, such as Mediation Arbitration Resolution Services (MARS) and ClickNSettle, simply use their websites as Internet storefronts to advertise the services they offer offline. See Consumers International, Supra, Note 132. Also see: J.W. Goodman, “The Pros and Cons of Online Dispute Resolution: An assessment of Cybermediation Websites”, 2003, available at: http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html (last visited on February 1, 2005).


250 SettlementOnline, http://www.settlementonline.com (last visited on February 1, 2005; this web site is no longer in activity).
(2) **Online mediation, arbitration and hybrid service providers**

Online mediation transposes traditional mediation into an electronic environment. The mediator is assigned to the case by the service provider or the parties, and facilitates the emergence of solutions to the dispute. This can involve the mediator listening to the parties together or separately. Throughout the online procedure, communication and document exchanges take place electronically, such as by email (at Internet Neutrals) or using a secure website (such as the ECODIR platform)\(^{252}\). As in traditional mediation, online mediation is completely voluntary, which means that the parties can withdraw from the process at any time.

Online arbitration is also a transposition of traditional arbitration into cyberspace. As in online mediation, both communication and exchanges of documents and evidence are electronic\(^{253}\). After having heard the claims of the parties in compliance with the rules of procedure established by the provider, the arbitrator deliberates and then delivers an arbitral award that is binding on the parties and enforceable in all of the countries that have signed the New York Convention.

It is difficult to establish the exact number of providers offering this type of service\(^{254}\). and a number of providers do not currently have a sufficiently sophisticated infrastructure to offer mediation or arbitration processes completely online.

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251 WeCanSettle, [https://www.wecansettle.com](https://www.wecansettle.com) (last visited on February 1, 2005; this web site is no longer in activity).

252 “Online mediation is the online form of traditional mediation. A third neutral person with no decision power tries to convince the parties to reach an agreement. The only difference with offline mediation is that the neutral person and the parties always communicate via the Internet. Although there are many ODR providers which offer online mediation, only few cases are solved by such a process, probably because such a system is technologically difficult to set up, as the parties usually ask for highly developed communication means”. V. Bonnet, K. Boudaoud, M. Gagnebin, J. Harms, T. Schultz, *supra*, note 246.

253 “Online arbitration is similar to traditional arbitration, in the sense that a third party chosen by the parties, or nominated by the institution chosen by the parties, renders a decision on the case after having heard the relevant arguments and seen the appropriate evidence... In online arbitration, the parties usually communicate by emails, web-based communication tools and videoconferences”. *Id.*

254 According to the same study, there are now approximately 25 online arbitration service providers. *Id.*
The following table shows the largest wholly online mediation and/or arbitration service providers in operation as of December 14, 2002:

<table>
<thead>
<tr>
<th>Service Provider</th>
<th>Services Offered</th>
<th>Types of Conflicts</th>
<th>Cost (Mediation and Arbitration Only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consensus Mediation</td>
<td>Mediation</td>
<td>Insurance Commercial Labour (stakes under £15,000)</td>
<td>Calculated on a case-by-case basis</td>
</tr>
<tr>
<td>ECODIR</td>
<td>Negotiation, Mediation, Recommendation</td>
<td>Commercial</td>
<td>Free of charge</td>
</tr>
<tr>
<td>Internet Neutrals</td>
<td>Mediation</td>
<td>Commercial</td>
<td>US$250 per party for the first 4 hours and US$125 for each additional hour Mediation can also be carried out by email. The cost varies from US$1–6/minute, depending on the amount at stake</td>
</tr>
<tr>
<td>Online Resolution</td>
<td>Negotiation Mediation Arbitration</td>
<td>Insurance Commercial Labour</td>
<td>Mediation and arbitration : US$50–100/hour (depending on the amount at stake) Minimum of 2 hours</td>
</tr>
<tr>
<td>SquareTrade</td>
<td>Negotiation Mediation</td>
<td>Commercial</td>
<td>US$20 paid only by the party who initiates the procedure if a mediator is assigned to the case</td>
</tr>
</tbody>
</table>

(3) SquareTrade

Founded in 2000, SquareTrade operates almost exclusively in consumer-to-consumer (C2C) electronic commerce. It is a United States company, and offers two levels of dispute resolution services: direct negotiation and mediation. When SquareTrade was launched in March 2000, it was a pilot project, but its partnership with eBay, one of the largest auction sites in cyberspace, quickly brought it a great deal of business. The agreement with eBay was changed into an exclusive contract in August of the same year, and the number of cases submitted to it has been growing steadily since then. To date, over 100,000 disputes have been resolved using the SquareTrade platform.

In order to submit a dispute arising out of an eBay transaction, the complainant has to create a user account in the SquareTrade system. Next,
the very user-friendly procedure encourages an out-of-court settlement at every step.

First, the buyer or seller submits the complaint to SquareTrade by entering all the relevant information on an electronic form. Next, the other party is informed by email that a complaint has been filed against him or her, and he or she is given the option to respond. Note that the other party has no legal obligation and is not bound to answer the complainant’s claims. If the party chooses to respond, however, SquareTrade makes the complaint and response forms available on a secure site that can be accessed by a password and user name. At that stage, the parties can try to resolve the dispute out of court using SquareTrade’s direct negotiation procedure and technology. SquareTrade’s staff plays no part in any stage of the negotiations.

It should be noted that the negotiation process uses electronic forms designed to help the parties identify problems and solutions that could lead to resolution of the dispute.

If the parties are unable to find common ground, they can ask SquareTrade to assign a mediator, which involves paying a modest fee. The mediator helps the parties by suggesting solutions to the dispute in light of their interests and the specific circumstances of the case. The reasoning behind the suggestions is also conveyed to the parties.

If the parties come to an agreement before or after the mediator takes action, the dispute is resolved and the parties are sent a document notifying them of the solution. The agreement can become binding if both parties so agree. However, it remains confidential and is not posted on SquareTrade’s public site.

The SquareTrade system has shown that disputes between consumers can be resolved online. It has also shown the usefulness of a structured negotiation system in which the consumer is, in some way, guided by technology. Better yet, SquareTrade continues to show that the simple intervention of a neutral third party, even if it is only a system that sends emails without human intervention, can help parties to resolve disputes. Indeed, according to the company, most of the disputes resolved using the system are settled before a mediator has to be assigned.

The SquareTrade system’s simplicity is elegant. However, it sacrifices much of the potential of online ADR because it limits its services to negotiation
and mediation. This leaves out the benefits, as well as the problems, of a system that can end with a binding decision.

C. The ECODIR platform

The Electronic COnsumer DIspute Resolution (ECODIR) project is a product of the European Commission’s desire to improve European consumers’ access to justice. Its primary objective is to develop a dispute resolution tool that is easy for Internet consumers to access, but it is also designed to explore the future of online resolution of disputes between consumers and sellers on the Internet.

(1) Summary of the ECODIR dispute resolution process

The ECODIR project is a joint venture of the Centre de Recherches Informatique et Droit (CRID) at the University of Namur, the Centre National de la Recherche Scientifique (CNRS), the University of Montreal’s Centre de Recherche en Droit Public (CRDP), and the University College Dublin Faculty of Law. The dispute resolution process is free of charge and voluntary; the parties can withdraw at any point.

The ECODIR resolution process is intended to apply to any transaction between consumers and sellers on the Internet so that all types of small disputes can be settled in the same environment where they arose easily, quickly and economically.

The system allows sellers and consumers to resolve disputes in three stages (negotiation, mediation and recommendation) as is illustrated more fully below:

![Diagram of ECODIR process]

Source: www.ecodir.org

The three-stage process is designed to maximize the chances that the parties will come to an agreement quickly. The parties begin by negotiating, but if they do not manage to settle, a mediator is appointed by the Secretariat to help them so that they can find a solution. The neutral third party who is
appointed has the obligation to assist the parties in an independent and impartial manner. The process is confidential and voluntary.

The parties can choose to withdraw at any time and submit the dispute to the courts. The procedure complies with the principles of transparency and the adversarial system. It also meets the highest standards of security and confidentiality.

One of ECODIR’s objectives is to develop a dispute resolution tool that is flexible, speedy and accessible to consumers entering into contracts on the Internet. In order to achieve this, the consortium responsible for the project sought the assistance of eResolution. Under the direction of the CRDP, eResolution designed and built a technological platform tailored to meet the specific needs identified by the ECODIR consortium. The first phase of the platform was launched in October 2001.

(2) The stages of the ECODIR procedure

Before accessing the ECODIR dispute resolution platform, users have to create a confidential personal account in which all relevant information (name, addresses, password) must be entered for subsequent visits to the platform, in compliance with Article 3(a) of the ECODIR Rules.
The user has to enter and confirm the information, and then accept the terms and conditions governing use of the platform. If they are not accepted, access will be denied.

In order to authenticate the user’s identity, a message is sent automatically to the email address that the user provided in the registration form. The automatic message also contains instructions for the user on how to activate the account and access the dispute resolution platform. The account can be activated simply by clicking on a hyperlink in the email.
Once the account is activated, the user can access the ECODIR dispute resolution platform, which is based on electronic forms that streamline the process of describing the problem and proposing solutions.

The platform contains the complete procedure, in other words, it automates the ECODIR Rules. However, users can consult the rules at any point in the dispute resolution process by clicking on the appropriate icon.

As mentioned above, the dispute resolution process is divided into three distinct stages: negotiation, mediation and finally recommendation.

Before beginning the negotiation stage, the first party is asked to provide contact information on both parties (names of key contacts, street addresses, telephone and fax numbers, email addresses, etc.).

Next, in compliance with Article 3(a)(2) of the ECODIR Rules, the first party has to complete the description and proposal forms. This involves first
explaining the problem by checking the boxes that most accurately describe the nature of the dispute with the second party. Naturally, the first party can provide additional details in a box provided for that purpose at the end of the form. For example, the details could include the objective of the transaction, reference numbers (invoices, confirmation, etc.), and a description of what has been done to solve the problem. The user can also append any documents supporting the claims using the uploading tool that we will describe in greater detail below.

Note that the user is required to confirm the accuracy of the information entered at each step in the process. This makes it possible to revise the information before submitting it and going on to the next step.

Once the problem has been described, the first party is invited to submit an initial proposal to settle the dispute. This proactive approach greatly increases the chances of a rapid and mutually advantageous settlement. Any proposal accepted by the second party can lead to a settlement that is binding on the parties if they so desire.

The information on this page can be accessed by all of the parties involved in the case, including the mediator if and as soon as one is appointed to the case.
As we mentioned above, the parties can append any relevant document in support of their claims. The tool can upload documents saved in .RTF (Rich Text Format), .PDF (Portable Document Format), .TXT (Plain Text), as well as images in .TIFF (Tagged Image File Format), JPEG (Joint Photographic Expert Group) and .GIF (Graphic Interchange Format).

When the upload is complete, the first party can submit the case. It is important to note that at any point before the case is submitted, the first party can change the information entered and the evidence appended.

Next, the first party has to wait for the second party’s answer. What appears on screen is the proposal chart, the platform’s primary tool for helping parties resolve their disputes.

When the first party submits the case to the ECODIR Secretariat, the second party automatically receives an email notification that a complaint has been filed and requesting that the second party create a user account and try to negotiate with the first party. The second party has seven days to answer the
invitation to negotiate with the first party, which requires going through the same process as the first party (creating a user account, activating it, etc.) before being able to access the platform. Note that in accordance with Article 3(a)(4) of the ECODIR Rules, if there is no answer within the time set, the second party is presumed to have refused to negotiate.

If the second party agrees to negotiate, it can give its own version of the facts and accept or reject the first party’s proposal, issue a counter-offer based on the first party’s proposal or make a new proposal.

When the second party has advanced a proposal and appended the relevant documents (if applicable), the first party is automatically notified by email and asked to look at the second party’s proposal.

At this stage, the first party has three choices. First, it could accept the second party’s proposal, in which case an automatic message will be sent to the latter and the case will be closed, in accordance with Article 3(a)(5) of the ECODIR Rules.
Second, if the first party finds that the second party’s proposal is unacceptable, it can continue negotiating and respond to the second party’s proposal. Third, if the first party finds the proposal unsatisfactory and considers it futile to continue negotiating with the second party, the first party can request that a mediator be appointed to the case. In every scenario, under Article 3(a)(8) of the ECODIR Rules, the parties have 18 days to try to negotiate a settlement from the time the user account is created by the first party. If there is no settlement or if one of the parties requests mediation, then when the deadline is reached, an automatic message is sent to both parties, inviting them to begin the mediation stage or close the case.

The mediation request is the first point at which the Secretariat takes action. The Secretariat has to contact a mediator, check his or her independence and impartiality with respect to the parties, and finally appoint him or her to the case. In compliance with Article 5 of the ECODIR Rules, the appointment of the mediator must take into account his or her expertise, geographical location and language skills.

Once the mediator is appointed, he or she can access the case at any time to consult the parties’ claims, proposals and appended documents.
Before making a proposal, the mediator can choose to send a message to the parties and request additional information from them. An internal messaging system allows the parties to exchange confidential information safely because the messages remain in the platform’s database and never travel over the Internet outside of secure sessions. The mediator can choose to send a message to either party. Every message sent by one of the parties is also sent to the mediator automatically.

When the mediator considers that he or she has enough information, he or she can propose one or more solutions to the dispute. The mediator is free to base recommendations on the parties’ past proposals.

Next, the parties can respond to the proposal by accepting, rejecting or changing it. It is also possible to send messages to the mediator, for example, in order to obtain further information.

Note that if the parties do not come to an agreement within 15 days after mediation begins, the recommendation stage commences. In compliance with Article 3(c)(2) of the ECODIR Rules, the mediator has four days from the beginning of the recommendation stage to send the parties a recommendation with reasons.
The parties then have seven days to accept the mediator’s recommendation or else close the case. If the recommendation is accepted, the dispute is resolved. As in all the other steps in the process, all of the parties to the case (as well as the Secretariat and mediator) are notified by email that the parties have resolved the dispute. Since it is a consensual process, the parties are not bound by the mediator’s recommendation unless, of course, they decide otherwise, which is possible depending on the circumstances.

The Secretariat contacts the parties 30 days after the dispute is resolved to ensure that the agreement has been implemented. If not, the Secretariat asks the parties to explain why.

D. The domain name platform

(1) The dispute resolution process for domain names

The Uniform Domain Name Dispute Resolution Policy (UDRP) procedure allows anyone to claim intellectual property rights against the holder of a domain name registration. The procedure takes place in front of an ad hoc
administrative panel of independent decision-makers appointed specifically to the case by one of the bodies certified by the Internet Corporation for Assigned Names and Numbers (ICANN). It is not the ICANN-certified body but the one- or three-member panel (depending on the case) that rules on the claim.

Given the relative simplicity of the disputes likely to be submitted and the requirements of speed and low cost underlying recourse to *sui generis* justice, the UDRP procedure excludes hearings but provides for an evidence-based process in which the parties are asked to submit their evidence and respective points of view exclusively in writing. This has the immense advantage of resolving disputes over domain name registration at a fraction of the cost normally associated with judicial proceedings before a state court. It also makes it possible to obtain a decision within 45-60 days of filing a claim, which is unimaginably fast compared to traditional judicial mechanisms.

Another point to be noted is that the procedure eliminates all problems related to implementing and enforcing decisions. The mechanism, which could be considered self-executing, is very simple. A domain name holder is bound by the registration contract with one of the many registrars now certified by ICANN. However, before being certified by ICANN, the registrar had to agree to adopt the URDP and insert the relevant clause in its registration contracts. The registration contracts are membership contracts, which means that the UDRP ends up applying to all unreserved generic top-level domain names (gTLDs). In accordance with the Policy, which gives

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260 With respect to simplicity, Note that since recourse is limited to the cancellation or transfer of domain name registration, issues pertaining to evidence and assessment of damages are excluded from the beginning.

261 It costs around US$1250 for a claimant to obtain a decision in a procedure involving a single decision-maker. Advocacy costs, for example, if a lawyer is assigned to the case, are in addition and cannot be reimbursed to the winning party, at least through this procedure.

262 Note that ICANN’s monopoly over this type of domain is contested and that generic “top-level” suffix domains have been established in the private sector. See in particular the New Net site at: [http://www.new.net](http://www.new.net) (last visited on February 1, 2005). ICANN has also created a series of new top-level suffixes: .aero (for the aeronautics industry), .biz (for business activities), .coop (for co-operatives), .info (for various activities related to the media), .museum (for museums), .name (for surnames), and .pro (for professionals). The UDRP procedure’s scope is extended in accordance with the contract between the administrator and ICANN. Indeed, most administrators have
recourse to third parties who consider that their intellectual property rights have been violated, the registrar executes decisions by carrying out the cancellation or transfer directly, in compliance with the procedure. The procedure therefore has the advantage of eliminating problems that commonly arise in international trade when judicial decisions must be enforced across borders. Those who engage in international trade usually try to avoid such problems by using arbitration, which is a legal institution that the UDRP procedure writers decided not to employ, though they did find inspiration in some of its features.\(^{263}\)

There are four conditions that have to be met for claimants to be successful. Claimants, who alone have the full burden of proof, must show:

- That they own the rights to the trademark in question;
- That the contested domain name is identical or similar to the trademark;
- That the owner of the domain name has no legitimate interest or right in the contested domain name; and
- That the domain name was registered and is used in bad faith.

With respect to the first condition, in order to use the UDRP procedure, claimants first have to prove that they have a right to the trademark or service mark that is associated with the domain name of which the registration is challenged. Note that if it is a registered trademark, the

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Note that the gTLD-MoU provided for recourse to arbitration in addition to the “administrative” mechanism: Internet Ad Hoc Committee & Internet Society, supra, note 85. Moreover, recourse to arbitration in law for domain name disputes was adopted, with the exclusion of the “administrative” mechanism, by the authority responsible for managing the Hong Kong domain, namely, the Hong Kong Domain Name Registration Company Limited, http://www.hkdnr.net.hk/ (last visited on February 1, 2005).

\(^{263}\)
certificate can come from any country. If the rights are based on use, the issue is more complex.

Common law trademark cases based on national law covering usage rather than registration have caused much ink to flow because of the resulting decisions under the UDRP procedure. The texts themselves never mention common law trademarks, which has given the false impression that the UDRP procedure applies only in cases where the trademark has been registered. Yet there is nothing in the relevant provisions that excludes common law trademarks. Thus, it is possible to successfully challenge the registration of a domain name associated with an unregistered trademark if one proves that it is a common law trademark. It should be noted that while the simple fact of registering a domain name gives the owner no right of property, its use over time can be taken into account as relevant evidence of a common law trademark.

The protection of famous names using the UDRP procedure was based generally on the common law notion of trademark. No matter what the validity of such decisions and given the relevance of the rules of law applicable under the UDRP procedure, it seems that a person who is famous in a civil law country but unknown in a common law country cannot claim trademark rights based on usage because such rights cannot be recognized independently unless we are to believe that the UDRP procedure vests rights that have no other legal foundation.

With respect to geographical names, the decision rendered under the auspices of WIPO in the Barcelona.com case has been widely criticized, and with reason. Indeed, WIPO had to review the issue in its second consultation process precisely because geographical names were excluded

264 Policy, supra, note 89, article 4(a)(i): “a trademark or service mark in which the complainant has rights”. Nothing indicates that the right to the trademark or service mark in question has to be based on registration.

265 In Canada, the legislation provides that it is use, not registration, that gives one the right to a trademark.

from the first consultation, which resulted in the UDRP procedure. The same applies to the use and protection of personal names as such.

The second condition refers to the degree of similarity between the trademark and the domain name. Such confusion is generally considered to exist when the domain name leads users to believe that they will be directed to a web page controlled or sponsored by the owner of the trademark.

Two epiphenomena have to be mentioned in relation to the second condition: domain names that are used as addresses for sites that criticize the trademark holder (e.g., ThisCompanyIsStupid.com) and domain names with deliberate typos designed to direct users to sites they did not want to visit. While the second category of epiphenomenon is generally associated with bad faith, the first often corresponds to freedom of speech, which is recognized as a right or legitimate interest.

Although the contested domain name may be identical or similar to the claimant’s trademark, its owner can have a right to use or legitimate interest in using it. The Policy takes care to list examples of circumstances that respondents can claim show their legitimate interest:

- You have used the domain name or a similar name to offer goods or services in good faith, or undertaken major preparations to this effect, before being informed of the dispute;
- You are known by the domain name in question even though you have not acquired the rights to a corresponding trademark; or
- You are making legitimate non-commercial use of the domain name, without intent for commercial gain or to misdirect consumers or tarnish the trademark.

The way the last example of a “defence” is formulated in the original text is far from clear, and this has had results that could at best be described as annoying. A fairly reasonable interpretation of the passage suggests that the non-commercial use defence is not valid if the use tarnishes the trademark in question. At first glance, this restricts the scope of freedom of expression as defined and protected in some national legislation. This problem was raised

267 Policy, supra, note 89, article 4(c) (paraphrase).
268 “You are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.” Id., Article 4(c)(iii).
The Online Dispute Resolution

when the Policy was in the final stage of preparation, but ICANN staff simply defined the notion of “tarnishment” as limited to situations in which there is “intent for commercial gain”\(^{269}\). This means that it is perfectly permissible to tarnish a trademark in good faith and legitimately so long as one makes no profit from doing so. Instead of clarifying the provision, the staff suggested taking action to make its interpretation public\(^{270}\). This did not happen, so now a surprisingly large number of critical but apparently non-profit sites have had their Internet addresses transferred at the end of UDRP procedures\(^{271}\).

Since the claimant has by hypothesis demonstrated the respondent’s lack of right or legitimate interest, the arbitrator’s analysis normally focuses on the last criterion, that of bad faith.

The Policy also gives examples of circumstances indicating bad faith with respect to domain name registration and use:

- The facts show that the respondent registered or acquired the domain name essentially for the purpose of selling or renting it, or otherwise transferring the registration to the complainant who holds the trademark or to one of the complainant’s competitors in return for valuable consideration exceeding the costs directly related to the domain name;

\(^{269}\) “In view of the comments, one detail of the policy's language should be emphasized. Several commentators indicated that the concept of ‘tarnishment’ in paragraph 4(c)(iii) might be misunderstood by those not familiar with United States law or might otherwise be applied inappropriately to non-commercial uses of parody names and the like. Staff is not convinced this is the case, but in any event wishes to point out that ‘tarnishment’ in paragraph 4(c)(iii) is limited to acts done with intent to commercially gain.” Internet Corporation for Assigned Names and Numbers, “Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy”, 25 October 1999, available at: http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm (last visited on February 1, 2005).

\(^{270}\) “Staff intends to take steps to publicize this point.” Id.

• The respondent registered the domain name in order to prevent the trademark holder in question from using it as a domain name, and makes a practice of such behaviour;

• The respondent registered the domain name essentially in order to disrupt the business of a competitor; or

• The respondent tried to attract, for commercial gain, Internet users to a site it controls by creating a probability of confusion with the claimant’s trademark with respect to the source, sponsor, affiliation or approval of the site or a product or service offered there.²⁷²

Note that in general the registration of a number of domain names by the respondent in a UDRP procedure is not considered sufficient to show bad faith. Note also how heavy the burden of proof is and how difficult it is to take evidence under the current procedure. As we have pointed out, in principle, the claimant in a UDRP procedure carries the complete burden of proof. Yet how can the respondent’s bad faith be proven if the latter provides no documentation? It is so difficult for the claimant to prove bad faith that arbitrators are encouraged to proceed by inference on the basis of circumstantial proof, which is sometimes very limited or even non-existent. In order to ensure the consistency of decisions and thus also justice, the UDRP procedure needs to be more specific about the criteria and manner by which the claimant can discharge the burden of proof²⁷³.

Before looking in greater detail at the UDRP procedure, we will end this section by discussing the apparent partiality of some providers and the phenomenon that it creates, namely forum shopping, which are two of the largest sources of criticism of the UDRP procedure²⁷⁴. A number of studies,

²⁷² Uniform Domain Name Dispute Resolution Policy, supra, note 89, article 4(b) (paraphrase).
²⁷³ Perhaps this burden should be reversed under conditions to be determined.
²⁷⁴ As Annette Kur notes, there are others: “Although the introduction of the UDRP has been a success story at least in regard of the number of conflicts which have been submitted for decision by UDRP Panels, the Policy was and remains the subject of concern and controversy. It was feared that the system might be misused by rightholders, in particular big companies, in order to obstruct the selection and use of domain names by small business and private parties, that the Policy was not formulated clearly enough, and that it did not furnish a sufficient ‘legal’ basis for the settlement of conflicts. On the other hand, it was argued that the policy had too many loopholes to function properly from the point of view of rightholders. It was inter alia for the last-mentioned reason that WIPO initiated its second domain name process, in
the first of which was published in November 2000, have gradually shown that the claimant success rate is considerably higher with some service providers than with others. For example, WIPO and NAF had higher rates of complainant success than eResolution. The difference can be explained by an “open” interpretation of the texts, which was favourable to complainants at WIPO and NAF but closer to the letter and the spirit at eResolution. Fear of forum shopping and the appearance of partiality were confirmed in August 2001 in an in-depth and widely distributed study by Michael Geist, who showed that a claimant had a 82.2% chance of winning with WIPO, 82.9% with NAF but only 63.4% with eResolution. This was reflected in the respective market shares of the providers: WIPO had 58%, NAF 34% and eResolution 7%.

The numbers are disturbing in themselves, but the study goes on to show that the WIPO and NAF panellists with the highest proportion of decisions in favour of claimants were on average appointed more often. For example, according to the study, the six panellists most often appointed by NAF rendered decisions in 53% of the provider’s cases, with an average of

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275 Milton Müller, “Rough Justice: An Analysis of ICANN’s Uniform Dispute Resolution Policy”, Syracuse University School of Information Studies, November 2000, available at: http://dcc.syr.edu/miscarticles/roughjustice.pdf (last visited on February 1, 2005). The study was the first to show that claimants win much more often with certain suppliers than with others. It concluded that the former suppliers could therefore receive a growing number of cases, giving rise to doubts about the impartiality of the system.

276 Id. The number cases processed by the CPR was considered too small to be given a statistical analysis. See: http://www.cpradr.org/ (last visited on February 1, 2005).

277 “Simply put, complainants win more frequently with WIPO and the NAF than with eResolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2% of the time with the WIPO, 82.9% of the time with the NAF, but only 63.4% of the time with eResolution. Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules, and low-key marketing, WIPO commands 58% of the UDRP caseload, compared with 34% for the NAF and a paltry 7% for eResolution”. Michael Geist, “Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP”, August 2001, p. 6, source: http://aix1.uottawa.ca/~geist/geistudrp.pdf (last visited on February 1, 2005).

278 Id., p. 8.
94% of decisions in the claimant’s favour\textsuperscript{279}! These data have been confirmed with the passage of time, as can be seen in a new statistical analysis published in February 2002\textsuperscript{280}.

There is no point in dwelling on the problem of prejudice in application of the Policy because in matters of justice the mere appearance of partiality is sufficient to render the process invalid. The numbers speak for themselves; clearly, the system has to be reformed. The arguments in favour of having providers compete with one another have to do with better quality service, market-controlled prices and free choice for all users. The only way to meet these objectives while avoiding the current problem is to involve the claimants and respondents in selecting the provider. This would require a larger number of providers and recourse to a third party (or the random choice of an algorithm) in case of disagreement. Competition would then have the specific and commendable effect of encouraging providers to lean to neither one side nor the other.

\section*{(2) The procedure using eResolution’s online platform}

We will now describe the domain name dispute resolution process offered by eResolution from January 1, 2000 to November 30, 2001.

\begin{itemize}
\item \textsuperscript{279} Id.
\end{itemize}
eResolution was one of the organizations accredited by ICANN in January 2000 to offer resolution services for domain name disputes. Even though the company ceased operations in November 2001, it remains today the only one to have offered the whole procedure completely online.

Parties to a dispute could use eResolution’s website to find all the information required to follow the resolution process for domain name disputes: the procedure and applicable rules, claim and response forms, deadlines, steps, relevant documents, etc. Only the eResolution Clerk, parties in question and panel members assigned to the case had access at all times to the relevant documents, evidence and information. The information was exchanged electronically in a secure environment. The system met the criteria of simplicity, user-friendliness and flexibility that must be fulfilled by ODR mechanisms.
Before accessing the dispute resolution platform, the parties had to create a user account. The mandatory fields included a user name and password, both of which were needed for any subsequent visits to the platform.

Once that was done, the parties received a message confirming the creation of their respective user accounts and asking them to complete the complaint or response form, as applicable.

The whole procedure was based on an electronic site reserved for the case and pre-established forms. The complainant could go from one part of the form to the next using a navigation bar at the top of the form pages. An automatic save tool made it possible to complete the form over several visits.

All of the elements that had to appear in the complaint in compliance with Article 3 of ICANN’s Rules for URDP were incorporated into the form developed by eResolution. Thus, on page 1A of the complaint form, complainants first had to say whether they wished the dispute to be resolved by a single expert or a three-member panel. When a three-member panel was chosen, complainants were required to provide the names and contact information of three candidates to serve on the panel. The candidates in question could be chosen from eResolution’s list of experts or from the list of experts of any other organization accredited by ICANN.
Next, complainants had to provide their names, postal and electronic addresses, and telephone and fax numbers. They also had to enter the name and contact information of any representatives authorized to act on their behalf in the course of the administrative procedure. The Clerk contacted the authorized representative throughout the procedure using a secure site and other forms of communication (email, fax, messenger, etc.), depending on the circumstances.

In the third part of the form, complainants had to provide the name of the domain name holder (the respondent) and other relevant information, such as the respondent’s postal and electronic addresses and telephone and fax numbers. eResolution’s Clerk used the information to send the complaint form to the respondent.
After they had stated the domain name the registration of which was challenged and where the domain name was registered, claimants were asked to state the grounds on which the complaint was based. Under Article 3(b)(ix) of the Rules for UDRP and in compliance with Article 4(a) of the Policy, complainants first had to establish that they owned the rights to the trademark. They then had to describe how the domain name in question was identical or very similar to the trademark and that this resulted in confusion with the trademark.

In compliance with Article 4(c) of the Policy, complainants then had to explain why the respondent should be considered to have no legitimate right or interest in the domain name.

Finally, complainants had to say why they thought the domain name should be considered to have been registered and used in bad faith. The conditions to be met to prove such a complaint are set out in Article 4(b) of the Policy.

Next, complainants had to choose among the solutions available: cancellation or transfer of registration of the domain name. The complainant also had to note whether any other judicial proceedings concerning the domain name were ongoing or completed.
A secure online payment tool enabled complainants to pay the fees for the administrative proceedings directly online. The fee varied depending on the number of domain names in question, the size of the panel of experts (one or three members) and the forms of communication chosen (email, secure eResolution site, fax, messenger, etc.).

When complainants had finished stating the basis for their complaints, they could append all relevant documents in support of the claims, as required under Article 4(a) of the Policy (identity or similarity of the contested domain name and a trademark held by the complainant, the respondent’s lack of legitimate right or interest, and the respondent’s registration and use in bad faith). The platform could upload documents saved in .RTF (Rich Text Format), .PDF (Portable Document Format), .TXT (Plain Text), and
If a required document existed only on paper, eResolution provided the parties with fax numbers where they could send a copy. The Secretariat received the documents in digital form, added them to the list of documents uploaded by the complainant, and made them available on the case’s secure site.

Finally, complainants had to choose one of the two specially designated fora (the head office of the domain name registration office or the respondent’s address as it appeared in the domain name registration contract and indexed...
in the *Whois* database), or both fora, if what was being challenged was an administrative decision to cancel or transfer registration of the domain name.

Once the form was completed, complainants could submit their complaints to the eResolution Secretariat. If certain sections of the form had been left blank, a window appeared specifying which fields had to be completed.
When the complaint was received (electronically and on paper, in compliance with Article 3(b) of the Rules for UDRP), eResolution’s clerks studied the form to ensure that it was in administrative compliance with the Policy and Rules for UDRP. If it was, then eResolution notified the respondent that a complaint had been filed and that a response was required within 20 days. The respondent had to complete the same steps described above to send the response to the eResolution Clerk.

Once the complaint and response forms had been received, the Clerk had five days to appoint an administrative panel. In order to ensure independence and in compliance with Article 7 of the Rules for UDRP, the expert(s) selected to resolve the dispute had to sign a declaration of independence and impartiality.

At that point, the Secretariat sent a user name and password to the panel so that it could access the whole case. Except under exceptional circumstances, the panel had to render a decision within 14 days of its appointment. The decision had to be in writing, and include reasons, the date it was rendered and the names of the panel member or members.

Within three days of receiving the decision, eResolution loaded it onto its website and sent the address to both parties, the domain name registration office in question and ICANN. It was possible to block implementation of the decision by instituting legal proceedings before a competent court within
10 days of notice of the decision\textsuperscript{281}. If the administrative decision was not challenged, it was implemented 10 days after notice had been sent to the parties, registration office and ICANN.

All of the proceedings were configured around the case’s private site. Throughout the procedure, eResolution played the role of clerk and secretary of the “court”, receiving complaints, collecting evidence and sending the files to the panel. At the end of the proceedings, in other words, 45–60 days after the complaint was filed, eResolution sent the decision to the parties concerned.

E. Technological considerations

ODR software must be designed to make the dispute resolution process faster and more effective than traditional justice. It can take advantage of the potential of the most recent technological advances in order to facilitate case processing for all concerned. Software solutions can be used to transpose the whole proceedings (from the filing of the complaint to the rendering of the final decision) online, or as a means of assisting traditional dispute resolution.

It should be noted that such software solutions can take many different forms depending on the procedural requirements (negotiation, mediation, arbitration) and the context in which they are used (B2B or B2C electronic commerce, domain names, etc.). Thus, it is important to take these variables into account when designing ODR systems.

Such technological platforms can meet very strict procedural requirements yet also be used for more flexible procedures, such as negotiation and mediation. Some system components are unavoidable, but others are not essential though they add value to ODR.

ODR platforms are based on document management systems. A document management system is a set of computer means (equipment, software, methods, processes, etc.) used to manage the complete life cycle of an electronic document (text, image, sound, etc.), from its creation to its destruction and including changes to it, publication, distribution, filing and tracking, so as to optimize access to the document, information it contains

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{281} Over 60 decisions were challenged. For a list of UDRP decisions challenged in court, see: \url{http://www.udrplaw.net/UDRPappeals.htm} (last visited on February 1, 2005).
\end{enumerate}
\end{footnotesize}
The Online Dispute Resolution

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and information it concerns. The architecture of an ODR platform has three components:

• The user component: the relationship between platform users has to be provided for and defined (for example, is it a simple complainant—respondent relationship or a complex relationship involving a complainant and a respondent with a representative?).

• The documentary component: some systems can allow users to upload documents in specific formats (.rtf and .pdf, for example) and store them temporarily in a personal location before entering them in the file.

• The procedural component: rules of procedure can be incorporated into the platform. It is possible for the parties to engage in two or more procedures at the same time (for example, arbitration and negotiation), and this component can also include a history of the events in the form of a table recording all of the events and actions in the case, their nature, when they occurred, etc.

The components can vary, depending on the context in which the ODR system is deployed.

In addition to its technological architecture, the dispute resolution platform has to contain a library of forms and authentication mechanisms for establishing information, such as the time of a transmission and the identity of the sender. The same authentication tools should be used for documents that the parties upload directly onto the platform to support their claims (invoices, letters, etc.).

Like the exchange of correspondence, the filing of evidence must be done in a secure environment accessed using an encrypted connection. In other words, this type of technological platform has to be designed to ensure maximum adaptability and the highest degree of security. We would simply like to note that it is important to use a combination of mechanisms internal to the platform and electronic commerce technology (SSL protocol, firewall, etc.) to maximize the security of exchanges.

282 Paraphrase of the definition at: www.olf.gouv.qc.ca (last visited on February 1, 2005).
There are two types of technology that can promote and facilitate communication between the parties throughout the dispute resolution process.

Asynchronous communication tools include message systems that are internal to the ODR system. Using such a message system ensures that the content does not travel and that the parties always have to use the platform to access it. The parties are notified by email to consult the platform when a specific event occurs, such as the appointment of a panel member to the case, and they can also be reminded of deadlines.

Videoconferencing, teleconferencing and discussion environments are synchronous tools that can increase the effectiveness and user-friendliness of the dispute resolution process, but they are not necessary. They make it possible to bring some human aspects back to the process while reinforcing the feeling that physical travel is not required. However, at present, one of the major obstacles to implementation of videoconferencing and teleconferencing tools is that they require that the user have fairly specialized equipment and knowledge. Imposing such a burden on the user reduces the effectiveness of the dispute resolution mechanism and makes it less user-friendly.

Finally, note that in addition to the reliability requirements, special attention has to be paid to the ergonomics and user-friendliness of the system as described above. It is important to tailor the interfaces to the user (for example, depending on whether the user is inexperienced or expert).

The following list is far from exhaustive, but paints a general picture of the components required for an ODR system to operate smoothly:

- Access to multiple files in the system;
- User-friendly structured navigation;
- Personal space reserved for each user so that documents can be viewed and organized before they are filed;
- Easy access to the library of procedures;
- Multi-format upload filing of digitized documents;

283 “Once parties can see each other and the neutral, some observers have reasoned, little incentive remains to ever bother getting together face to face”. C. Rule, Supra, Note 28, p.53.
• Chronological table of events;
• Protected and hierarchized message system;
• Online user guides, checklists, advice and assistance concerning both the procedure and use of the platform itself;
• Process management that is integrated yet can be broken into modules;
• Incorporation of access control lists and the lightweight directory access protocol (LDAP);
• Incorporation of daybook functions (calendar, reminders, to do lists, etc.).

The following functionalities can improve the ODR procedure:
• Integration of fax capabilities (automated inbound and outbound eFax);
• Audio and video teleconferencing;
• Transcription services (24 hour voice-to-text transcription);
• Online payment.

These components are already easily available at the current stage of technological development. We have to wonder why full use is not yet being made of them.

However, when we look at the markets, with respect to both trust on the Internet and the wild race to constantly upgrade computer equipment and software, we inevitably face the problem of standardization, which is important but perhaps yields way in justice to the issue of future-proofness of equipment and methods. Justice has a major edifice to construct in the information age; why would we lay the foundations using anything but the best tools available?
Appendix A

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international\(^1\) commercial\(^2\) conciliation.

(2) For the purposes of this Law, “conciliator” means a sole conciliator or two or more conciliators, as the case may be.

(3) For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

(4) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

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1 States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:

– Delete the word “international” in paragraph (1) of article 1; and

– Delete paragraphs (4), (5) and (6) of article 1.

2 The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

Draft: Not to be quoted without authors’ permission
(5) For the purposes of this article:
(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;
(b) If a party does not have a place of business, reference is to be made to the party’s habitual residence.

(6) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

(7) The parties are free to agree to exclude the applicability of this Law.

(8) Subject to the provisions of paragraph (9) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreements between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(9) This Law does not apply to:
(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and
(b) […]

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.
Article 4. Commencement of conciliation proceedings

(1) Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

(1) There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

(2) The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:
   (a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or
   (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the

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The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period.
When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.
conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

**Article 6. Conduct of conciliation**

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

**Article 7. Communication between conciliator and parties**

The conciliator may meet or communicate with the parties together or with each of them separately.

**Article 8. Disclosure of information**

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

**Article 9. Confidentiality**

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

**Article 10. Admissibility of evidence in other proceedings**

(1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
(c) Statements or admissions made by a party in the course of the conciliation proceedings;
(d) Proposals made by the conciliator;
(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

**Article 11. Termination of conciliation proceedings**

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;
(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;
(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration;
(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.
Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ...

When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.
Appendix B

UNCITRAL Model Law on International Commercial Arbitration

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

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EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

A. Background to the Model Law
   1. Inadequacy of domestic laws
   2. Disparity between national laws

B. Salient features of the Model Law
   1. Special procedural regime for international commercial arbitration
   2. Arbitration agreement
   3. Composition of arbitral tribunal
   4. Jurisdiction of arbitral tribunal
   5. Conduct of arbitral proceedings
   6. Making of award and termination of proceedings
   7. Recourse against award
   8. Recognition and enforcement of awards

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
(United Nations document A/40/17, Annex I)
CHAPTER I.
GENERAL PROVISIONS

Article 1. Scope of application\(^1\)

1. This Law applies to international commercial\(^2\) arbitration, subject to any agreement in force between this State and any other State or States.

2. The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

3. An arbitration is international if:
   (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
   (b) one of the following places is situated outside the State in which the parties have their places of business:
      (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
      (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
   (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:
   (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
   (b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

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1. Article headings are for reference purposes only and are not to be used for purposes of interpretation.

2. The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
(c) “court” means a body or organ of the judicial system of a State;
(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.
Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II.

ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. 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 provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III.
COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(4) Where, under an appointment procedure agreed upon by the parties,
   (a) a party fails to act as required under such procedure, or
   (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
   (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to
justifiable doubts as to his impartiality or independence. An arbitrator, from
the time of his appointment and throughout the arbitral proceedings, shall
without delay disclose any such circumstances to the parties unless they have
already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to
justifiable doubts as to his impartiality or independence, or if he does not
possess qualifications agreed to by the parties. A party may challenge an
arbitrator appointed by him, or in whose appointment he has participated,
only for reasons of which he becomes aware after the appointment has been
made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator,
subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall,
within fifteen days after becoming aware of the constitution of the arbitral
tribunal or after becoming aware of any circumstance referred to in article
12(2), send a written statement of the reasons for the challenge to the arbitral
tribunal. Unless the challenged arbitrator withdraws from his office or the
other party agrees to the challenge, the arbitral tribunal shall decide on the
challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the
procedure of paragraph (2) of this article is not successful, the challenging
party may request, within thirty days after having received notice of the
decision rejecting the challenge, the court or other authority specified in
article 6 to decide on the challenge, which decision shall be subject to no
appeal; while such a request is pending, the arbitral tribunal, including the
challenged arbitrator, may continue the arbitral proceedings and make an
award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or
for other reasons fails to act without undue delay, his mandate terminates if
he withdraws from his office or if the parties agree on the termination.
Otherwise, if a controversy remains concerning any of these grounds, any
party may request the court or other authority specified in article 6 to decide
on the termination of the mandate, which decision shall be subject to no
appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office
or a party agrees to the termination of the mandate of an arbitrator, this does
not imply acceptance of the validity of any ground referred to in this article
or article 12(2).
Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.
CHAPTER V.
CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties
The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure
(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration
(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings
Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language
(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, 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.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal
   (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
   (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI.
MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(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.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

**Article 33. Correction and interpretation of award; additional award**

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

**CHAPTER VII.
RECOUSE AGAINST AWARD**

**Article 34. Application for setting aside as exclusive recourse against arbitral award**

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:
(a) the party making the application furnishes proof that:
   (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
   (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
   (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
   (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII.
RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

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The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.
(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.
Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration


2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers.

A. BACKGROUND TO THE MODEL LAW

4. The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

1. Inadequacy of domestic laws

5. A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up-to-date

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4 This Note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an earlier draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI - 1985) (United Nations publication, Sales No. E.87.V.4).
and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by a general arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

6. The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties’ ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

2. **Disparity between national laws**

7. Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impractical or impossible to obtain a full and precise account of the law applicable to the arbitration.

8. Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

B. **SALIENT FEATURES OF THE MODEL LAW**

1. **Special procedural regime for international commercial arbitration**

9. The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal
The Online Dispute Resolution

regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

a. Substantive and territorial scope of application

10. The Model Law defines an arbitration as international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1(3)). The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

11. As regards the term “commercial”, no hard and fast definition could be provided. Article 1 contains a note calling for “a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”. The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as “commercial”.

12. Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

13. The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a “foreign” law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a “foreign” law, provided there is no conflict with the few mandatory provisions of

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the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

b. Delimitation of court assistance and supervision

14. As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

15. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

16. Beyond the instances in these two groups, “no court shall intervene, in matters governed by this Law”. This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

2. Arbitration agreement

17. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as “1958 New York Convention”), with a number of useful clarifications added.

a. Definition and form of arbitration agreement

18. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (“compromis”) or a future dispute
The latter type of agreement is presently not given full effect under certain national laws.

19. While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding “telex or other means of telecommunication which provide a record of the agreement”, by covering the submission-type situation of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”, and by providing that “the reference in a contract to a document” (e.g. general conditions) “containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”.

b. Arbitration agreement and the courts

20. Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

21. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

3. Composition of arbitral tribunal

22. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of
recognizing the freedom of the parties to determine, by reference to an existing set of
arbitration rules or by an ad hoc agreement, the procedure to be followed, subject
to fundamental requirements of fairness and justice. Secondly, where the parties
have not used their freedom to lay down the rules of procedure or a particular issue
has not been covered, the Model Law ensures, by providing a set of suppletive rules,
that the arbitration may commence and proceed effectively to the resolution of the
dispute.

23. Where under any procedure, agreed upon by the parties or based upon the
suppletive rules of the Model Law, difficulties arise in the process of appointment,
challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14
provide for assistance by courts or other authorities. In view of the urgency of the
matter and in order to reduce the risk and effect of any dilatory tactics, instant resort
may be had by a party within a short period of time and the decision is not
appealable.

4. Jurisdiction of arbitral tribunal
   a. Competence to rule on own jurisdiction

24. Article 16(1) adopts the two important (not yet generally recognized)
principles of “Kompetenz-Kompetenz” and of separability or autonomy of the
arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including
any objections with respect to the existence or validity of the arbitration agreement.
For that purpose, an arbitration clause shall be treated as an agreement independent
of the other terms of the contract, and a decision by the arbitral tribunal that the
contract is null and void shall not entail ipso jure the invalidity of the arbitration
clause. Detailed provisions in paragraph (2) require that any objections relating to
the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the
very foundation of its mandate and power, is, of course, subject to court control.
Where the arbitral tribunal rules as a preliminary question that it has jurisdiction,
article 16(3) provides for instant court control in order to avoid unnecessary waste
of money and time. However, three procedural safeguards are added to reduce the
risk and effect of dilatory tactics: short time-period for resort to court (30 days),
court decision is not appealable, and discretion of the arbitral tribunal to continue
the proceedings and make an award while the matter is pending with the court. In
those less common cases where the arbitral tribunal combines its decision on
jurisdiction with an award on the merits, judicial review on the question of
jurisdiction is available in setting aside proceedings under article 34 or in
enforcement proceedings under article 36.

b. Power to order interim measures

26. Unlike some national laws, the Model Law empowers the arbitral tribunal,
unless otherwise agreed by the parties, to order any party to take an interim measure
of protection in respect of the subject-matter of the dispute, if so requested by a
party (article 17). It may be noted that the article does not deal with enforcement of
such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

5. **Conduct of arbitral proceedings**

27. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

   a. **Fundamental procedural rights of a party**

28. Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

29. Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24(2)).

   b. **Determination of rules of procedure**

30. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

31. Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the
rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

32. In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

c. Default of a party

33. Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25(c)). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim (article 25(a), (b)).

34. Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

a. Rules applicable to substance of dispute

35. Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law gives the parties a wider range of options as regards the designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.
36. According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases, i.e. including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

b. **Making of award and other decisions**

37. In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

38. Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

39. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits “dissenting opinions”.

7. **Recourse against award**

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

a. **Application for setting aside as exclusive recourse**

41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that “recourse” means actively “attacking” the award; a party is, of course, not precluded from
seeking court control by way of defence in enforcement proceedings (article 36). Furthermore, “recourse” means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

b. Grounds for setting aside

42. As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

43. Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

8. Recognition and enforcement of awards

45. The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.
a. **Towards uniform treatment of all awards irrespective of country of origin**

46. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between “international” and “non-international” awards instead of the traditional line between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

47. By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

b. **Procedural conditions of recognition and enforcement**

48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement (article 35(2)).

c. **Grounds for refusing recognition or enforcement**

50. As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. “the parties to the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.
Appendix C

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
   (a) The duly authenticated original award or a duly certified copy thereof;
   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

**Article VI**

If an application for the setting, aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

**Article VII**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

**Article VIII**

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the
federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;
(b) Accessions in accordance with article IX;
(c) Declarations and notifications under articles I, X and XI;
(d) The date upon which this Convention enters into force in accordance with article XII;
(e) Denunciations and notifications in accordance with article XIII.
Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.
Appendix D

UNIFORM DOMAIN-NAME DISPUTE RESOLUTION POLICY
(As approved by ICANN on October 24, 1999)

1. Purpose. This Uniform Domain Name Dispute Resolution Policy (the “Policy”) has been adopted by the Internet Corporation for Assigned Names and Numbers (“ICANN”), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules of Procedure”), which are available at www.icann.org/udrp/udrp-rules-24oct99.htm, and the selected administrative-dispute-resolution service provider's supplemental rules.

2. Your Representations. By applying to register a domain name, or by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights.

3. Cancellations, Transfers, and Changes. We will cancel, transfer or otherwise make changes to domain name registrations under the following circumstances:
   a. subject to the provisions of Paragraph 8, our receipt of written or appropriate electronic instructions from you or your authorized agent to take such action;
   b. our receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action; and/or
   c. our receipt of a decision of an Administrative Panel requiring such action in any administrative proceeding to which you were a party and which was conducted under this Policy or a later version of this Policy adopted by ICANN. (See Paragraph 4(i) and (k) below.)

We may also cancel, transfer or otherwise make changes to a domain name registration in accordance with the terms of your Registration Agreement or other legal requirements.
4. Mandatory Administrative Proceeding. This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at www.icann.org/udrp/approved-providers.htm (each, a “Provider”).

a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a “complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

b. Evidence of registration and use in bad faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

c. How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint. When you receive a
complaint, you should refer to Paragraph 5 of the Rules of Procedure in determining how your response should be prepared. Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

d. **Selection of Provider.** The complainant shall select the Provider from among those approved by ICANN by submitting the complaint to that Provider. The selected Provider will administer the proceeding, except in cases of consolidation as described in Paragraph 4(f).

e. **Initiation of Proceeding and Process and Appointment of Administrative Panel.** The Rules of Procedure state the process for initiating and conducting a proceeding and for appointing the panel that will decide the dispute (the “Administrative Panel”).

f. **Consolidation.** In the event of multiple disputes between you and a complainant, either you or the complainant may petition to consolidate the disputes before a single Administrative Panel. This petition shall be made to the first Administrative Panel appointed to hear a pending dispute between the parties. This Administrative Panel may consolidate before it any or all such disputes in its sole discretion, provided that the disputes being consolidated are governed by this Policy or a later version of this Policy adopted by ICANN.

g. **Fees.** All fees charged by a Provider in connection with any dispute before an Administrative Panel pursuant to this Policy shall be paid by the complainant, except in cases where you elect to expand the Administrative Panel from one to three panelists as provided in Paragraph 5(b)(iv) of the Rules of Procedure, in which case all fees will be split evenly by you and the complainant.

h. **Our Involvement in Administrative Proceedings.** We do not, and will not, participate in the administration or conduct of any proceeding before an Administrative Panel. In addition, we will not be liable as a result of any decisions rendered by the Administrative Panel.
i. **Remedies.** The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant.

j. **Notification and Publication.** The Provider shall notify us of any decision made by an Administrative Panel with respect to a domain name you have registered with us. All decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision.

k. **Availability of Court Proceedings.** The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

5. **All Other Disputes and Litigation.** All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available.

6. **Our Involvement in Disputes.** We will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not name us as a party or otherwise include us in any such proceeding. In the event that we are named as a party in any such
proceeding, we reserve the right to raise any and all defenses deemed appropriate, and to take any other action necessary to defend ourselves.

7. Maintaining the Status Quo. We will not cancel, transfer, activate, deactivate, or otherwise change the status of any domain name registration under this Policy except as provided in Paragraph 3 above.

8. Transfers During a Dispute.
   a. Transfers of a Domain Name to a New Holder. You may not transfer your domain name registration to another holder (i) during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded; or (ii) during a pending court proceeding or arbitration commenced regarding your domain name unless the party to whom the domain name registration is being transferred agrees, in writing, to be bound by the decision of the court or arbitrator. We reserve the right to cancel any transfer of a domain name registration to another holder that is made in violation of this subparagraph.

   b. Changing Registrars. You may not transfer your domain name registration to another registrar during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded. You may transfer administration of your domain name registration to another registrar during a pending court action or arbitration, provided that the domain name you have registered with us shall continue to be subject to the proceedings commenced against you in accordance with the terms of this Policy. In the event that you transfer a domain name registration to us during the pendency of a court action or arbitration, such dispute shall remain subject to the domain name dispute policy of the registrar from which the domain name registration was transferred.

9. Policy Modifications. We reserve the right to modify this Policy at any time with the permission of ICANN. We will post our revised Policy at <URL> at least thirty (30) calendar days before it becomes effective. Unless this Policy has already been invoked by the submission of a complaint to a Provider, in which event the version of the Policy in effect at the time it was invoked will apply to you until the dispute is over, all such changes will be binding upon you with respect to any domain name registration dispute, whether the dispute arose before, on or after the effective date of our change. In the event that you object to a change in this Policy, your sole remedy is to cancel your domain name registration with us, provided that you will not be entitled to a refund of any fees you paid to us. The revised Policy will apply to you until you cancel your domain name registration.
Appendix E

RULES FOR THE UNIFORM DOMAIN-NAME DISPUTE RESOLUTION POLICY
( THE «RULES»)
(As approved by ICANN on October 24, 1999)

Administrative proceedings for the resolution of disputes under the Uniform Dispute Resolution Policy adopted by ICANN shall be governed by these Rules and also the Supplemental Rules of the Provider administering the proceedings, as posted on its web site.

1. Definitions

In these Rules:

Complainant means the party initiating a complaint concerning a domain-name registration.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

Mutual Jurisdiction means a court jurisdiction at the location of either (a) the principal office of the Registrar (provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name) or (b) the domain-name holder's address as shown for the registration of the domain name in Registrar's Who is database at the time the complaint is submitted to the Provider.

Panel means an administrative panel appointed by a Provider to decide a complaint concerning a domain-name registration.

Panelist means an individual appointed by a Provider to be a member of a Panel.

Party means a Complainant or a Respondent.

Policy means the Uniform Domain Name Dispute Resolution Policy that is incorporated by reference and made a part of the Registration Agreement.

Provider means a dispute-resolution service provider approved by ICANN. A list of such Providers appears at www.icann.org/udrp/approved-providers.htm.

Registrar means the entity with which the Respondent has registered a domain name that is the subject of a complaint.

Registration Agreement means the agreement between a Registrar and a domain-name holder.
Respondent means the holder of a domain-name registration against which a complaint is initiated.

Reverse Domain Name Hijacking means using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name.

Supplemental Rules means the rules adopted by the Provider administering a proceeding to supplement these Rules. Supplemental Rules shall not be inconsistent with the Policy or these Rules and shall cover such topics as fees, word and page limits and guidelines, the means for communicating with the Provider and the Panel, and the form of cover sheets.

2. Communications

(a) When forwarding a complaint to the Respondent, it shall be the Provider's responsibility to employ reasonably available means calculated to achieve actual notice to Respondent. Achieving actual notice, or employing the following measures to do so, shall discharge this responsibility:

(i) sending the complaint to all postal-mail and facsimile addresses (A) shown in the domain name's registration data in Registrar's Who is database for the registered domain-name holder, the technical contact, and the administrative contact and (B) supplied by Registrar to the Provider for the registration's billing contact; and

(ii) sending the complaint in electronic form (including annexes to the extent available in that form) by e-mail to:

(A) the e-mail addresses for those technical, administrative, and billing contacts;

(B) postmaster@<the contested domain name>; and

(C) if the domain name (or “www.” followed by the domain name) resolves to an active web page (other than a generic page the Provider concludes is maintained by a registrar or ISP for parking domain-names registered by multiple domain-name holders), any e-mail address shown or e-mail links on that web page; and

(iii) sending the complaint to any address the Respondent has notified the Provider it prefers and, to the extent practicable, to all other addresses provided to the Provider by Complainant under Paragraph 3(b)(v).

(b) Except as provided in Paragraph 2(a), any written communication to Complainant or Respondent provided for under these Rules shall be made by the preferred means stated by the Complainant or Respondent, respectively (see Paragraphs 3(b)(iii) and 5(b)(iii)), or in the absence of such specification...
(i) by telecopy or facsimile transmission, with a confirmation of transmission; or
(ii) by postal or courier service, postage pre-paid and return receipt requested; or
(iii) electronically via the Internet, provided a record of its transmission is available.

(c) Any communication to the Provider or the Panel shall be made by the means and in the manner (including number of copies) stated in the Provider's Supplemental Rules.

(d) Communications shall be made in the language prescribed in Paragraph 11. E-mail communications should, if practicable, be sent in plaintext.

(e) Either Party may update its contact details by notifying the Provider and the Registrar.

(f) Except as otherwise provided in these Rules, or decided by a Panel, all communications provided for under these Rules shall be deemed to have been made:
   (i) if delivered by telecopy or facsimile transmission, on the date shown on the confirmation of transmission; or
   (ii) if by postal or courier service, on the date marked on the receipt; or
   (iii) if via the Internet, on the date that the communication was transmitted, provided that the date of transmission is verifiable.

(g) Except as otherwise provided in these Rules, all time periods calculated under these Rules to begin when a communication is made shall begin to run on the earliest date that the communication is deemed to have been made in accordance with Paragraph 2(f).

(h) Any communication by
   (i) a Panel to any Party shall be copied to the Provider and to the other Party;
   (ii) the Provider to any Party shall be copied to the other Party; and
   (iii) a Party shall be copied to the other Party, the Panel and the Provider, as the case may be.

(i) It shall be the responsibility of the sender to retain records of the fact and circumstances of sending, which shall be available for inspection by affected parties and for reporting purposes.

(j) In the event a Party sending a communication receives notification of non-delivery of the communication, the Party shall promptly notify the Panel (or, if no Panel is yet appointed, the Provider) of the circumstances of the notification. Further proceedings concerning the communication and any response shall be as directed by the Panel (or the Provider).
3. **The Complaint**

(a) Any person or entity may initiate an administrative proceeding by submitting a complaint in accordance with the Policy and these Rules to any Provider approved by ICANN. (Due to capacity constraints or for other reasons, a Provider's ability to accept complaints may be suspended at times. In that event, the Provider shall refuse the submission. The person or entity may submit the complaint to another Provider.)

(b) The complaint shall be submitted in hard copy and (except to the extent not available for annexes) in electronic form and shall:

(i) Request that the complaint be submitted for decision in accordance with the Policy and these Rules;

(ii) Provide the name, postal and e-mail addresses, and the telephone and telefax numbers of the Complainant and of any representative authorized to act for the Complainant in the administrative proceeding;

(iii) Specify a preferred method for communications directed to the Complainant in the administrative proceeding (including person to be contacted, medium, and address information) for each of (A) electronic-only material and (B) material including hard copy;

(iv) Designate whether Complainant elects to have the dispute decided by a single-member or a three-member Panel and, in the event Complainant elects a three-member Panel, provide the names and contact details of three candidates to serve as one of the Panelists (these candidates may be drawn from any ICANN-approved Provider's list of panelists);

(v) Provide the name of the Respondent (domain-name holder) and all information (including any postal and e-mail addresses and telephone and telefax numbers) known to Complainant regarding how to contact Respondent or any representative of Respondent, including contact information based on pre-complaint dealings, in sufficient detail to allow the Provider to send the complaint as described in Paragraph 2(a);

(vi) Specify the domain name(s) that is/are the subject of the complaint;

(vii) Identify the Registrar(s) with whom the domain name(s) is/are registered at the time the complaint is filed;

(viii) Specify the trademark(s) or service mark(s) on which the complaint is based and, for each mark, describe the goods or services, if any, with which the mark is used (Complainant may also separately describe other goods and services with which it intends, at the time the complaint is submitted, to use the mark in the future.).
(ix) Describe, in accordance with the Policy, the grounds on which the complaint is made including, in particular,

(1) the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and

(2) why the Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the complaint; and

(3) why the domain name(s) should be considered as having been registered and being used in bad faith

(The description should, for elements (2) and (3), discuss any aspects of Paragraphs 4(b) and 4(c) of the Policy that are applicable. The description shall comply with any word or page limit set forth in the Provider's Supplemental Rules.);

(x) Specify, in accordance with the Policy, the remedies sought;

(xi) Identify any other legal proceedings that have been commenced or terminated in connection with or relating to any of the domain name(s) that are the subject of the complaint;

(xii) State that a copy of the complaint, together with the cover sheet as prescribed by the Provider's Supplemental Rules, has been sent or transmitted to the Respondent (domain-name holder), in accordance with Paragraph 2(b);

(xiii) State that Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction;

(xiv) Conclude with the following statement followed by the signature of the Complainant or its authorized representative:

“Complainant agrees that its claims and remedies concerning the registration of the domain name, the dispute, or the dispute's resolution shall be solely against the domain-name holder and waives all such claims and remedies against (a) the dispute-resolution provider and panelists, except in the case of deliberate wrongdoing, (b) the registrar, (c) the registry administrator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.”

“Complainant certifies that the information contained in this Complaint is to the best of Complainant's knowledge complete and accurate, that this Complaint is not being presented for any improper purpose, such as to harass, and that the assertions in this Complaint are warranted under these Rules and under applicable law, as it now
exists or as it may be extended by a good-faith and reasonable argument.”; and

(xv) Annex any documentary or other evidence, including a copy of the Policy applicable to the domain name(s) in dispute and any trademark or service mark registration upon which the complaint relies, together with a schedule indexing such evidence.

(c) The complaint may relate to more than one domain name, provided that the domain names are registered by the same domain-name holder.

4. Notification of Complaint

(a) The Provider shall review the complaint for administrative compliance with the Policy and these Rules and, if in compliance, shall forward the complaint (together with the explanatory cover sheet prescribed by the Provider's Supplemental Rules) to the Respondent, in the manner prescribed by Paragraph 2(a), within three (3) calendar days following receipt of the fees to be paid by the Complainant in accordance with Paragraph 19.

(b) If the Provider finds the complaint to be administratively deficient, it shall promptly notify the Complainant and the Respondent of the nature of the deficiencies identified. The Complainant shall have five (5) calendar days within which to correct any such deficiencies, after which the administrative proceeding will be deemed withdrawn without prejudice to submission of a different complaint by Complainant.

(c) The date of commencement of the administrative proceeding shall be the date on which the Provider completes its responsibilities under Paragraph 2(a) in connection with forwarding the Complaint to the Respondent.

(d) The Provider shall immediately notify the Complainant, the Respondent, the concerned Registrar(s), and ICANN of the date of commencement of the administrative proceeding.

5. The Response

(a) Within twenty (20) days of the date of commencement of the administrative proceeding the Respondent shall submit a response to the Provider.

(b) The response shall be submitted in hard copy and (except to the extent not available for annexes) in electronic form and shall:

(i) Respond specifically to the statements and allegations contained in the complaint and include any and all bases for the Respondent (domain-name holder) to retain registration and use of the disputed domain name (This portion of the response shall comply with any word or page limit set forth in the Provider's Supplemental Rules.).
(ii) Provide the name, postal and e-mail addresses, and the telephone and telefax numbers of the Respondent (domain-name holder) and of any representative authorized to act for the Respondent in the administrative proceeding;

(iii) Specify a preferred method for communications directed to the Respondent in the administrative proceeding (including person to be contacted, medium, and address information) for each of (A) electronic-only material and (B) material including hard copy;

(iv) If Complainant has elected a single-member panel in the Complaint (see Paragraph 3(b)(iv)), state whether Respondent elects instead to have the dispute decided by a three-member panel;

(v) If either Complainant or Respondent elects a three-member Panel, provide the names and contact details of three candidates to serve as one of the Panelists (these candidates may be drawn from any ICANN-approved Provider's list of panelists);

(vi) Identify any other legal proceedings that have been commenced or terminated in connection with or relating to any of the domain name(s) that are the subject of the complaint;

(vii) State that a copy of the response has been sent or transmitted to the Complainant, in accordance with Paragraph 2(b); and

(viii) Conclude with the following statement followed by the signature of the Respondent or its authorized representative:

"Respondent certifies that the information contained in this Response is to the best of Respondent's knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under these Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument."

(ix) Annex any documentary or other evidence upon which the Respondent relies, together with a schedule indexing such documents.

(c) If Complainant has elected to have the dispute decided by a single-member Panel and Respondent elects a three-member Panel, Respondent shall be required to pay one-half of the applicable fee for a three-member Panel as set forth in the Provider's Supplemental Rules. This payment shall be made together with the submission of the response to the Provider. In the event that the required payment is not made, the dispute shall be decided by a single-member Panel.

(d) At the request of the Respondent, the Provider may, in exceptional cases, extend the period of time for the filing of the response. The period may also be extended by written stipulation between the Parties, provided the stipulation is approved by the Provider.
(e) If a Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute based upon the complaint.

6. **Appointment of the Panel and Timing of Decision**
   
   (a) Each Provider shall maintain and publish a publicly available list of panelists and their qualifications.

   (b) If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraphs 3(b)(iv) and 5(b)(iv)), the Provider shall appoint, within five (5) calendar days following receipt of the response by the Provider, or the lapse of the time period for the submission thereof, a single Panelist from its list of panelists. The fees for a single-member Panel shall be paid entirely by the Complainant.

   (c) If either the Complainant or the Respondent elects to have the dispute decided by a three-member Panel, the Provider shall appoint three Panelists in accordance with the procedures identified in Paragraph 6(e). The fees for a three-member Panel shall be paid in their entirety by the Complainant, except where the election for a three-member Panel was made by the Respondent, in which case the applicable fees shall be shared equally between the Parties.

   (d) Unless it has already elected a three-member Panel, the Complainant shall submit to the Provider, within five (5) calendar days of communication of a response in which the Respondent elects a three-member Panel, the names and contact details of three candidates to serve as one of the Panelists. These candidates may be drawn from any ICANN-approved Provider's list of panelists.

   (e) In the event that either the Complainant or the Respondent elects a three-member Panel, the Provider shall endeavor to appoint one Panelist from the list of candidates provided by each of the Complainant and the Respondent. In the event the Provider is unable within five (5) calendar days to secure the appointment of a Panelist on its customary terms from either Party's list of candidates, the Provider shall make that appointment from its list of panelists. The third Panelist shall be appointed by the Provider from a list of five candidates submitted by the Provider to the Parties, the Provider's selection from among the five being made in a manner that reasonably balances the preferences of both Parties, as they may specify to the Provider within five (5) calendar days of the Provider's submission of the five-candidate list to the Parties.

   (f) Once the entire Panel is appointed, the Provider shall notify the Parties of the Panelists appointed and the date by which, absent exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider.
7. Impartiality and Independence

A Panelist shall be impartial and independent and shall have, before accepting appointment, disclosed to the Provider any circumstances giving rise to justifiable doubt as to the Panelist's impartiality or independence. If, at any stage during the administrative proceeding, new circumstances arise that could give rise to justifiable doubt as to the impartiality or independence of the Panelist, that Panelist shall promptly disclose such circumstances to the Provider. In such event, the Provider shall have the discretion to appoint a substitute Panelist.

8. Communication Between Parties and the Panel

No Party or anyone acting on its behalf may have any unilateral communication with the Panel. All communications between a Party and the Panel or the Provider shall be made to a case administrator appointed by the Provider in the manner prescribed in the Provider's Supplemental Rules.

9. Transmission of the File to the Panel

The Provider shall forward the file to the Panel as soon as the Panelist is appointed in the case of a Panel consisting of a single member, or as soon as the last Panelist is appointed in the case of a three-member Panel.

10. General Powers of the Panel

(a) The Panel shall conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules.

(b) In all cases, the Panel shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case.

(c) The Panel shall ensure that the administrative proceeding takes place with due expedition. It may, at the request of a Party or on its own motion, extend, in exceptional cases, a period of time fixed by these Rules or by the Panel.

(d) The Panel shall determine the admissibility, relevance, materiality and weight of the evidence.

(e) A Panel shall decide a request by a Party to consolidate multiple domain name disputes in accordance with the Policy and these Rules.

11. Language of Proceedings

(a) Unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding.

(b) The Panel may order that any documents submitted in languages other than the language of the administrative proceeding be accompanied by a
translation in whole or in part into the language of the administrative proceeding.

12. Further Statements

In addition to the complaint and the response, the Panel may request, in its sole discretion, further statements or documents from either of the Parties.

13. In-Person Hearings

There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.

14. Default

(a) In the event that a Party, in the absence of exceptional circumstances, does not comply with any of the time periods established by these Rules or the Panel, the Panel shall proceed to a decision on the complaint.

(b) If a Party, in the absence of exceptional circumstances, does not comply with any provision of, or requirement under, these Rules or any request from the Panel, the Panel shall draw such inferences therefrom as it considers appropriate.

15. Panel Decisions

(a) A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

(b) In the absence of exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider within fourteen (14) days of its appointment pursuant to Paragraph 6.

(c) In the case of a three-member Panel, the Panel's decision shall be made by a majority.

(d) The Panel's decision shall be in writing, provide the reasons on which it is based, indicate the date on which it was rendered and identify the name(s) of the Panelist(s).

(e) Panel decisions and dissenting opinions shall normally comply with the guidelines as to length set forth in the Provider's Supplemental Rules. Any dissenting opinion shall accompany the majority decision. If the Panel concludes that the dispute is not within the scope of Paragraph 4(a) of the Policy, it shall so state. If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.
16. **Communication of Decision to Parties**

(a) Within three (3) calendar days after receiving the decision from the Panel, the Provider shall communicate the full text of the decision to each Party, the concerned Registrar(s), and ICANN. The concerned Registrar(s) shall immediately communicate to each Party, the Provider, and ICANN the date for the implementation of the decision in accordance with the Policy.

(b) Except if the Panel determines otherwise (see Paragraph 4(j) of the Policy), the Provider shall publish the full decision and the date of its implementation on a publicly accessible web site. In any event, the portion of any decision determining a complaint to have been brought in bad faith (see Paragraph 15(e) of these Rules) shall be published.

17. **Settlement or Other Grounds for Termination**

(a) If, before the Panel's decision, the Parties agree on a settlement, the Panel shall terminate the administrative proceeding.

(b) If, before the Panel's decision is made, it becomes unnecessary or impossible to continue the administrative proceeding for any reason, the Panel shall terminate the administrative proceeding, unless a Party raises justifiable grounds for objection within a period of time to be determined by the Panel.

18. **Effect of Court Proceedings**

(a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision.

(b) In the event that a Party initiates any legal proceedings during the pendency of an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, it shall promptly notify the Panel and the Provider. See Paragraph 8 above.

19. **Fees**

(a) The Complainant shall pay to the Provider an initial fixed fee, in accordance with the Provider's Supplemental Rules, within the time and in the amount required. A Respondent electing under Paragraph 5(b)(iv) to have the dispute decided by a three-member Panel, rather than the single-member Panel elected by the Complainant, shall pay the Provider one-half the fixed fee for a three-member Panel. See Paragraph 5(c). In all other cases, the Complainant shall bear all of the Provider's fees, except as prescribed under Paragraph 19(d). Upon appointment of the Panel, the Provider shall refund the appropriate portion, if any, of the initial fee to the Complainant, as specified in the Provider's Supplemental Rules.
(b) No action shall be taken by the Provider on a complaint until it has received from Complainant the initial fee in accordance with Paragraph 19(a).

(c) If the Provider has not received the fee within ten (10) calendar days of receiving the complaint, the complaint shall be deemed withdrawn and the administrative proceeding terminated.

(d) In exceptional circumstances, for example in the event an in-person hearing is held, the Provider shall request the Parties for the payment of additional fees, which shall be established in agreement with the Parties and the Panel.

20. **Exclusion of Liability**

Except in the case of deliberate wrongdoing, neither the Provider nor a Panelist shall be liable to a Party for any act or omission in connection with any administrative proceeding under these Rules.

21. **Amendments**

The version of these Rules in effect at the time of the submission of the complaint to the Provider shall apply to the administrative proceeding commenced thereby. These Rules may not be amended without the express written approval of ICANN.
Appendix F

ECODIR RESOLUTION RULES

Article 1. Application of the Rules
1. The ECODIR Rules apply where the Parties have agreed to submit to the ECODIR process to try to resolve their dispute.
2. The ECODIR process deals exclusively with disputes arising out of Internet transactions involving at least one consumer (e.g. a consumer and a business or two consumers). Disputes related to illicit content are excluded from its scope as are issues related to corporal damages, family, taxation and intellectual property.

Article 2. Definitions
1. “ECODIR” designates the online consumer dispute resolution organisation whose services are available at the following address: www.ecodir.org.
2. “ECODIR process”, designates ECODIR’s online process composed of three phases, namely negotiation, mediation and recommendation.
3. “Form” designates electronic document forms provided by ECODIR and completed by the Parties and the Mediator during the process.
4. “Secretariat” designates the office of the Clerk of ECODIR.
5. “Secure Site of the case in question” designates the private website storing the set of data, documents and information relevant to the case to which only the Secretariat, the Mediator and the Parties have access with a username and a password.
6. “First Party” designates the party filing an Invitation to Negotiate.
7. “Second Party” designates the party responding to the Invitation to Negotiate.
8. “Mediator” designates the individual appointed by ECODIR, to assist the Parties during the Mediation and the Recommendation Phases.
9. “Settlement” designates the agreement reached by the Parties regarding a dispute.
10. “Consumer” designates an individual.

Article 3. The Process

The Negotiation Phase
1. In order to access the ECODIR platform, the First Party must create a confidential user account.
2. Once the user account is created, the First Party completes the Description and Proposal form available on ECODIR’s website, stating his/her version of the facts and one or more proposed solutions to resolve the dispute. Once completed, this form is submitted to the Secretariat.

3. Once the form is received by the Secretariat, a message is sent automatically to the Second Party. Upon receipt of the invitation to negotiate message, the Second Party shall have seven (7) calendar days to respond to it.

4. If the Second Party does not respond to the invitation within the seven (7) day period, he/she is presumed to have refused to negotiate and the case is terminated.

5. If the Second Party responds to the invitation to negotiate within the seven (7) day period and accepts one of the solutions proposed by the First Party, a message is sent automatically to the First Party and the case is terminated. An Agreement form formalizing the Settlement is generated by the system.

6. If the Second Party responds to the invitation to negotiate and does not accept any of the solutions proposed by the First Party, the Second Party shall indicate his/her allegations and proposed solutions.

7. If none of the solutions proposed initially by the Second Party are accepted by the First Party, one of the Parties can ask for the appointment of a Mediator or both Parties can continue to negotiate.

8. From the creation of the First Party’s user account, the Parties have eighteen (18) calendar days to negotiate and exchange as many proposals and as much information as they wish. After the eighteen (18) day period, if the Parties have not reached a Settlement, a message will be sent to give them the opportunity either to start the Mediation Phase or to terminate the process.

**The Mediation Phase**

1. Once the Parties have agreed to participate in the Mediation Phase, a Mediator is appointed to the case in question by the Secretariat and the Parties are automatically notified. The Mediation Phase begins on the date of the appointment of the Mediator to the case in question.

2. The Mediator is given access to the Secure Site of the case in question to review the information, proposed solutions and arguments exchanged by the Parties during the Negotiation Phase.

3. The Mediator invites the Parties to communicate, exchange documents and arguments.

4. The Mediator’s proposed solutions are submitted to the Parties for their comments.
5. If the Parties select one common solution, the dispute is considered resolved. An Agreement form is prepared by the Mediator to formalise the Settlement. At this stage the case is terminated.

**The Recommendation Phase**

1. If the Parties did not select a common solution among the solutions proposed by the Mediator within fifteen (15) days from the beginning of the Mediation Phase, the Recommendation Phase is initiated.
2. Within four (4) days from the beginning of the Recommendation Phase, the Mediator makes a recommendation and indicates the reasons therefor.
3. Except when the Parties have entered into a valid prior agreement to be bound by the final recommendation of the Mediator, it shall not be legally binding.
4. If the Parties do not approve the final recommendation of the Mediator within seven (7) days following the Recommendation, the case is terminated.
5. If both Parties accept the final recommendation of the Mediator, the recommendation becomes a Settlement. An Agreement form is prepared by the Mediator to formalize the Settlement. At this stage the case is terminated.

**Article 4. Implementation of the Settlement**

Thirty (30) calendar days after the settlement of a case, the Secretariat contacts the Parties to enquire if the Settlement has been implemented. If not, the Parties are invited by the Secretariat to provide reasons.

**Article 5. Appointment of Mediator**

The Mediators field of expertise, geographic location and language proficiency are taken into consideration in their appointment.

**Article 6. Role of the Mediator**

1. The Mediator assists the Parties in an independent and impartial manner in their attempt to reach an amicable settlement to their problem.
2. The Mediator will be guided by principles of fairness and justice, giving consideration to, among other things, the rights and obligations of the Parties and the circumstances surrounding the dispute.
3. The Mediator undertakes not to act as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the process.

**Article 7. Replacement**

1. A Mediator may be replaced in case of death, incapacity, or resignation that is accepted by the Secretariat.
2. As quickly as possible, the Secretariat shall proceed with the appointment of a new Mediator.

3. The new Mediator shall review the information exchanged and continue the process where it was interrupted.

**Article 8. Parties’ Representation and Assistance**

During the ECODIR process, the Parties may be represented or assisted by persons of their choice.

**Article 9. Role of the Parties**

1. The Parties shall exercise their best efforts to reach an agreement.

2. The Parties shall submit proposed solutions for the settlement of the dispute.

3. The Parties shall co-operate in good faith with the Mediator and the other party.

4. The Parties shall respect the confidentiality of the process and information provided by the other party, as established in Article 10 of the present Rules.

**Article 10. Confidentiality**

1. Except if the Parties decide otherwise all settlements reached through ECODIR's website will be kept confidential.

2. Except if the Parties decide otherwise, the Secretariat, the Mediator and the Parties must keep confidential all matters relating to the process and all communications exchanged during the process. Confidentiality extends also to the Settlement, except where its disclosure is necessary for purposes of implementation or enforcement.

3. When the Mediator receives information from a party, he/she will disclose the substance of the information to the other party, unless the party specified that the information must be kept confidential.

4. The Secretariat, the Mediator and the Parties will not disclose any information acquired during the course of the proceeding to any person unless compelled to do so by a court of law.

5. Data might be extracted from cases for the purpose of publishing and circulating anonymous dispute resolution information and statistics.

**Article 11. Communications**

1. The Parties shall communicate with the Secretariat and the Mediator through the case site messaging system.

2. All communications with the Secretariat and the Mediator must be transmitted using the applicable forms when such forms exist. In all cases,
the Mediator shall communicate with the Secretariat through the case site messaging system.

Article 12. Language of the process
1. The communications coming from ECODIR’s Secretariat are available in English.
2. The language of resolution of the dispute is the common language of the Parties. By default, the language of resolution of the dispute will be the language of the transaction that gave rise to the dispute.

Article 13. End of process
The process ends:
1. When the Parties reach a Settlement.
2. When one party or all Parties ask for the termination of the process or otherwise fail to participate in the ECODIR process.
3. If the Parties do not accept the final recommendation made by the Mediator.

Article 14. Settlement
1. At any stage of the process, the Parties may reach a Settlement. The Settlement shall not be legally binding for the Consumer.
2. By agreeing electronically to a solution, the Parties put an end to their dispute.
3. The Settlement is archived and accessible for a period of sixty (60) days.

Article 15. General provisions
1. The Secretariat may amend the ECODIR Rules in consultation with the partners of the ECODIR Project. The Rules in effect at the time of the submission of the Invitation to Negotiate continue to apply until the end of such case.
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