

## 15 ONLINE DISPUTE RESOLUTION AND OMBUDSMANSHIP

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This chapter focuses on the applicability of Online Dispute Resolution (ODR) for a specific dispute resolution mechanism, the Ombudsman. The chapter is based on the experiences and observations of Dr. Frank Fowlie, who served as the Inaugural Ombudsman for the Internet Corporation for Assigned Names and Numbers (ICANN).

It is submitted that ODR is a process that may be applied to Alternative Dispute Resolution (ADR) techniques. Specifically, ODR uses technology, especially the Internet, to augment ADR processes. It has been emphasized that ODR may be applicable to disputes which emanate from either online or real world activities. For example, ODR may be used as a vehicle to handle consumer disputes relating to online purchasing of goods, or it may be used as a resolution system for small claims in direct business to consumer transactions (B2C).

### 1 TWO TYPES OF ONLINE DISPUTE RESOLUTION

There are two basic branches of ODR, both based on the role of technology. The first branch may be called “Technology Based”. Technology-based ODR refers to those systems where technology plays an active role in conducting the dispute resolution. A prominent example of technology-based ODR systems are “blind-bidding” systems. The technology uses multivariate algorithms to help parties arrive at the optimal outcome.

Blind-bidding systems are, for the most part, nascent technologies. They are usually most applicable in situations where there is some tangible and monetary remedy sought by the parties, for example, a refund on a faulty good, or a value for an insurance claim following a car accident. The technology-based system will assist parties to determine Best and Worst Alternatives to a Negotiated Agreement (BATNA and WATNA). The technology receives inputs from the parties, and then draws from them to develop an optimal outcome.

Blind-bidding systems are less likely, as nascent technologies, to be able to provide for the inclusion of the non-quantum based variables, such as apologies, or the creation of new alternative solutions or options beyond the quantum values.

The second branch of ODR consists of technology-assisted solutions. Technology-assisted ODR refers to the use of technology to augment ADR processes that exist independently of the technology. As the following discussion will demonstrate, technology-assisted ODR is well suited for ombudsman work, as its tools allow for an increased efficiency of human-based transactions and activities.

The ICANN Office of the Ombudsman is a good example of a technology-assisted ODR operation. The most important aspect of this position as an ODR provider is the use of an online case management system. The case management system (CMS) facilitates communications and correspondence between complainants, the organization, and the Ombudsman. The CMS augments, but does not replace, the human aspect of the communication.

The ICANN community is an online community. By definition, participants in ICANN are online users, as the role of the organization is to administer the Domain Name System (DNS), which is the addressing backbone of the Internet. Disputes that occur within ICANN may be either in the real world, or online in nature. A unique element of the ICANN Office of the Ombudsman is that it serves a global community. ICANN stakeholders come from every nation in the world and span all twenty-four time zones. As the ICANN Office of the Ombudsman is a sole practitioner office, it would be impossible to be operational twenty-four hours a day to communicate synchronously with complainants. However, using the CMS complainants, the organization and the Ombudsman may engage in asynchronous communication. Asynchronous communication may be described as parties sharing communications that is not a direct real-time conversation. For example, a complainant in Asia may use the CMS to initiate a complaint while the Ombudsman is sleeping in North America; the Ombudsman may then respond to the complainant after office hours have closed in Asia.

The CMS also allows for the collection and analysis of data for statistical reporting. During the case intake process, information such as the country location and category of complaint are recorded. In closing the complaint, the Ombudsman designates the resolution type, and confirms the complaint category. These statistical records help to identify complaint trends which may assist in providing early intervention on systemic issues.

These three technical adjuncts – case management, asynchronous communication, and trend identification – all assist and augment the human-based activity in handling complaints. However, the Ombudsman process is still driven by the human-based activities of investigating; developing questions, options, and recommendations; and communicating findings and reports. Thus, we may conclude that technology-assisted ODR is appropriate for Ombudsmen.

Generally, ODR is a relatively new field in dispute resolution. It remains in its infancy, but it continues to grow in a rapid manner. As ODR has grown, it has begun to codify its activities. For example, in 2009, the Advisory Committee of the National Centre for Technology and Dispute Resolution developed the ‘Online Dispute Resolution Standards of Practice’.<sup>1</sup> These standards inform ODR practitioners about basic rules of practice.

## 2 FOUR PRACTITIONER ROLES IN TECHNOLOGY ASSISTED DISPUTE RESOLUTION

There are four broad categories of practitioners who are well suited to using technology assisted ODR functionalities. These roles include: Online mediators, Online Conflict Managers, Online Conflict Resolvers, and Ombudsmen.

### 2.1 *Online Mediators*

In the first role, ODR practitioners may act as mediators. People in conflict with another party may come to an ODR practitioner and say, “Can you help me to negotiate with the person with whom I am in conflict?” The mediator is somewhat passive in the process, in that they are uniquely a conduit for the flow of communication between the parties and are not at all a protagonist. There are several very good examples of this mediation role.<sup>2</sup>

### 2.2 *Online Conflict Managers*

Second, there is the role of conflict manager. This role kicks in when one party says that there is a problem and requests the neutral third party to assist in keeping the issue from escalating. The question posed by the parties to the practitioner might be, “Look, we have a relationship, and there is a problem, and we want you to help us manage it before it gets

<sup>1</sup> <[www.icann.org/ombudsman/odr-standards-of-practice-en.htm](http://www.icann.org/ombudsman/odr-standards-of-practice-en.htm)>, last accessed 10 December 2010.

<sup>2</sup> See, for example, The Mediation Room: <[www.themediationroom1.com](http://www.themediationroom1.com)>, last accessed 12 December 2010.

worse”. ODR systems that look at issues such as levels of support or child access in family law are examples of this role.<sup>3</sup>

### 2.3 *Online Conflict Resolvers*

Third, there is the role of conflict resolver. The conflict resolver takes on this role when the parties say, “We were not able to manage the conflicts between us, or we did not come to you in time to manage those conflicts, and there has now been a meaningful change to our relationship that we need the help of a third party to resolve”. Both parties may not necessarily share this perspective simultaneously. For example, your bank, because it is a big institution, may think it simply needs to *manage* an issue when it inadvertently overdraws your account; however, to you as the consumer, it is a conflict that needs to be *resolved*, rather than be *managed*, because the overdraft has caused you distrust the bank, and there has been a fundamental change in your relationship with the bank.<sup>4</sup>

### 2.4 *Ombudsmen*

Fourth, there is the role of the Internet-based Ombudsman, meaning Ombudsmen who are online practitioners. In this final scenario, the parties would come to the Ombudsman and ask the following question: “We have a conflict between us because one of us feels unfairly treated by the other. Can you work with us, evaluate this situation, and if one of us was treated unfairly, can you help us work out a solution that we all can work with and that is fair?”<sup>5</sup> This chapter concerns itself with this last category of practitioner, however, Ombudsmen use a wide range of tools in handling conflict, and they may use the same skill sets as mediators, conflict managers, and conflict resolvers.

## 3 WHAT IS AN OMBUDSMAN?

An ombudsman is an independent, objective investigator of people’s complaints against government agencies and other organizations, both public and private sectors. After a fair,

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3 See, for example, Our Family Wizard: <[www.ourfamilywizard.com](http://www.ourfamilywizard.com)>, last accessed 5 December 2010.

4 See, for example, The Financial Consumer Agency of Canada: <[www.fcac-acfc.gc.ca/eng/contactus-eng.asp](http://www.fcac-acfc.gc.ca/eng/contactus-eng.asp)>, last accessed 7 December 2010.

5 See, for example, ICANN Office of the Ombudsman: <[www.icannombudsman.org](http://www.icannombudsman.org)>, last accessed 1 December 2010.

thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.<sup>6</sup>

Ombudsmanship came into being in 1809, when the Swedish Parliament appointed the first ombudsman to protect citizens from the excesses of bureaucracy.<sup>7</sup> The word ombudsman consists of two parts: *ombuds*, meaning representative; and *man*, a gender-non-specific term meaning the people. Historically, an ombudsman has been the representative of the people in dealings with bureaucracy. In Quebec the ombudsman is referred to as “The Protector of the Citizens”, while in France the ombudsman is called “The State Mediator”.<sup>8</sup>

Ombudsmen are generally concerned with ensuring that the bureaucracy or agency they oversee fairly treats the members of their constituency. Ombudsmen are generally characterized as being independent, impartial, and neutral advocates neither for the agency nor the complainant, but rather for the principles of administrative fairness. It is worthwhile to consider the distinction between substantive fairness, which can be defined as a fair outcome of an administrative process, and procedural or administrative fairness, which is defined in the following paragraphs.

Ombudsmen are generally concerned with administrative fairness, as opposed to results in regulatory or criminal processes. Ombudsmen deal with the redress of unfair situations rather than the administration of compliance frameworks. The Code of Administrative Justice by the British Columbia Ombudsman lists at least sixteen criteria for administrative fairness. These include issues such as unreasonable delay and unfair procedures.<sup>9</sup>

This chapter relies primarily on that Code of Administrative Justice to provide a working definition of administrative fairness that can be applied consistently and universally for ombudsman purposes. Fairness can have different meanings across context, culture, language, and tradition. The Code of Administrative Fairness provides an excellent example of describing “being fair” in neutral and explicit terms.

Administrative fairness has been defined in the following manner:

6 Forum of Canadian Ombudsman, 2006, *What is an Ombudsman?*, <[www.ombudsmanforum.ca/whatis\\_e.asp](http://www.ombudsmanforum.ca/whatis_e.asp)>, last accessed 13 January 2011.

7 United States Ombudsman Association, 2006, *History of the Public Sector Ombudsman*, <[http://usoa.non-profitsites.biz/en/About\\_Us/history.cfm](http://usoa.non-profitsites.biz/en/About_Us/history.cfm)>, last accessed 13 January 2011.

8 Protecteur de la Citoyenne; Mediateur de L’Etat.

9 British Columbia Ombudsman, 2003, *Special Report 42, Code of Administrative Justice*, <[www.ombudsman.bc.ca/images/resources/reports/Public\\_Reports/Public%20Report%20No%20-%2042.pdf](http://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2042.pdf)>, last accessed 13 January 2011.

[...] our judges have had an historic association with the concept which we call 'due process of law.' The phrase, which has its roots in the Magna Carta, sums up our attachment to civility no less than to legality. In popular terms, it means fair play: assuring a hearing on the pros and cons of an issue to those affected; apprising them of what they have to meet or, in a criminal case, of the charges against them; giving them an opportunity to produce witnesses and to counter evidence adduced against them; allowing them to present argument on the facts and legal issues raised in the litigation; and assuring them finally of a considered decision by an impartial judge. What is important about due process is the fact that its rationale has taken hold beyond the courtroom and has been applied in administrative proceedings and to public affairs generally. It has, in short, become a social norm, implying both a right of individuals and groups in our society, who have grievances to air, or demands to press, or claims to litigate, to make themselves heard; and correlatively, an obligation to advance their causes through rational procedures which, after painful experience, have displaced naked force as the means through which the case is made for change and the redress of wrongs.<sup>10</sup>

Ombudsmen can be important actors in the overall operation of the civil justice system. They provide alternative dispute resolution<sup>11</sup> services, which may reduce the propensity for costly and time-consuming grievances and litigation. Their existence and presence ensures that administrative fairness is supported in a wide variety of civil and business institutions.

### 3.1 *Three Types of Ombudsmen*

Ombudsmen are generally classed in one of three categories: *classical or legislative, organizational, and executive*.<sup>12</sup>

*Classical or legislative* ombudsmen are appointed by a national, state or provincial, or municipal legislative body to ensure the fair treatment of the population by the adminis-

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10 Justice Bora Laskin, SCC, quoted at Zacks, Micheal, 1999, *Administrative Fairness in the Investigative Process*, in Linda Reif (ed.), *The International Ombudsman Anthology*, The Hague, Kluwer Law International pp. 555-556.

11 "ADR is any method of dispute resolution other than formal adjudication such as court litigation or administrative proceedings. ADR is not a fancy, new approach but rather an alternative – characterized by common sense and flexibility." Cathy Costantino *et al.*, *Designing Conflict Management Systems*, San Francisco, Jossey-Bass 1996, p. 33.

12 There is a category for Advocate Ombudsman, but the research has failed to identify any such programs in existence.

tration. There are numerous examples of classical ombudsmen around the globe. These would include the many municipal, state, provincial, or national ombudsmen appointed by the appropriate level of government. They are located outside of the structure of the agency they oversee, and receive complaints from the external users of services provided by the agency. Classical ombudsmen receive wide-ranging powers to investigate complaints, make reports, make recommendations, and resolve matters.

*Organizational* ombudsmen are appointed by their respective agencies to receive complaints about fairness issues within the organization. These internal ombudsmen service a community within an organization, such as staff, patients, or students. Organizational ombudsmen are an informal resource and do not conduct investigations, nor do they make reports or recommendations.

*Executive* ombudsmen are appointed by their agency as an internal dispute resolution resource for complaints generated by an external community. Examples of executive ombudsmen would be bank or insurance ombudsmen, newspaper ombudsmen, and, in the case of ICANN, an Internet Ombudsman.

While executive ombudsmen are located within specific agencies, they are different from organizational ombudsmen because the executive ombudsmen deal with an external public and conduct investigations, and may make reports and recommendations, as do classical ombudsmen.

The American Bar Association (ABA) Standards define an executive ombudsman as:

An executive ombudsman may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors.<sup>13</sup>

#### 4 WHAT IS DRIVING THE UPTAKE IN ODR?

There are a number of factors driving the adoption of ODR systems. Access to justice is important. It is undeniable that there are increasing numbers of people in disputes who either lack the resources to engage a lawyer, who do not meet the means test for legal aid, whose issue is outside of the legal aid remit, or those who simply choose to act without representation. Recently, the Supreme Court of Canada published an unrepresented liti-

<sup>13</sup> American Bar Association, 2004, *Standards for the Establishment and Operation of Ombuds Offices*, <[www.abanet.org/adminlaw/ombuds/115.pdf](http://www.abanet.org/adminlaw/ombuds/115.pdf)>, last accessed 13 January 2011.

gant's guide, due to the growth in cases heard by the Court where citizens appear without counsel.<sup>14</sup>

ODR is a vehicle that allows the parties to a dispute to resolve the matter, with or without the participation of third parties. It allows the private ordering of affairs, regardless of locale, jurisdiction, or legislative paradigm. The ability to seek resolution, redress, and potentially justice from the comfort of one's own living room, with little or marginal expense, is attractive to many. This is not to say that ODR is a replacement for brick and mortar court rooms. In fact, ODR may be particularly well-suited to a number of areas where the courts already have jurisdiction. It has its greatest potentials in e-commerce, small claims, and interpersonal disputes.

The astounding growth of e-commerce has drawn the attention of international organizations, such as the United Nations and the Organization for Economic Co-operation and Development (OECD). In 2007, the OECD produced a set of consensus recommendations on Consumer Dispute Resolution and Redress. These recommendations state that processes should enable consumers to conduct the redress procedure without the need for legal representation or assistance, as much as possible. The OECD also recommends the greater use of technology to resolve disputes.<sup>15</sup>

The United Nations, through a number of its bodies, including the World Intellectual Property Organization, the United Nations Commission on International Trade Law,<sup>16</sup> and United Nations Social and Economic Commission for the Asia Pacific, has shown great interest in Online Dispute Resolution.

One of the first and most often accessed ODR systems is the Uniform Domain Name Resolution Policy (UDRP). The UDRP is a policy that has been instituted by the ICANN to deal with disputes over the rightful ownership of domain names, and in particular, cyber-squatting. ICANN has developed a set of rules that describe when someone is disputing a domain's ownership or claims someone is cyber-squatting on a domain. ICANN works with four international arbitration providers: the National Arbitration Forum from the United States, the World Intellectual Property Organization from Geneva, the Czech Arbitration Court Center for Internet Disputes in Prague, and the Asia Domain Name

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14 The Supreme Court of Canada <[www.scc-csc.gc.ca/rep/index-eng.asp](http://www.scc-csc.gc.ca/rep/index-eng.asp)>, last accessed 13 January 2011.

15 Organization for Economic Co-operation and Development, July 2007, OECD Recommendation on Consumer Dispute Resolution and Redress, <[www.oecd.org/dataoecd/43/50/38960101.pdf](http://www.oecd.org/dataoecd/43/50/38960101.pdf)> p. 12, last accessed 5 January 2011.

16 See, for example, <[www.uncitral.org/pdf/english/colloquia/ODR/IICL\\_Bro\\_2010\\_v6.pdf](http://www.uncitral.org/pdf/english/colloquia/ODR/IICL_Bro_2010_v6.pdf)>, last accessed 4 January 2010.

Arbitration Centre headquartered in Hong Kong. To give examples of those involved in a UDRP process, a trademark owner who wished to register a domain name may be located in Vancouver, the cyber-squatter in China, and the arbitrator in Europe. This process has worked for thousands of cases around the globe privately, trans-nationally, and outside of the courts. A large body of UDRP related jurisprudence has been established, and this is used by the national courts, who are the appeals bodies.

Finally, in a world that is increasingly concerned with being “green” or eco-friendly, ODR inherently reduces the amount of paper used. Now and in the future, it is possible that disputes make be resolved without the use of paper. For example: small claims discoveries may be conducted by the filing of documents online, parties may be examined through chat rooms, and whole Ombudsman investigations may take place entirely online.

Based on all of this information, it is submitted that the world is increasingly witnessing an accelerated growth in the use of ODR systems and techniques.

## 5 IS THERE A ROLE FOR ODR IN OMBUDSMAN PROGRAMS?

The previous section underscores reasons why ODR is increasingly becoming used across a wide selection of dispute techniques. The uptake of ODR into Ombudsman programs may be based on any of these factors of economy, efficiency, the environment, or changes in professional acceptance of the technology. ODR techniques may be well used in Ombudsman programs, but in looking at the applicability of ODR three factors must be taken into consideration. First, the Ombudsman practitioner must understand the differences between technology-based and technology-assisted ODR, and must select and implement the appropriate form of ODR for his or her practice. Second, the Ombudsman practitioner should consider a number of criteria to determine how, and in what manner, ODR provides a “fit” with his or her operations. Third, Ombudsman practices may need to be modified in order to integrate ODR into the conduct of work.

### 5.1 *Factor One – Technology-Based or Technology-Assisted ODR for Ombudsmen?*

Earlier in the chapter, we looked at the two forms of Online Dispute Resolution – technology-based and technology-assisted ODR. Briefly, we described technology-based ODR primarily as a blind bidding system which allows two parties in a dispute to use multivariate matching to obtain a win-win outcome. Technology-based ODR is likely most applicable

for disputes where there is a quantum involved, *i.e.*, the value for a vehicle in an insurance claim that is disputed between the car's owner and the insurance company.

Technology-assisted ODR uses technology to improve the efficacy of human-based processes. For example, the use of fax machines rather than postal services has improved the rapid exchange of correspondence. Technology-assisted ODR is scalable to the needs, finances, and technical competencies of dispute resolution programs.

In our previous analysis of Ombudsmanship, we underlined that the basis for Ombudsman work is established in the concept of fairness. We emphasized that the concept of fairness is the basis of Ombudsman work. Fairness is not a concept that may be easily actualized in a blind bidding environment. Therefore, we can conclude that technology-assisted ODR is the most appropriate form of ODR for use in Ombudsman programs.

## 5.2 *Factor Two – Criteria to Determine Whether ODR Fits into an Ombudsman Practice*

Ombudsmen may wish to consider a number of criteria when planning to implement ODR as a tool, or when considering the scalability of their ODR programs. Consideration of these criteria will inform Ombudsmen about the level of technology they will require to conduct a successful ODR-assisted practice.

The criteria that Ombudsman may wish to consider include:

- Geography;
- Legislative requirements;
- Case management users and complaint volume;
- Literacy and language;
- Internet connectivity;
- Time zones;
- Service requirements;
- Client or audience characteristics;
- Synchronous and asynchronous usage, and
- The socio-cultural context.

### 5.2.1 **Geography**

Ombudsmen must take geography into account when they contemplate the use of ODR. Ombudsmen should consider such questions as: Where are the potential system users located? Are they all in one building, or dispersed over several countries or continents? Is

the Ombudsman operation located in one place, or is it a decentralized operation with many offices where information needs to be shared? Does the mandate of the Ombudsman cover a defined geographic area such as a country, province or state, city, or a hospital or university campus? If the Ombudsman operation is located in a corporation or organization, is the client group located in the same location or building, or in multiple locations, cities, provinces or states, or continents?

### **5.2.2 Legislative Considerations**

Before embarking on ODR implementations, Ombudsmen practitioners must evaluate their chartering documents, bylaw, statute or legislation to determine if there are any barriers to using ODR. Ombudsmen must determine if complaints must be delivered in a particular manner. For example, if a signature is required, do intakes have to be done in person to verify identity? Are there privacy or information access laws that impact the use of ODR in the Ombudsman operation?

### **5.2.3 Case Management Users and Complaint Volume**

Ombudsmen need to consider the scalability and cost of ODR with respect to the volume of complaints received, and the number of system users. Obviously, the unit cost for implementation drops if the number of complainants or ombudsman officials using the system is greater. Ombudsmen must carefully consider the per-unit costs against existing costs for travel, investigation interviews, etc., prior to implementation.

ODR has particular appeal when Ombudsman investigations involve systemic events, or when there are multiple complaints on a file. The use of ODR technologies easily tracks large volumes of correspondence, and enables Ombudsman investigators to differentiate or combine fact patterns, evidence, communications, and outcomes, as the investigation and redress process progresses.

### **5.2.4 Literacy and Language**

Ombudsmen must be aware of the languages in which system users may wish to communicate, and ombudsmen must also take into consideration both the general literacy and computer literacy of their client group. If Ombudsmen serve a multi-lingual client group, the ODR system should be designed to accommodate system inputs in all the languages served, or to take into consideration translation services. Translations may be accomplished by using online translation tools, or by using native language translators. Ombudsmen must take translation as a matter of concern for both incoming correspondence from complainants and for outgoing correspondence to them.

Ombudsmen must include the use of language and idioms as part of the general literacy factor. For example, is a client group that usually communicates in slang or patois well served in a written environment?

Ombudsmen, when considering the implementation of ODR, must evaluate the general literacy level of their client group, and their computer literacy.<sup>17</sup> If clients or Ombudsman staff lack either general literacy or computer literacy skills, Ombudsmen should reconsider the implementation of ODR.

#### 5.2.5 Internet Connectivity

Ombudsmen must evaluate the Internet connectivity of their clients. There is an obvious difference between local dial-up access and broadband high speed Internet. Ombudsmen should also consider the availability of computers or mobile technologies that enable clients to access the ODR system. If Ombudsmen are serving clients in areas where there is limited network connectivity, or where there is limited computer access, then ODR may be less successful than an area where there is high broadband or device penetration.

#### 5.2.6 Time Zones

Ombudsmen must consider the hours of access they wish to offer, the time zones they serve, and the appropriate times that clients can access the system. Does the Office wish to be available on a 24/7 basis? Does the Ombudsman serve clients in multiple time zones, *i.e.*, are clients spread across all of Canada – which has six time zones? Are the clients most likely to use the ODR system during working hours, or outside of them?<sup>18</sup>

#### 5.2.7 Service Requirements

Ombudsmen must reflect on the need for service requirements in designing and implementing an ODR system. A Human Rights Ombudsman who investigates unfair *habeas corpus* practices in a conflict zone may have different service response requirements than a consumer-oriented banking Ombudsman program. If clients are at immediate risk, then the ODR system must be designed to be very reactive.

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17 Col. Patrick Stogran was the inaugural Ombudsman Veteran's Affairs Canada. In conversation he assessed his clients' computer literacy and presented an interesting conundrum. On the one hand his client group consisted of young veterans who had served in the Afghanistan conflict. These veterans were all very computer literate and have high internet skills. On the other hand, his clients also consisted of older Second World War and Korean War veterans whose computer literacy skills were generally much lower.

18 A website access visit study conducted by a federal agency in Canada showed that the highest web access by clients occurred after 9 p.m. Client interviews indicated that this was the time of day where young families had put the children in bed, and that parents had time to access the internet without being disturbed.

**5.2.8 Client or Audience Characteristics**

Is there anything specific about the client group which would inform the Ombudsman about the design of the ODR system? For example, the ICANN Office of the Ombudsman serves a specific audience that is based on some sort of relationship with the Internet. One may infer that this client audience may be highly computer literate. The same may be said for audiences in universities. If the Ombudsman serves a client group that consists of person with disabilities is ODR likely to have the same impact as face-to-face activities?

For example, persons who have disabilities which restrict their mobility may find it more accommodating to use ODR technologies as opposed to having to take great efforts to attend an Ombudsman's office. As well, persons who have disabilities which affect their ability to communicate in person, such as deafness, or psychiatric or cognitive disabilities may find the use of synchronous ODR technologies to be a preferred manner of dealing with their complaint.

**5.2.9 Synchronous and Asynchronous Usage**

Synchronous use of an ODR system means that the client and the Ombudsman are able to communicate in real time. These real-time online conversations or chats may be conducted through the case management or ODR system, or by other means, such as email or social networks. Asynchronous communication means that the conversation between the parties does not occur in real time.

Well this principle easily applies when there is a time zone change; it also applies in a social or familial context. For example, a young family with children may find it convenient to communicate with the Ombudsman at the end of the day, when the chores are done and the children are tucked away in bed, and this correspondence is received by the Ombudsman the following morning. The Ombudsman replies to the family, and it is received by them later in the evening, etc. This allows provides the family the convenience of having their complaint attended to without having to take time away from work or home responsibilities to visit the Ombudsman's office.

**5.2.10 The Sociocultural Context**

Ombudsmen wishing to implement ODR systems should take into consideration the general sociocultural context in which they operate. There will be differences in communication and culture between high context and low context societies. This will help inform the Ombudsman of the potential for success. The ODR system must be designed to accommodate the cultural requirements of the client group.

### 5.3 *Factor Three – Modifying the Ombudsman Practice*

As discussed earlier in this chapter, there are three basic forms of Ombudsmanship – Classical, Executive, and Organizational. Each of them, to some greater or lesser extent, has the capacity to use ODR as a tool in the practice of Ombudsmanship.

Classical Ombudsmen are appointed by a government to receive complaints at a provincial, state, or national level. These complaints relate to the general functioning of governmental administrative activities.

Executive Ombudsmen may be appointed by a government, ministry, corporation, association, or entity to take complaints about specific administrative functions. This is the group of Ombudsmen presently experiencing the greatest growth. Executive Ombudsman may hear complaints from a wide populace that exceeds state or territorial boundaries. For example, the client group may be all of the customers of an international bank, or they may be all of the passengers of a world-wide airline.

Organizational Ombudsmen usually deal with internal clients of an institution, such as employees or students. Organizational Ombudsmen may deal with issues beyond fair administration, and often are involved in relationship issues.

Of these three types of Ombudsman practice, the Executive Ombudsman role is likely the one with whom ODR would have the greatest impact. That is not to say that Classical and Organizational Ombudsmen would not benefit from ODR, but simply that because of the nature of Executive Ombudsmen's potentially wide client bases, ODR may most benefit Executive Ombudsmen.

Ombudsmen might have to modify their practices to accommodate ODR in a number of ways, which might include:

- An appropriate case management and correspondence system. This could be a one-off purpose built ODR system, or it could simply be an existing email program.
- For security reasons, it is strongly advised that the case management or mail systems be housed on a separate, secure server, independent of other applications within the organization, business, or government.
- Be proactive in providing a website that promotes the Ombudsman function and that links to the complaint intake case management system. The website should contain a reasonable amount of self help information to educate, inform, and assist potential clients.

- Have the capacity to provide native language translators for complainants. Community resources may be available to assist.<sup>19</sup> Translators must be covered by either privacy laws or non-disclosure agreements to keep the correspondence they review as private and confidential.
- Be prepared to develop effectiveness measures relating to the use of ODR.
- Ombudsmen, especially those who deal with multi-cultural client groups, must develop a sense of self and their own culture, as they work with online documents to conduct dispute resolution. Culture, in this case, refers especially to how people develop a socio-cultural context to the manner in which they resolve disputes. Practitioners need to be particularly aware of their own culture as they work with clients or institutions that are different from them in the high context-low context<sup>20</sup> scale. In ODR scenarios, Ombudsmen must be prepared to allow correspondents to display their own conflict culture, without the Ombudsman forcing complainants to adopt the Ombudsman's conflict culture.
- Ombudsmen must be able to allot time and energy to work with complainants who have low general or computer literacy skills. The same skills used in active listening may be applied to "active writing".
- Ombudsmen must practice writing skills that will assist in developing a "trust" environment.
- Ombudsmen must be aware that correspondents may have a tendency, with the written word, to stray from core issues and processes. Much of the Ombudsman process will be to focus on these core issues and to use the many tools in the Ombudsman tool box to develop options and possible outcomes.

## 6 CONCLUSION

Ombudsmanship is a field of dispute resolution which can greatly benefit from the use of Online Dispute Resolution as a tool. There are presently very few Ombudsman operations that practice ODR.<sup>21</sup> Those who have engaged ODR have found that it has the capacity to

<sup>19</sup> The ICANN Office of the Ombudsman works with a local refugee, immigrant, and new citizen centre in suburban Vancouver, British Columbia to provide translation services. This creates a win-win scenario.

<sup>20</sup> "...the expressions 'high context' and 'low context' are labels denoting inherent cultural differences between societies. High-context and low-context communication refers to how much speakers rely on things other than words to convey meaning. Hall states that in communication, individuals face many more sensory cues than they are able to fully process. In each culture, members have been supplied with specific 'filters' that allow them to focus only on what society has deemed important. In general, cultures that favor low-context communication will pay more attention to the literal meanings of words than to the context surrounding them." MQJeffrey, *High Context vs. Low Context Communication*, <<http://hubpages.com/hub/High-Context-vs-Low-Context-Communication>>, last accessed 13 January 2011.

<sup>21</sup> See for example, the ICANN Office of the Ombudsman <[www.icannombudsman.org](http://www.icannombudsman.org)>.

increase effectiveness in complaint handling. As we enter the second decade of the 21<sup>st</sup> century, we can expect to see an uptake of ODR in the practice of Ombudsmanship.

Ombudsman practitioners may wish to take the following guidelines into account as they consider the use of ODR technology:

- Timing: is this the appropriate point in time to launch an ODR program? Are there risks or benefits to waiting to start using ODR?
- Economy: Can a case be made for the expenditure of resources, both capital and human to use ODR? Will there be an efficiency gained in managing files or the technology process which makes the operation run more effectively? How can we measure that?
- Audience: Does the use of ODR increase access to Ombudsman operations? Will new users be attracted to the system? Will other users be affected due to a lack of computer literacy? Are there strategies to overcome barriers? Are there particular audience segments which will particularly benefit from ODR?
- Technology: Will ODR technologies replace – improve – or make redundant any existing case management system? Are there compatibility issues? Is a custom designed system most appropriate?
- Organizational communications: How will we inform our audience of the movement towards ODR?
- Practitioner accommodations: What will the Office of the Ombudsman need to do to accommodate the use of ODR into its practice?