

23 ONLINE DISPUTE RESOLUTION IN LATIN AMERICA

Challenges and Opportunities

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1 INTRODUCTION

How is the Latin American region dealing with disputes in the justice system? What are the prospects for ICT and the development of Digital Economy in the Latin American region? Is the region ready for ODR? What about its readiness for a Global ODR system for cross border e-commerce?

This chapter poses some answers to these questions, suggests some other possibilities, and poses several more questions for further discussion.

First, this chapter offers a brief overview regarding the justice systems in Latin America and the need for reform. Transformation in the region begins with ICT reforms, which aim to forge a more efficient and effective justice system. But this transformation comes hand-in-glove with ADR reforms, which aim to diversify the way in which disputes are addressed, from a competitive model into a cooperative and peaceful approach.

Second, this chapter offers a readiness-for-ODR analysis, in which the regional challenges, opportunities and particularities are pointed out and briefly analyzed. The focus of attention in this section will be ODR for the Digital Economy in Latin America.

While the first and second sections mentioned above provide the context in which ODR is gradually finding its way to emerge, the third section analyzes ODR experiences and regional programs in action, followed by final thoughts regarding a promising future for ODR in Latin America.

2 JUDICIAL SYSTEMS IN LATIN AMERICA: TRANSFORMATION IN PROGRESS

2.1 *Some Inefficiencies Exposed*

Court litigation is built as a confrontational process in which there are winners and losers. In the majority of cases parties find litigating an unpleasant experience, regardless of the outcome.

In the Latin American region the citizenry presents high levels of dissatisfaction whenever confronted by the justice system. Most people mistrust the system as a whole. The percentage of Latin American citizens said to have some or a lot of trust in the Executive Branch is 39%, while the Judiciary Branch scores only 30%.¹

A variety of scholars have identified the reasons for this lack of trust:

1. The complexity of the judicial system which is perceived by most citizens as distant and out of reach.
2. High cost of litigating, both in terms of direct costs (like lawyer fees) or indirect costs, (like the cost of opportunity).
3. Slowness of the processes, and the uncertainty regarding the duration of cases.²
4. An excess of ritualistic formalism and bureaucratic practices in general, which elevate frustration among the parties during the whole process.
5. Perception of corruption as expressed by citizens regarding the judiciary branches.

For instance, litigating at the National Courts in Buenos Aires, Argentina, involves a lot of paperwork. After filing the case the complaint has to be brought to the assigned court, where in about three to seven working days the written case file folder is created, enabling the court to render the first resolution. This resolution officially opens the case and orders notification to the defendant that an action has been instituted against him/her/it and that a response to the complaint must be made prior to a specified date.

1 C. Hernández & R. Adelardi, *Perspectivas de uso e impacto de las TIC en la Administración de Justicia en América Latina*, Working Paper – in Spanish, Study Centre for Justice in the Americas (CEJA) and Microsoft (no year informed), p. 7, n. 4. Available online at: <www.cejamericas.org/portal/index.php/es/biblioteca/biblioteca-virtual/doc_download/1776-perspectivas-de-uso-e-impacto-de-las-tic-en-la-administracion-de-justicia-en-america-latina>. For more about Public Opinion statistics in Latin America see: <www.latino-barometro.org>.

2 Regarding duration of cases, the region lacks of accurate statistics in respect of many of its countries. According to CEJA in the XIV Iberoamerican Judicial Summit, among twelve participating countries, none of them could deliver information about the duration of processes for the total instances and subjects. See *id.*, p. 20, n. 8.

In the last few years some judicial systems in the region have been gradually incorporating online services. Now, even though there is information about most case files available online,³ the existing platforms for Buenos Aires National civil and commercial cases – following the example – do not provide for digitalization of all the case files. It only shows some resolutions rendered by the office of the First Instance Judge. This means that most information not uploaded to the platforms is only available by going to the court personally, standing in a queue, asking for the file and, if available, copying it – generally by hand.

If an auxiliary of the court has to intervene in the case file, such as the Child Protective Services (*Defensor de Menores*), the whole case file will be physically transferred to that office for the auxiliary to analyze it and render an expert opinion. When rendered, the opinion will be incorporated to the case file. The case file will be transferred back to the court where the Judge, by another resolution, will inform to the parties that the case file is back.⁴

This kind of physical movement of the case file means lots of wasted time, unnecessary risks, and inefficiencies. Also, as courts are too overloaded with work and have limited space, a case file may be sometimes “lost” for a while just because it was put in the wrong locker or because it is still at another office. Records about the physical movement of the case file may be mistaken or not accurate, and nobody may know where the case file actually is. In these cases parties need to present a written petition asking for the search of the “lost” case file.

These descriptions illustrate the need for reform. No wonder in the context described above, there is extensive criticism of the system. Professionals frequently request, among other things, streamlined bureaucratic procedures. Judges denounce lack of resources and excessive workload. And citizens suffer from the lack of transparency and perceive the justice system as unintelligible and inefficient.

The backlog of cases and the impossible task of managing those cases in an efficient way given the current design is a problem affecting most of the countries of the Latin American region.

3 See <www.pjn.gov.ar>.

4 In the National Commercial or Civil Courts in Buenos Aires, at the present, when an expert opinion from the Child Protection Agency is incorporated, parties won't be able to read that expert opinion online. They will need to go personally – it is actually the lawyers or their assistants that do that – to get informed about the expert opinion rendered. In other jurisdictions this has already been reformed properly and hopefully this will be reformed also in these courts as well.

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Despite what has been said in this section, it is also true that during the last twenty-five years many justice systems in Latin America have undergone important change, maybe the most significant in all its previous history.

The legal community has witnessed (among other improvements that will be discussed more extensively) “higher levels of training of employees, higher levels of independence, and professionalism within institutions”.⁵

It has been said that:

Since the beginning of the 1980s, governments, judicial leaders, organization of the civil society and a number of external help agencies have committed to make regional efforts for justice institutional reform in Latin America. [...] Change has been introduced in the legal framework, the organization and resources for justice in most of the countries; [...]. In some cases tangible improvements have taken place [...].⁶

The Study Centre for Justice in the Americas (CEJA) indicates that:

[...] this transformation process, in a traditionally conservative and not innovative enough sector, is in itself a fact of major importance. But what is even more significant is that everything indicates that these changes will not stop.⁷

5 C. Hernández & R. Adelardi, (no year informed), p. 13. Original text in Spanish: “Mejores grados de preparación de los funcionarios y niveles más altos de independencia y profesionalismo en las instituciones”.

6 L. Hammergren, *Quince Años de Reforma Judicial en América Latina: Dónde estamos y por qué no hemos progresado más*, in *Reforma Judicial en América Latina: Una tarea inconclusa*, Internacional Law Department, Ed. OAS, (no year informed), available at <www.oas.org/juridico/spanish/adjusti5.htm>. Original text in Spanish: “Desde comienzos de la década de 1980, los gobiernos, los líderes judiciales, las organizaciones de la sociedad civil y una serie de agencias de ayuda externa se han comprometido a realizar esfuerzos regionales para reformar las instituciones del sector de la justicia en Latinoamérica . [...] han introducido cambios en el marco legal, la organización y los recursos presupuestales del sector en la mayor parte de los países; en algunos casos ha generado mejoras tangibles [...]”.

7 C. Hernández & R. Adelardi, (no year informed), p. 11. Original text in Spanish: “[...] este proceso de transformaciones, en un sector tradicionalmente conservador y poco innovador, es en sí un hecho de la mayor importancia. Pero más significativo aún es que todo indica que estos cambios no se detendrán.”

2.2 ICT Partnership for Reform

According to Gamba, in the region “[...] a lot is being developed for ICT to bring efficacy to the administration of Justice”.⁸

Even though the challenges are still huge, some countries already offer online forms, online filing for some kind of cases, common areas for the reception of documents, possibilities to send simple petitions to the court by e-mail, e-mail notification, the possibility of online consultation of the status of the cases, jurisprudence searching facilities, etc.:

The region demonstrates valuable initiatives and forefront applications, even though they are limited to only a few judicial scopes. Some countries are advancing faster than others thanks to best practices, which can be the engine for the necessary reforms for the digitalization of justice in the region.⁹

The same author gives some examples of best practices in the implementation of ICT in the administration of justice in some of the countries of the region, such as Uruguay, where there is a kind of administrative (non judicial) proceeding that uses electronic files. Also, Costa Rica, Peru and some Argentinean jurisdictions have implemented reforms such as electronic notifications. Argentina also has a pilot program for digital filing and case management for Pension Law cases. Brazil has the *Ley de Informatización do Processo Judicial* N° 11.419/2006 (and its modification) that has implemented, among other reforms, electronic citation and electronic petitions to the courts. In addition, Chile has been implementing reforms for the gradual elimination of the physical case file and has improved cases management in general.

In the last decade the impulse for change and implementation of ICT reforms for the administration of Justice has become evident. The benefits of consolidation of ICT reforms in the administration of justice have been pointed out by CEJA expressing that:

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- 8 J. Gamba, *Panorama del Derecho Informático en América Latina y el Caribe*, Ed. ECLAC/CEPAL-UN, Santiago de Chile 2010. Accessible at <www.eclac.org/id.asp?id=38898>/. Original text in Spanish: “[...] mucho se está desarrollando para que las TIC brinden mayor eficacia a la administración de la Justicia”.
- 9 *Id.*, p. 7. Original text in Spanish: “La Región, en esta esfera, demuestra generalmente iniciativas valiosas y aplicaciones de vanguardia, aunque queden limitadas a algunos sectores judiciales. Algunos países están avanzando mucho más rápidamente respecto a otros y, gracias a sus buenas practicas, pueden ser motor de las reformas necesarias para la informatización de la justicia en la Región.” Consult the same work for information about access to cases information as well as for information about the online publications of sentences by the courts in the Latin American Countries, p. 31 *et seq.*

ICT would bring a positive impact on improving levels of transparency in the operation of the institutions of the justice system, improving access to the justice system by the citizenry, improving efficiency and efficacy in the performance of multiple tasks, enabling and enhancing innovation processes in the delivery of justice and at judicial management, enabling citizenry scrutiny over the justice system, facilitating accountability of the judicial authorities by the citizenry, among other scopes.¹⁰

2.3 *Alternative Dispute Resolution Methods as Allies for Change*

Reform of the Judicial Systems of the region is not only addressed by ICT changes but also by the implementation of ADR strategies:

[...] not only through the traditional way of increasing infrastructure and resources of the institutions but by making use of new ways for the resolution of conflicts. Among these new ways, arbitration (mainly institutional) or mediation, being developed within the formal system or in autonomous scenarios can both be mentioned.¹¹

ADR methods constitute interesting and suitable options for reducing costs and time, improving outcomes' efficiency, and avoiding the unnecessary escalation of the dispute into the courts of justice.

In the last twenty years or more the use of ADR has been slowly but firmly growing in the region. This can be explained by different causes, most significantly the judicial systems'

10 C. Hernández & R. Adelardi, (no year informed), p. 5. Original text in Spanish: "Las TIC podrían tener un alto impacto en mejorar los niveles de transparencia en la operación de las instituciones del sistema de justicia, en mejorar el acceso de la ciudadanía al sistema de justicia, en aumentar los grados de eficiencia y eficacia en el desempeño de múltiples labores, en posibilitar y potenciar los procesos de innovación en la impartición de justicia y en la gestión judicial, en posibilitar la auditoría ciudadana sobre el sistema de justicia, en facilitar la rendición de cuentas de las autoridades judiciales a la ciudadanía, entre otros ámbitos". Also see: V. Abad, A.F. Ávila, C. Carjuzaa, I. Carrión, G.R. Cosentino, G.C. Garavano, C.G. Gregorio, E.B. Hequera, M.A. Hernández, R. Li Rosi, R. Madueño, O. Martínez Ferreyra, C. M. Salaberry, G.G. Vassallo, N.G. Vecchi, & M.I. de Villafañe, *Jueces y Nuevas Tecnologías: Recomendaciones Acordadas durante el seminario realizado en Puerto Madryn*, Puerto Madryn, 10 September 2004, available at <www.bibliojuridica.org/libros/4/1646/26.pdf>.

11 *Id.*, p. 15. Original text in Spanish: "No sólo a través de la vía tradicional de acrecentar la infraestructura y la dotación de las instituciones del sector, sino echando mano a nuevas vías para la solución de los conflictos. Entre estas nuevas vías se puede mencionar el arbitraje (principalmente el institucional) o la mediación, ya sea que esta última se desarrolle adosada al sistema formal o en escenarios autónomos."

crisis and the practical impossibility of attending efficiently the increasing number of the cases submitted.

Ortega Hernández¹² has considered that, by promoting universal access to justice, states have ended up with a backlog of cases that is impossible to attend efficiently. As a consequence, this has given great impulse to ADR in the region, which is performed outside the courts but within some kind of state framework support.¹³

From a different perspective, others consider that an important impulse for ADR in the region, in particular, for arbitration, came from the expansion of cross border commerce in general:

Certainly this proliferation of alternative dispute resolution mechanisms (in Latin America) is a function of the remarkable explosion of world trade, commerce and finance of the past twenty years. With economic globalization, the number of international commercial transactions has multiplied, and so have the numbers of international disputes appropriate for submission to ADR procedures of one sort or another.¹⁴

In this sense, it has been stated that:

In this world economic globalization, conflicts derived from agreements and contracts between companies are no longer solved by ordinary courts, whatever the nationalities of the companies involved. Considering the general delays of judicial resolutions in every country that we take into consideration and the high costs of the proceedings, the economic world has searched for more suitable solutions for its interests.¹⁵

12 R.J. Ortega Hernández, *Resolución Electrónica de Disputas. Perspectiva del Derecho Español*, available online – in Spanish – at <<https://www.coloriuris.net/panel/acceptacion.jsp?hash=556dabbdc0a4be5490d9a785aad815ea>>.

13 One example of this phenomenon can be found in Argentina's Prejudicial Mediation system for Civil and Commercial disputes, and the Labour Conciliation system, both services provided outside courts but organized by the Ministry of Justice, in the case of Prejudicial Mediation, and by the Ministry of Labour, in the case of the Conciliation system. Similar situations are found in Peru and Chile for special type of cases, as well as other examples found in other countries of the region.

14 Speech by W.D. Rogers, "Inter-American Development Bank Conference on Commercial Alternative Dispute Resolution in the XXI Century", *The Road Ahead for Latin America and the Caribbean*, 26-27 October 2000, Washington D.C., Available at: <www.iadb.org/mif/v2/speeches/rogers.html>.

15 R. García, *Aproximación a los mecanismos de Resolución Alternativa de Conflictos en América Latina*, in *El Otro Derecho*, No. 26-27, ILSA, Colombia, April 2002, p. 157. Original text in Spanish: "En este mundo de economía globalizada, los conflictos derivados de acuerdos y contratos entre empresas ya no se resuelven por los tribunales ordinarios, sea cual sea la nacionalidad de las mismas. Dada la demora general de las res-

ADR is being incorporated with different approaches as an integral part of many of the justice systems of the region, or as complements to it, and the process continues to expand and deepen.

Highton and Álvarez, both referents in the field, said about ADR back in 1998:

A conflict resolution system is efficient when it counts with numerous institutions and proceedings that allow preventing disputes and solving them, mostly, with the lowest cost possible, starting from the needs and interests of the parties [...].¹⁶

It is now possible to find in the countries of the region, negotiation, mediation, conciliation, arbitration, and med/arb (combination of mediation and arbitration), as methods available in different settings and contexts and with varying degrees of acceptance and success in each case.¹⁷

As Highton and Álvarez stated: “[...] the movement does not end there; it is wider and more revolutionary”.¹⁸ Certainly, the most innovative and interesting revolution in the field of ADR is Online Dispute Resolution (ODR).

Katsh and Gaitenby eloquently observed that:

Online dispute resolution shares with mediation, arbitration, negotiation and other processes of alternative dispute resolution a belief that disputes can be resolved out of court. ODR is unique in that it attempts to resolve disputes at

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- oluciones judiciales de cualquier país que queramos estudiar y los elevados costos de los procesos, el mundo económico ha buscado fórmulas más adecuadas para sus intereses.”
- 16 E.I. Highton & G.S. Álvarez, *Mediación para resolver conflictos*, Ed. Ad Hoc, Buenos Aires 1998, p. 25. Original text in Spanish: “Un sistema de resolución de conflictos es eficiente cuando cuenta con numerosas instituciones y procedimientos que permiten prevenir las controversias y resolverlas, en su mayor parte, con el menor costo posible, partiendo de las necesidades e intereses de las partes [...]”.
- 17 For more detail on ADR in the Region recommended Arts. for consultation are the following: 1) *The Cost of Disputes in Companies and the Use of ADR methods: Lessons from Nine Latin American Countries*, Ed. Program ADR Network, Multilateral Investing Found, Inter-American Development Bank (in English), January 2006. Accessible at <www.iadb.org/document.cfm?id=1078124>. 2) *Dossier: Resolución Alternativa de Conflictos en América*, in *Sistemas Judiciales* Vol. 2, 2001, pp. 148-170, CEJA and Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP). Accesible at <<http://issuu.com/sistemasjudiciales/docs/sistemasjudiciales2/7>>, general source <<http://sistemasjudiciales.org>>.
- 18 E.I. Highton & G.S. Álvarez (1998), p. 27. Original text in Spanish: “[...] el movimiento no termina allí; es más amplio y revolucionario”.

a distance, using the network and technologies connected to the network to facilitate solutions for the parties in dispute.¹⁹

The future for ODR in Latin America is still uncertain due to the many challenges that still need to be overcome. Some of those challenges will be analyzed in the following sections. Nevertheless, and at the risk of overgeneralization, it might be said that the future is full of promising opportunities for the ODR field in the Latin American region.

3 READINESS FOR ODR IN THE REGION

Regarding the expected evolution of ODR in the developed world, it might be said that:

[...] from the results of the various experiences among professionals, virtual platforms and public initiatives, [...], it is abundantly clear that many of these mechanisms [referring to ODR] will continue to evolve and permeate into society. Because as it has been reckoned [...] quantitative but also qualitative benefits are emerging from ODR methods.²⁰

Still, while ODR has been an object of research for quite some time, and while it has been applied in the developed world for more than a decade now, in the Latin American region the situation is quite different. Only in the last few years the first experiences have emerged. In this sense, for ODR to evolve and permeate into society, regional challenges should be addressed as well.

The opportunities for ODR in the region are promising due to key reforms currently being undertaken in ICT, Cyberlegislation harmonization,²¹ and the Digital Economy.

As Mohamed Wahab has stated:

19 E. Katsh & A. Gaitenby, "Introduction: Technology as the 'Fourth Party'", in *Online Dispute Resolution (ODR): Technology as the "Fourth Party", Papers and Proceedings of the 2003 United Nations Forum on ODR*, Geneva, 30 June - 1 July 2003, Ethan Katsh and Daewon Cho (eds.), co-edited by Alan Gaitenby and Colin Rule. Available at <www.odr.info/unece2003>.

20 A.E. Vilalta Nicuesa, *Legal Framework and Harmonization of Online Disputes Resolution Methods*, 2009 International Workshop on ADR/ODRs. Building bridges: legal framework and principles. Universitat Oberta de Catalunya (UOC), Internet Interdisciplinary Institute (IN3), 15 September 2009. Available at: <www.uoc.edu/symposia/adr>.

21 For more information about Cyberlegislation in Latin America see Gamba 2010. Also, in English, see: *Study On Prospects for Harmonizing Cyberlegislation in Latin America*, Ed. UNCTAD-UN, New York-Geneva 2010. Accessible at <www.unctad.org/en/docs/dtlstict20091_en.pdf>.

Information technology, the Internet, wide area networking techniques, and broadband connections have made it possible for anyone to transmit significant amounts of information across the globe instantaneously, which improves the conditions of the global economy, accelerates the growth of e-commerce, and creates an apposite milieu for the development of Online Dispute Resolution (“ODR”).²²

Thus, ICT and the Digital Economy in Latin America are interesting indicators of the readiness for implementation of ODR services, in particular when considering ODR services for e- and m-commerce disputes, being local or cross border in character.

The region experiences an incorporation of new internet users on a daily basis. At the end of 2010 there were approximately 181 million users, suggesting that the Digital Economy in the region is in constant expansion.

Studies have projected that global e-commerce will continue growing, being Latin America one of the regions that have led e-commerce growth rates (51% of average annual growth between 2003 and 2009).²³ In fact, despite the collapse of many economies, e-commerce B2C grew 39.2% in Latin America in 2009, which represented USD 21.2 billion for Latin America and the Caribbean.²⁴

Despite the still comparatively low numbers, the region is increasingly targeted for its great opportunities. Also, ICT has elevated efficiency and thus become a strategic tool for economic growth in the whole region, helping to develop competitiveness and transparency.

The Economic Commission for Latin America and the Caribbean (ECLAC) inform us that:

Latin American Companies recognize positive changes occurred by the incorporation of ICT, mainly in the level of customer satisfaction, reduction of costs

22 M.A. Wahab, “The Digital Divide, E-Commerce, and ODR: Constructing the Egyptian Information Society”, p. 1 in *Online Dispute Resolution (ODR): Technology as the “Fourth Party”*, *Papers and Proceedings of the 2003 United Nations Forum on ODR*, Geneva, 30 June-1 July 2003, Ethan Katsh and Daewon Cho (eds.), co-edited by Alan Gaitenby and Colin Rule. Available at: <www.odr.info/unece2003>.

23 According to América Economía Intelligence, 2010.

24 *Special Report: E-Commerce in Latin America*, ed. América Economía Intelligence and Visa, 2010, p. 1, available at <http://especiales.americaeconomia.com/2010/comercio_electronico/estudio.php>.

and increase of income. [...]. The potential for access of small and medium sized companies to new niches and markets is recognized as well.²⁵

On the other hand, regarding the larger players:

Of Latin America's sixty largest retail operators, whose annual sales all exceed US\$500 million, 53% already have an online strategy in place. It might not seem much, but it represents a high growth rate if one bears in mind that the overwhelming majority of their e-commerce sites are less than two years old. In fact, many retail operators that do not yet have an online sales strategy told [...] they plan to launch their first e-Commerce site in the coming months.²⁶

Many components which are crucial for Digital Economy development continue growing in spite of the global economic crisis. For example, PC and Broadband penetration grew at a rate of 20% & 15% respectively. At the end of 2009, there were 150 million PC users and 40 million with broadband access in the region.²⁷

Even so, the cost of access to broadband is one of the main obstacles to the growth of regional broadband connection penetration. It is expected that solutions will be found to spread broadband connection in the region at a better rate each year. Also, there are policies in progress to provide free Wi-Fi access in public places, as well as in schools. The region has been characterized by a huge proliferation of cybercafé's. These places provide broadband Internet access to a great portion of the population when other broadband connection facilities are unavailable or unaffordable.²⁸

25 W. Peres & M. Hilbert, *La Sociedad de la Información en América Latina y el Caribe Desarrollo de las Tecnologías y Tecnologías para el Desarrollo*, CEPAL/ECLAC-UN, Santiago de Chile, February 2009, p. 277. It is also true that different scholars have been debating about the impact of ICT on economic growth in the Latin American region. The debate still remains open. For more information on this issues, see: Peres & Hilbert (2009), pp. 63-73, also: Chapter X. On the other hand, when it comes to the impact of applying ICT in Government activities and services there is a clear consensus and strong evidence about its benefits in terms of improvement in transparency and efficiency. For more information see: Peres & Hilbert (2009), Chapter IX. Original text in Spanish: "Las empresas latinoamericanas reconocen los cambios positivos provocados por la incorporación de las TIC, principalmente en el nivel de satisfacción del cliente, la reducción de costos y el aumento de ingresos. [...]. También se reconoce su potencial para el acceso de las pequeñas y medianas empresas a nuevos nichos y mercados".

26 *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, ed. América Economía Intelligence and Visa, 2010, p. 2

27 *Special Report: E-Commerce in Latin America*, 2010, p. 1/2. Also total Internet users in 2009 hit 181 million in 2009 in Latin America, according to different sources such as the *Report E-Readiness in Latin America: A Report into Regional Conditions for e-Commerce*, ed. América Economía Intelligence and Visa, p. 4.

28 "In Latin America the most important places for the use of the Internet are those of public access, being the cybercafé's or the community centres such as libraries or other institutions". Original text in Spanish: "En

These growing processes have also been accompanied by the improvement and sophistication of the online offerings and a more educated online consumer base, composed of younger generations and digital immigrants who are becoming more aware of the benefits of new technologies:

Various studies point out that at an international level the digital divide might be closing and that the developing countries might be going through an unprecedented catching up process in terms of access. [...] It has been sustained that the difference will be smaller as markets become saturated in developed countries.²⁹

From the business point of view, Alec Oxenford, founder of the online auction house DeRemate.com (purchased by MercadoLibre.com), and a referent in the region, stated that, "In Latin America we finally reached a critical mass of users so that many business models on the Internet can rapidly produce revenue".³⁰

Regarding banking services, like credit cards, there is also still a need to promote the availability of those services to the population of the region:

At the end of 2009 there were 205 million credit card users in Latin America (representing a penetration of 37%) and 381 million (70%) owned a debit card, not all of which can be used in electronic commerce.³¹

This situation explains partly why in Latin America many people use the Internet as a research channel but, then purchase offline. This phenomenon, called ROPO (Research Online/Purchase Offline), has become common due to several different factors, but mainly

América Latina, los lugares más importantes para el uso de Internet son los de acceso público, sean los llamados cibercafés o centros comunitarios en bibliotecas u otras instituciones." Peres & Hilbert (2009), p. 58.

29 *Id.*, p. 48. Original text in Spanish: "Varios estudios señalan que a nivel internacional la brecha digital se estaría cerrando y que los países en desarrollo estarían atravesando por un proceso de recuperación (catching up) sin precedente en términos de acceso [...] En particular, se sostiene que la diferencia disminuiría a medida que se saturan los mercados de los países desarrollados". On the other hand, the same study refers to the internal digital divide as a challenge to overcome being the internal digital divide the result of social and economic inequalities pre-existent in the region. Also it points out that access to broadband and connectivity are not sufficient indicators but the quality of the information and communication digitally transmitted should also be considered when analyzing the internal digital divide in Latin America. For more details, see Peres & Hilbert (2009), Chapter II.

30 *Special Report: E-Commerce in Latin America*, 2010, p. 2

31 In comparison, the US had a stock of 576 million credit cards at the end of 2009 (188%) while Spain had 44 million (95%). *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 5. For more information and comparative charts see: Peres & Hilbert, 2009, p. 47.

due to lack of banking services access and a general lack of trust in the Internet as a commerce channel.³²

Still, from the vendors' point of view, ROPO means that there's a synergy process going on and businesses are acknowledging that for each online sale, there are approximately eight to ten offline sales that were initiated in online research done by consumers before they got into physical stores. This also means that consumers are getting more sophisticated and demanding, and at the same time are more prepared for a different kind of interaction.

Having said all of this, even though the constantly growing numbers of the region are encouraging, Latin America still has huge challenges to overcome in terms of broadband, PC penetration and banking services availability.

The situation for mobile phone penetration is quite different. At the end of 2009, the penetration of mobile phones in the Latin American region stood at 100.7%, far ahead of the US where the figure was 90%.³³

This might be explained by the development of prepaid mobile phones that do not require a credit card or any other prerequisite. "Prepaid modality facilitates access to users, particularly the poorest, by demanding fewer prerequisites to own a line, even though the cost of the line might not be cheaper."³⁴

In any case, this massive and fast technology adoption phenomenon means a significant change to vulnerable populations of the region. As most did not have regular phones available before, mobile devices elevated life quality and provided access to technology and new services.

Still the number of these mobile phones with broadband internet access is still not as high as expected, and most of the projections for the growth of m-commerce in the region are

32 This lack of trust in the Internet as a commerce channel occurs due to security and privacy issues, inefficiencies of the online sites, impossibility to access the web via secured access – like access through a cybercafé connection, etc.

33 Information based on *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4.

34 Peres & Hilbert (2009), p. 54. Also, see: ---, *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4, and E. Kaufman, "La Telefonía Móvil y los Servicios Para Ciudades" in *La Innovación ya no es lo que era*, ed. Dunken, Buenos Aires 2007, pp. 83-104. <www.links.org.ar/infoteca/innovacion.pdf>. Original text in Spanish: "La modalidad de prepago facilita el acceso de los usuarios, particularmente de los más pobres, al exigir menos condiciones para abonarse a una línea, aunque su operación no necesariamente tenga un costo menor."

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based on the expectation of the growth of cheap broadband connection through mobile devices.³⁵

ECLAC has said in this sense that:

[...] it is expected that the big number of mobile phones in use would imply a greater incidence in that technology in the processing of the volume of information transmitted through digital networks, a phenomenon that has particular importance for Latin America and the Caribbean.³⁶

3.1 *The Cross Border E-Commerce Puzzle*

Despite many obstacles, the number of Latin American consumers buying across borders through the Internet has been growing as well. This phenomenon is seen especially in the purchase of goods which are unavailable in the consumer's country.³⁷

Paul Gartland, CEO at SkyBox, a logistics company based in Miami, declared to *América Economía Intelligence* that:

When the iPhone was released in 2007, we received an enormous quantity of orders for the new gadget from Latin America. In 2009, we made 150,000 shipments for products from the US to Latin America – a rise of 18% compared to 2008 and despite the crisis [...].³⁸

Still, cross border e-commerce has not reached its full potential, due to logistics and customs problems; online means of payment unavailability; IT interoperability issues; *lack of forum for solving disputes*; and generalized lack of trust from consumers in companies which are

35 For more information on mobile ecommerce in the region, see *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4.

36 Peres & Hilbert (2009), p. 53. Original text in Spanish: “[...] es de esperar que el gran número de celulares en funcionamiento implique una mayor incidencia de esa tecnología en el procesamiento del volumen de información que se transmite a través de redes digitales, fenómeno que reviste particular importancia en América Latina y el Caribe.”

37 Regarding cross border e-commerce some authors have stated that ICT would mean a loss of local markets to the local companies of the developing countries, displaced by online competitors in the developed world. Others consider that even though the impact of these processes is still not clear, it is expected that cross border e-commerce would lead to better efficiency and competitiveness levels and would also open the global markets to the local companies of the developing world, which is already happening, thus benefiting also them in the process. For more information, see: Peres & Hilbert (2009), pp. Chapter X, in particular, pp. 275-276.

38 *Special Report: E-Commerce in Latin America*, 2010, p. 5

located too far away from the consumer's location. Also, in the future, the region expects to experience higher growth rates in intraregional cross border e-commerce.

Logistics present huge challenges both for cross border e-commerce and for local e-commerce as well. The regular mail in the region is not as efficient as expected presenting an infrastructure problem affecting, except from the Brazilian case, the whole region: bad routes, inefficiencies in terms of services; high costs associated to delivery of products, etc.:

The countries in this region have inefficient and costly mechanisms for distributing goods. These inefficiencies make it necessary for many companies to set up their own logistics. In the US this practice is unimaginable, where firms like DHL, UPS and FedEx are the stores' best partners.³⁹

While the region is facing many challenges, even the shyest projections present a promising future for ICT development and Digital Economy expansion. Online commercial transactions will continue to yield positive results and accelerated annual growth rates.

This scenario brings new puzzles:

The expansion of traditional computer networks globally, as well as the emergence of mobile commerce, has enabled consumers to purchase goods and services from almost any vendor in the world. But what if something goes wrong? What if the item does not arrive, or what arrives is different than what the buyer expected?⁴⁰

These questions asked by Rule, Rogers & Del Duca, are valid also for Latin America.

In the region's context the kind of problems described, as well as others, will be growing together with the increase in online commercial transactions, both at a local as well as at a cross border level.

Still, the question remains open as to how to address the disputes that will eventually arise, especially when it comes to cross border transactions, bearing in mind that there are no adequate, nor efficient forums available for online users to rely on.

³⁹ *Id.*, p. 8

⁴⁰ C. Rule, V. Rogers & L.F. Del Duca, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value – High Volume Claims – OAS Developments", 6 July, in *Uniform Commercial Code Law Journal*, (2010) Vol. 42, p. 221; Penn State Legal Studies Research Paper No. 24-2010; Stanford Public Law Working Paper No. 1635463. Available at SSRN: <<http://ssrn.com/abstract=1635463>>.

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Under the current conditions:

[...] possibilities for redress [...] are illusory [...] being the parties involved from different jurisdictions, and being at stake mostly non expensive transactions, traditional solutions available offline are too expensive, complex and of uncertain duration.⁴¹

These issues must be addressed for the region to keep pace in the growth of e-commerce and promote cross border interchange. Not doing so might mean the loss of consumer trust in the Digital Economy.

As Rule *et al.* have stated:

[...] The complexities have led to the erosion of consumer confidence for this category of transaction. [...] Consumers need to have a way to obtain redress if they are to have confidence in making online purchases.⁴²

But how to determine the applicable law or the jurisdiction in the cases mentioned above? In this sense, it has been said that:

When the transaction occurs in cyberspace, to determine the applicable law and other jurisdiction issues about the dispute, turns out to be more complicated, and sometimes even impossible.⁴³

And also that:

41 G.R. Szlak, *Global Online Dispute Resolution (ODR) para casos provenientes del eCommerce transfronterizo B2B y B2C*, in Digital Journal *ElDerechoInformatico.com*, Vol. Nº5, year 2010. Available at <www.elderechoinformatico.com> (online free registration is required). Original Text in Spanish: “las posibilidades de reparación [...] son ilusorias. [...] encontrándose los actores involucrados en diferentes jurisdicciones, y tratándose generalmente de transacciones de bajo monto, las soluciones tradicionales, disponibles offline, son demasiado onerosas, complejas, y de duración incierta”.

42 Rule *et al.*, 2010.

43 M. Tamayo Calíbrese & J. Hanna, “El Comercio Electrónico y los Métodos Alternativos para la Solución de Disputas. Una intersección inevitable”, in *Sistemas Judiciales* No. 2, 2001, pp. 56-59, ed. Study Centre for Justice in the Americas (CEJA) and Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP). Accesible at <<http://issuu.com/sistemasjudiciales/docs/sistemasjudiciales2/7>>, general source <<http://sistemasjudiciales.org>>. Original text in Spanish states: “Cuando la transacción ocurre dentro del ciberespacio, el fijar la ley aplicable y otros temas de jurisdicción, sobre la disputa, se torna mucho más complicado, y hasta tal vez, imposible”.

[...] interaction on the Internet is often of a cross border character, which is why problems derived from the lack of territorial boundaries of the virtual environment, and the lack of regulation, accentuate the problem of determination of the competent tribunals.⁴⁴

Nevertheless, even if the competent judge and the applicable law would be easy to determine in a given case, litigation costs when the parties are located in different jurisdictions is still perceived as a problem not easy to solve, especially when professional fees may exceed the amount of the transaction in dispute.

The situation described above presents great challenges to governments and to legal and technology experts as well.

Solutions proposed point out the need for ODR. As Shultz *et al.* have stated:

As cyberspace is an environment characterized by interconnections and dematerialization, it makes sense to resolve disputes by an interconnected and dematerialized tool. This tool is online dispute resolution [...].⁴⁵

Traditional legal systems are based on the stability provided by time and space as the regular framework for the legal structure. Using online tools to address disputes that arise online means a radical change. As online interaction is increasingly perceived as more flexible, informal and efficient, ODR has become a promising option for out-of-court dispute resolution.

As has been mentioned before, in the developed countries ODR has been an object of debate and research since the late 1990s. Latin America, even though still behind, cannot afford to stay out of this debate. This is particularly significant due to the fact that the region is consolidating ICT and Digital Economy indicators and is moving towards the deepening of these processes.

44 R.J. Ortega Hernández, "Regulación en Internet", in *Alfa Redi: Revista de Derecho Informático*, No. 109, Peru, August, 2007. Available at <www.alfa-redi.org/rdi-articulo.shtml?x=9464>. Original text in Spanish: "(...) es sabido que las relaciones en Internet son muchas veces de carácter transfronterizo, por lo cual los problemas derivados a la desterritorialidad del espacio virtual y la escasa regulación, acentúan los problemas referidos a la escogencia de tribunales competentes en la materia." Also see: R.J. Ortega Hernández & J.M. Lezcano, *El Camino hacia Nuevos Paradigmas en la Resolución de Conflictos*, Paper presented at the 9° ODR World Forum, Buenos Aires 2010.

45 T. Schultz, G. Kaufmann-Kohler, D. Langer & V. Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*, University of Geneva 2001, p. 13, Available at SSRN: <<http://ssrn.com/abstract=899079>>.

3.2 *Facing the Regional Challenges*

Implementation of ODR Programs at a regional level is not an easy task, but neither an impossible one.

ODR regional initiatives need to set strategic long term goals and to do so through a multi-stakeholder perspective. This will allow the region to address the complexity required for the technological, social, economical, legal and cultural challenges certain to be faced moving forward.⁴⁶

Government cooperation with companies, the scientific community and civil society, both at the national and international level, is needed for ODR to flourish in the region in two specific aspects:

- 1) The promotion of ICT policies to reduce the internal and international digital divide and to overcome social, economic and cultural challenges.
- 2) The consolidation of an adequate legal framework for ICT in general that would support ODR development.

3.2.1 **Promoting ICT Policies**

ICT policies at the regional level can serve as catalysers in terms of ODR. Since the 1990s the Latin American and Caribbean governments have been developing and implementing actions directed toward bringing the benefits of ICT to the general public. This process has included different policies, such as the inclusion of ICT programs in schools; the promotion of ICT through social media campaigns; the leverage of the hardware and software industries; and the digitalization of government processes, among others.

Those policies have been deepened and expanded over the years, and, most important; they have been progressive, including the private sector as a crucial partner for the adoption and implementation of ICT:

In the last years most of the countries defined strategies, plans, policies or digital programs that tended to implement public policies on ICT as means for the construction of the Information Society. At the regional level, numerous global and regional declarations were finally expressed in a strategy for the

46 For general economic, social and environmental indicators for Latin America and the Caribbean, in English, see *Statistical Yearbook for Latin America and the Caribbean*, CEPAL/ECLAC-UN, Santiago de Chile 2010. Accesible at <www.eclac.org/estadisticas/default.asp?idioma=IN>.

Information Society for Latin America and the Caribbean, which implies a sequence of regional action plans known as eLAC.⁴⁷

eLAC is the biggest joint initiative in terms of a regional agenda for ICT policies. It constitutes a regional tool to achieve the goals set at the World Summit on the Information Society (WSIS) as well as at the Millennium Development Goals (MDGs).

Its purpose is to identify and take into account the specific and urgent needs of the countries of the region, facilitating adoption processes throughout cooperation and interchange of best practices among them.⁴⁸

Regarding regional cooperation efforts:

The plan also calls for strengthening the mechanisms for shared e-government services, by developing regional cooperation efforts to facilitate the sharing/transfer of technologies, platforms and computer applications and programs, as well as relevant knowledge, skills and best practices. It also proposes the goal of promoting the interoperability of standards based e-government systems in Latin America and the Caribbean, and of continuing to develop a regional program of interoperability and standards for e-government services. The effort is aimed at ensuring that it will be possible to interconnect services within a jurisdiction and between jurisdictions, and draws on recommendations from sources such as the White Book on e-Government Interoperability.⁴⁹

Key breakthroughs have been achieved, and there is a lot more in progress. The *Concilianet/Profeco* case, an ODR provider established as an e-government service by the Mexican government, is an excellent example of ICT policies in action to be examined below.

47 Peres & Hilbert (2009), pp. 301-302. "En los últimos años la mayoría de los países definieron estrategias, planes, políticas o programas digitales tendientes a poner en práctica políticas públicas sobre las TIC como medios para construir sociedades de la información. En el ámbito regional, numerosas declaraciones regionales y mundiales finalmente se plasmaron en una estrategia sobre la sociedad de la información para América Latina y el Caribe que implica una secuencia de planes de acción regionales conocidos como eLAC."

48 For more information about eLAC 2007 & eLAC 2010 see: <www.eclac.org/socinfo/default.asp?idioma=IN>. See also Peres & Hilbert (2009), Chapters X and XII.

49 *Study On Prospects For Harmonizing Cyberlegislation In Latin America*, ed. UNCTAD- UN, *English Version*, New York and Geneva 2010, p. 48. Also see this Study in order to get information about Cyberlegislation in each of the following eleven Latin American countries: Argentina, Plurinational State of Bolivia, Colombia, Chile, Cuba, Ecuador, México, Paraguay, Peru, Uruguay and The Bolivarian Republic of Venezuela, pp. 10-33.

3.2.2 Promoting an Adequate Legal Framework

The promotion of an adequate legal framework would bring confidence, security and certainty to ICT development in general and to ODR in particular.

Regarding consumer protection in the e-commerce environment, efforts must be exerted to meet the needs of the Digital Economy. Even though some countries have incorporated specific reforms in order to protect consumers in the local online environment, most have not yet addressed the issue of consumer protection when they choose to buy online across borders using the Internet:

At a global level, governments face the challenge of promoting and facilitating the [...] economic growth based on technologies emerging from networks, and bringing their citizens an effective and transparent protection to the consumer in e-commerce. [...] The OCDE country members initiated, by the end of the 1990s, a revision of their applicable laws as well as their practices in the field of consumer protection, to determine whether changes are required or not in terms of the particular characteristics of e-commerce. Furthermore, the country members have studied the way in which auto-regulation efforts might help bring an effective and fair protection to consumers in this environment.⁵⁰

Regarding the regional legal framework for electronic contracts and e-commerce, different countries have chosen different approaches. Some countries in the region have decided to refer to UNCITRAL Model Law, others have reformed existent laws to meet the needs of the Digital Economy, while another group has opted to dictate new and specific laws to address those issues.

Regarding electronic and digital signatures, the UNCITRAL Model Law on Electronic Signatures (2001) has been also relevant, bearing in mind that many countries of the region refer to it in their legislation.

According to Gamba:

50 Gamba 2010, pp. 8-9. Original text in Spanish: “A nivel global los gobiernos enfrentan el reto de impulsar y facilitar el [...] crecimiento económico basado en las tecnologías emergentes de redes, y de proporcionar a sus ciudadanos una efectiva y transparente protección al consumidor en el comercio electrónico. [...] Los países miembros de la OCDE han iniciado, a finales de los años 90, la revisión de sus leyes vigentes así como de las prácticas de protección al consumidor, para determinar si se requiere o no realizar cambios en términos de las características particulares del comercio electrónico. Asimismo, los países miembros han estudiado la manera en que los esfuerzos de autorregulación pueden ayudar a proporcionar una protección efectiva y justa a los consumidores en este contexto”. Please note that from the region, only Chile and Mexico are OCDE members.

Almost all (18/23) of the countries of the region that have been analyzed have specific laws dedicated to electronic and digital signatures. In the 23 analyzed cases, 5 do not have a specific norm in the discipline yet (Bolivia, Cuba, El Salvador, Paraguay, Saint Lucia), 4 have [specific norms] prior to [the year] 2000 (Bermuda, Colombia, Puerto Rico, Uruguay), while 14 have [specific norms] dictated in the period 2000-2009 (Argentina, Barbados, Belize, Brazil, Chile, Costa Rica, Ecuador, Cayman Islands, Mexico, Panama, Peru, Trinidad and Tobago, Dominican Republic and Venezuela).⁵¹

3.2.3 Promoting Research and Development (R&D) for the Cultural Change

Another regional necessity is to promote R&D specifically for ODR. This will facilitate identification of regional needs, for ODR to be able to consolidate in the region.

Kaufman states that “The convergence of society, government and ICT urgently requires the participation of universities, especially in the field of Social Science”.⁵²

R&D will also help build successful action toward facing the hardest of the challenges, namely *cultural change*:

[...] ICT increases competitiveness, regardless of which both people and companies tend to adopt and use it in a slower pace than the actual technical progress, due to the uncertainty that [ICT] generates [...].⁵³

Last but not least, R&D would also provide tools for accurate statistics in the performance of ODR programs yet to be implemented.

51 *Id.*, p. 10. Note that Paraguay already approved a Digital Signature Law in late 2010. Original text in Spanish: “La casi totalidad (18/23) de los países de la región que han sido analizados cuentan con normativas específicas dedicadas a la materia de firma electrónica y firma digital. En los 23 casos analizados, 5 resultan no tener todavía una disciplina específica en la materia (Bolivia, Cuba, El Salvador, Paraguay, Saint Lucia), 4 resultan ser anteriores al 2000 (Bermuda, Colombia, Puerto Rico, Uruguay), mientras que 14 han sido realizadas en el periodo 2000-2009 (Argentina, Barbados, Belize, Brasil, Chile, Costa Rica, Ecuador, Islas Caimán, México, Panamá, Perú, Trinidad y Tobago, Rep. Dominicana y Venezuela).”

52 E. Kaufman, Buenos Aires, 2005, p. 13

53 Peres & Hilbert (2009), Chapter X, in particular p. 304. Original text in Spanish: “[...] las TIC permiten aumentar la competitividad, pese a lo cual su apropiación y utilización por parte de personas físicas y empresas es más lenta que el ritmo del progreso técnico, debido a la incertidumbre que este genera [...]”.

3.3 *The “Trust Cocktail”*

The distance between the developed world and the developing world in terms of consumer satisfaction is huge. Still, as will be seen in this chapter, positive changes are arising in the region, together with transparency and competitiveness developments making progress as part of the Digital Economy expansion.

In traditional commerce as well as in e-commerce transactions in the region, still most consumers (depending on the company, the circumstances and the type of item bought) find it quite difficult to do things like returning an item, returning an item and not paying for shipping (even in the cases when the return is due to problems under the business responsibility), making a guarantee effective, getting a refund, etc.

Even when the relevant consumer protection legislation is in favour of the consumer, it is not surprising to find out that companies simply do not comply with the law or they just do it only when threatened with enforcement.

One interesting shift taking place gradually in the region since the proliferation of the Digital Economy is that, when it comes to e-commerce approaches, businesses are addressing disputes with costumers/consumers not as a loss to be *thrown* to the legal department, but rather as an opportunity to build trust and increase sales through the consumer support and the marketing departments.

Maybe this approach has been taking place in the developed world for many years, but for the Latin American region the awareness that solving problems or disputes is an opportunity to build trust and bond with costumers is only now maturing. Together with the expansion of the Digital Economy and the empowerment of consumers, this understanding is growing as part of the awareness that comes along with social networks, reputation and feedback systems, online forums and other similar tools.

As a result, businesses of the region selling products and services online through e-commerce, have become quite aware of the need for efficient mechanisms for the resolution of problems and disputes arising from the online environment.

This new ingredient of consumer empowerment has been also gradually influencing traditional commerce as well, because even when buying products or services offline, still, consumers will use the Internet to comment about those products or services.

In this sense, cultural change is being promoted by Internet interaction, affecting the way business is done and, most importantly, the way disputes are managed in the region.

As an example, a businessman from the region confessed that, even though he had better profit margins when selling through his own e-commerce platform (at his own website), he applied higher standards for customer support for those customers buying his products through a famous market place platform, just because that market place platform had a strong reputation system that he used as a marketing tool.

Marketplaces understand their community capacity building and thus recognize the importance of keeping fair and strong reputation systems. This also makes them aware of the need to count on efficient mechanisms to manage disputes regarding negative feedback in their communities in a fair way, and limit legal responsibility for users' behaviour online.

For all the reasons mentioned above, the field is fertile for ODR to flourish, at least in the private sector in Latin America. Companies have started to welcome proposals for ODR implementation, expecting to combine ODR with other marketing initiatives for building trust in their businesses and in the Digital Economy as a whole. They understand more than any of the other relevant stakeholders the meaning and potential of ODR as a tool for value creation in the customer experience.

Still, ODR is not seen by companies as a legal or dispute resolution matter, nor as an autonomous issue, but rather as one of the elements of what I will be calling the "trust cocktail", which also refers to auto-regulatory measures, such as codes of conduct, best practices, trustmarks or seals of trust, and feedback or reputation management systems, among others.

This promising and fertile context has inspired the Latin American eCommerce Institute (ILCE) to develop its ODR Regional Program for the Digital Economy in partnership with its eConfianza Trustmark Program.⁵⁴

Both initiatives working together seek to build trust in the online environment; improve the relationship between online consumers and vendors; achieve high levels of transparency and respect for legality online; facilitate redress for consumers while promoting best practices and auto-regulatory frameworks for cross border regional transactions, all of which will help to build trust in the Digital Economy.

54 See <www.econfianza.org>.

4 ODR IN ACTION IN LATIN AMERICA

4.1 ODR Regional Program for the Digital Economy by the Latin American E-Commerce Institute – ILCE

ILCE is a non profit organization of regional character. It is organized as a federation of e-commerce chambers and associations.⁵⁵ Its mission is to build an open network among these institutions and spark initiatives of each of its organization members and of all of them together as a whole, in order to promote e-commerce and e-business and help to develop the Digital Economy in the Latin American region.

Since its creation, ILCE has promoted many initiatives which have been expressed in activities of each of the institutions of the network.⁵⁶

Regarding ODR, at the end of 2009 ILCE created its ODR Regional Program for the Digital Economy, which is associated with another ILCE initiative called *eConfianza*, which promotes the use of a trustmark, including a reputation system, as well as an auto-regulation framework for e-commerce.

As ILCE's mission is to promote the development of the Digital Economy in Latin America and taking into consideration the context described in the previous sections, this institution decided to assume the challenge of leading and assisting the implementation of ODR ser-

55 ILCE's network members from Latin America and the Caribbean are: 1) Argentina: Argentinean e-Commerce Chamber – CACE – <www.cace.org.ar> 2) Brazil: Brasileña e-Commerce Chamber – Camara e-Net <www.camara-e.net> 3) Colombia: Colombian e-Commerce Chamber – CCCE- <www.cce.org> 4) Chile: Santiago's e-Commerce Chamber – CCS – <www.ccs.cl> 5) Ecuador: Ecuadorian Corporation of e-Commerce – CORPECE – <www.corpece.org.ec> 6) Ecuador: Guayaquilean e-Commerce Chamber – CCG- <www.lacamara.org> 7) Mexico: Mexican Association for Internet – AMIPCI – <www.amipci.org.mx> 8) Paraguay: Paraguayan e-Commerce Chamber – CAPACE – <www.capace.org.py> 9) Paraguay: Paraguayan Internet Chamber – CAPADI – <www.capadi.org.py> 10) Peru: Peruvian e-Commerce Chamber – CAPECE – <www.capece.org.pe> 11) Dominican Republic: Dominican e-Commerce Chamber – CADOLEC – <www.cadolec.org> 12) Venezuela: Venezuelan e-Commerce Chamber – CAVECOM – <www.cavecom.org.ve> ILCE's network members from other regions: 13) Spain: Spanish Association for e-Commerce – AECCEM – <www.aecem.org> 14) Portugal: Association of e-Commerce and Interactive Publicity ACEPI <www.acepi.pt>.

56 Other ILCE's initiatives are: Latin American Congresses on e-commerce “eCommerce LATAM”, National Conferences “eCommerce Day”, Social Network for ebusiness interchange “Comunidad eBusiness”, awards for e-commerce “eCommerce Awards”, training and e-learning programs on e-commerce and e-business, spreading activities, such as Seminars, Conferences, etc., the “Centre for Studies for the Digital Economy”, the online digital TV show on online business “Explorando Negocios.tv”, the “Business 2.0 bridging Program” for the interchange of experiences and knowledge between Latin America and Europe, and Latin America and the US, among others. For more information about these and other initiatives from ILCE, see <www.einstituto.org>.

vices regarding disputes arising from e- and m-commerce to meet the needs of online consumers and vendors at a regional level. Also, by specializing in the field, the institution seeks to promote and assist implementation of different ODR services for a variety of different contexts and needs.

4.2 *International Cooperation: What About the Region's Readiness for a Global ODR System?*

Since 2010 ILCE's ODR Regional Program has been collaborating at the international level with a group of experts and institutions advocating for the establishment of an UNCITRAL Working Group for ODR.⁵⁷ ILCE has also supported the debate for the approval of a Model Law or similar framework for cross border e- and m-commerce ODR disputes, B2B and B2C.⁵⁸

This cooperation is done in the understanding that a framework as such might facilitate the creation in the future of a global ODR system that would help to handle cross border e-commerce disputes, fairly, adequately and efficiently, both for consumers and for sellers.

In the promotion of multi-stakeholder approaches, ILCE's member organizations are involved in regional frameworks such as Mercosur,⁵⁹ in particular the 13th Subgroup on Electronic Commerce. Just to mention the latest examples: During the XXIII Subgroup ordinary session, held in May 2010 in Buenos Aires, Argentina, a presentation on ODR for the Digital Economy was done by the Argentinean eCommerce Chamber (CACE) – member of ILCE – and ILCE. National delegations from Argentina, Brazil, Uruguay and Paraguay, participated and debated about the possibilities offered by ODR. The Brazilian delegation suggested that the organ might be working in a Best Practices document for the use of ODR tools by public institutions of the region. CACE/ILCE's presentation on ODR and the Brazilian suggestion for Best Practices were both incorporated to the final resolution of the meeting.⁶⁰

57 For information about ILCE's advocacy for the global ODR system see: Note A/CN.9/710, dated 26 May 2010, Buenos Aires Global ODR event organized by ILCE in 2010 <www.einstituto.org/onlinedisputeresolution>, ILCE's participation at the Vancouver 2010 Conference and blog: <www.odrandconsumers2010.org>, among others.

58 It is expected that UNCITRAL's framework will be the basis for the creation of a Global ODR System. For more information about the proposal for a Global ODR System see Del Duca *et al.*, 2010.

59 MERCOSUR is a subregional union of states integrated by Argentina, Brasil, Paraguay and Uruguay, as member states and by Bolivia, Colombia, Chile, Ecuador, Peru and Venezuela as associated states. It was created in March 1991 by the signature of the *Asunción* treaty. <www.mercosur.int>.

60 MERCOSUR/SGT N°13/ Acta N°1/0 XXIII Ordinary Meeting of the Working Subgroup N° 13 "Electronic Commerce". To see CACE/ILCE presentation please see Annex at: <www.mercosur.int/show?contentid=383>.

Finally, existing ODR models should be reshaped and adapted to the region's characteristics if the purpose is to achieve regional adoption of ODR. Also, when defining a future model law or similar framework, the particular characteristics of the Latin American environment should be identified and taken into account.

For example, while the issue of confronting power imbalances between parties might be addressed by promoting the development of ODR providers which comply with quality standards and best practices, or, for instance, by providing adjudicative processes such as arbitration, complemented with chargebacks or refunds through payment systems, in the Latin American region this might be useful but might not be enough for this purpose. Thus, further action and measures, probably focused on motivation through marketing ideas (social networks, reputation systems, etc.) should be proposed and implemented.⁶¹

The promotion of local and regional ODR services as well as the promotion of an adequate legal framework for the Digital Economy will facilitate the shaping of the change needed in the region toward its involvement in global systems for cross border e-commerce ODR and for other ODR applications as well.

4.3 *The Mexican Case Profeco/Concilianet: E-Government and ODR*

In 2008 the Mexican Consumers' Protection Agency⁶² created *Concilianet*,⁶³ an e-government service for consumers which offers online mediation.

Concilianet/Profeco has been recognized in Mexico as one of the best e-government services available. The system is still only available for claims against previously registered companies (18 until the end of 2010). Regarding those companies, consumers can select to proceed through the traditional service offered by *Profeco*, or to file a case through the *Concilianet* online platform.⁶⁴ A case filed in the traditional system lasts about 73 days, while in *Concilianet* system the number of days is significantly reduced to 22.

A distinctive feature of *Concilianet* is that it does not specialize in disputes arising from the online environment. It rather offers services regarding conflicts arising also from online and offline transactions, regulated by the Mexican Federal Law for Consumer Protection

61 For more analysis please see section 3.4 of this document.

62 Consumer Protection Agency in Mexico: <www.profeco.gob.mx/>.

63 See <<http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>>.

64 The possibility of filing an online case into *Concilianet* was made possible in Mexico since a 2004 legal reform of the Mexican Federal Law for Consumer Protection, in Spanish "*Ley Federal de Protección al Consumidor*", Art. No. 99.

(*Ley Federal de Protección al Consumidor*). The innovation is that the mechanism for the mediation offered to the parties is provided online through videoconferencing and the assistance of a *Concilianet* neutral who works online as well.

The whole proceeding is carried on online, from the beginning: filing the case, uploading documents, hearings, and outcome, with *Concilianet* being the first fully-online ODR government provider for consumer disputes in the Latin American region.

If an agreement is reached between the consumer and the company, it is written and signed online with electronic signature.

Concilianet's implementation process started in 2008. For a year and a half the first experiences were with two companies participating: Aeroméxico and Hewlett Packard Mexico. In the next stage three other companies joined *Concilianet*, among them another airline and a company for the provision of natural gas. In 2009 another ten companies joined, reaching in 2010 a total of 18 companies committed to the system.

In 2008 171 cases were handled with 97% agreement rates. Between 2008 and 2010 *Concilianet* has mediated in 1134 cases with a 96% of agreement rate.

4.4 *The Peruvian Case: Cibertribunal Peruano*⁶⁵

The Peruvian Cybertribunal is an NGO created in November 1999. It is dedicated to two main activities:

1. Conciliation (Mediation) Centre certified by the Peruvian Ministry of Justice since 2001.
2. Dispute Resolution Centre (Arbitration) for disputes of domain names accredited by the ccTLD.pe administrator since 2008.

4.4.1 The Cibertribunal as Conciliation (Mediation) Centre – Traditional ADR
The *Cibertribunal* specializes in ICT and cases arising from the use of the Internet. The working areas covered by the centre are: e-commerce, electronic contracts, intellectual property, marketing online, telework, etc.

The conciliation (mediation) services offered by the centre are not online services but rather traditional ADR services in order to comply with the Extrajudicial Conciliation Law

⁶⁵ See <www.cibertribunalperuano.org>.

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of Peru (*Ley de Conciliación Extrajudicial*)⁶⁶ which establishes mediation as a previous requirement before resorting to courts and only for specified issues. This law is applicable only in some of the Peruvian jurisdictions and does not provide authorization for online proceedings. Even though the centre is technically and professionally ready for ODR, they do not apply it because they are bound by the above mention law.

In any case, the existence of this centre and its readiness for ODR means that in Peru, ODR for Internet related matters might become a reality in the near future

4.4.2 **The *Cibertribunal* as Dispute Resolution Centre – ODR – for Domain Names .pe**

In the field of domain names .pe and trademarks' disputes, the service offered by the *Cibertribunal* is ODR, and is the first regional organization to bring ODR services for these kinds of disputes.⁶⁷

There is a lot still to do, especially in terms of spreading the centre's activities and services among relevant stakeholders. The total cases managed until the end of 2010 were 16.

As limited as this number might sound, the work the centre is doing is of great value for the region.

Both the *Cibertribunal Peruano*, and *Concilianet* from Mexico, are local ODR providers offering services along with state recognition.

4.5 *ODRLatinoamerica: Social Network for Conflict Resolution Professionals*

ODRLatinoamerica is a social network, created at the end of 2008. It was created for conflict resolution professionals to be able to exchange knowledge and experience and to learn about the application of ICT to the ADR field.

The network reached 2000 members at the beginning of 2011. Its main success has been the leadership of cultural change, the spreading of ODR and the generation of favourable consensus towards ODR among conflict resolution practitioners and experts in the region.

⁶⁶ See Law Nr. 26872, 13 November 1997.

⁶⁷ For more information about the *Cibertribunal Peruano*, see A. Alvarez Calderón, *El Cibertribunal Peruano*, in *REDI*, No. 14 September 1999. Available at <www.alfa-redi.org/rdi-articulo.shtml?x=336>.

During 2010 *ODRLatinoamerica* organized the 9th ODR World Forum 2010 together with the Federal Police University Institute and other international organizations.⁶⁸

This social network has promoted Latin American participation in international ODR forums, such as Cyberweek. In fact in 2008 and 2009 *ODRLatinoamerica* has coordinated a Spanish online event in the framework of the Cyberweek. In 2010, the Spanish participation in Cyberweek deepened by the completion of a complete version in Spanish of Cyberweek co-organized by this organization.⁶⁹

It is expected that this initiative together with others will keep helping and preparing the region for ODR.

5 FINAL THOUGHTS

As Cortés states:

To predict how ODR might develop in the EU over the next few years may be speculative and risky since a forecast on anything involving technology may soon be proven wrong.⁷⁰

This statement is also true for Latin America. Still, the future for ODR implementation in the region seems promising.

Regarding traditional disputes addressed by the judicial systems, efficiency and efficacy is being searched by ICT reforms and ADR assistance. Both elements, ICT and ADR, are of a crucial character for the expansion of ODR. Also, ICT structural reforms in the region, cyber legislation harmonization and Digital Economy expansion, are indicators for the readiness of the region in terms of capacity for ODR successful implementation.

Regarding the justice system, a positive trend might be taking place in the near future.

⁶⁸ For more information see <www.odr2010.com.ar>.

⁶⁹ Cyberweek is a web-based conference focused on the practice of ODR. It has been convened by the National Centre for Technology and Dispute Resolution (NCTDR) annually for the past 13 years. Cyberweek 2010 was co-organized by NCTDR & The Werner Institute for Negotiation and Dispute Resolution at Creighton University School of Law. The Spanish version was coordinated by *Odr Latinoamerica*. To visit Cyberweek 2010 site in Spanish please see <<http://cyberweek2010esp.jimdo.com>>.

⁷⁰ P. Cortés, *Building Legal Standards in the EU for ODR Services*, in *2009 International Workshop on ADR/ODRs. Building bridges: legal framework and principles*, Universitat Oberta de Catalunya (UOC), Internet Interdisciplinary Institute (IN3), 15 September 2009. Available at <www.uoc.edu/symposia/adr>.

On the one hand, ICT deployment in the justice system will be preparing the general public and the legal community for new and more efficient ways of handling disputes.

On the other hand, ODR characteristics, and especially when applied to e- and m-commerce, will deepen the process of users involvement in dispute resolution proceedings. This will lead users to expect the same kind of transparency and efficiency when dealing with disputes in the traditional system as well. Accordingly, the user's new protagonist role and maturity might be generating a domino effect for better practices in the field of dispute resolution in general, be it for disputes addressed by the traditional justice system, or for out of court mechanisms.

From a different perspective but along the same line of analysis, Orna Rabinovich-Einy states that, "even where ODR is not employed as a means for resolving conflict, it can inspire change in the design of traditional means for dispute resolution". She believes that while traditional approaches for dispute resolution adopted rigid molds that resist learning improvement, "ODR, in particular due to its automatic recording of rich data on resolution communications in digital format, has the potential for enhancing both accountability and learning".⁷¹

Regarding disputes arising from the Digital Economy and/or from the online environment in general, ODR solutions seem crucial, both for (a) cases for which there is no other possible or practical solution available, and for (b) cases in which there are available solutions but they are too expensive and/or complex to rely on.

Accordingly, it is expected that with e-commerce growth and maturity in the region the strongest impulse for ODR will come from private sector initiatives, as part of providing solutions for both those types of cases [(a) and (b)]. This solution will be implemented as part of the "trust cocktail" measures to be adopted by companies to strengthen bonds with costumers and build trust in the Digital Economy, thus accelerating e- and m-commerce expansion.

Nevertheless, for ODR implementation to be successful and permeate into society in the long term, multi-stakeholder approaches should be emphasized and preferred to enrich its capabilities and meet the needs of its end users, while offering high level standards and best practices for out of courts resolution of disputes.

71 O. Rabinovich-Einy, "Enhancing Accountability and Learning in Dispute Resolution Through Technology", in *IDP. Revista de Internet, Derecho y Política*, Universitat Oberta de Catalunya, June 2010, p. 1.

There are some initiatives in action, and it is expected that in the future, and with the deepening and maturity of the region in terms of Digital Economy and ICT, more initiatives will be functioning, not only from the private sector but also from the public sector, as part of e-government services expansion. Still, to enable users to actually take advantage of ODR systems to be implemented, the cultural challenge will play an important role, which is why spreading, training and reaching out activities are crucial for the user's adoption of available services, together with an adequate legal framework for ICT that can bring certainty to online interaction.

Finally, regarding the readiness of the region for the adoption of Global ODR initiatives, the promotion of local and regional ODR services to meet different needs, as has been previously stressed, will help prepare the region for successful involvement in global initiatives.

