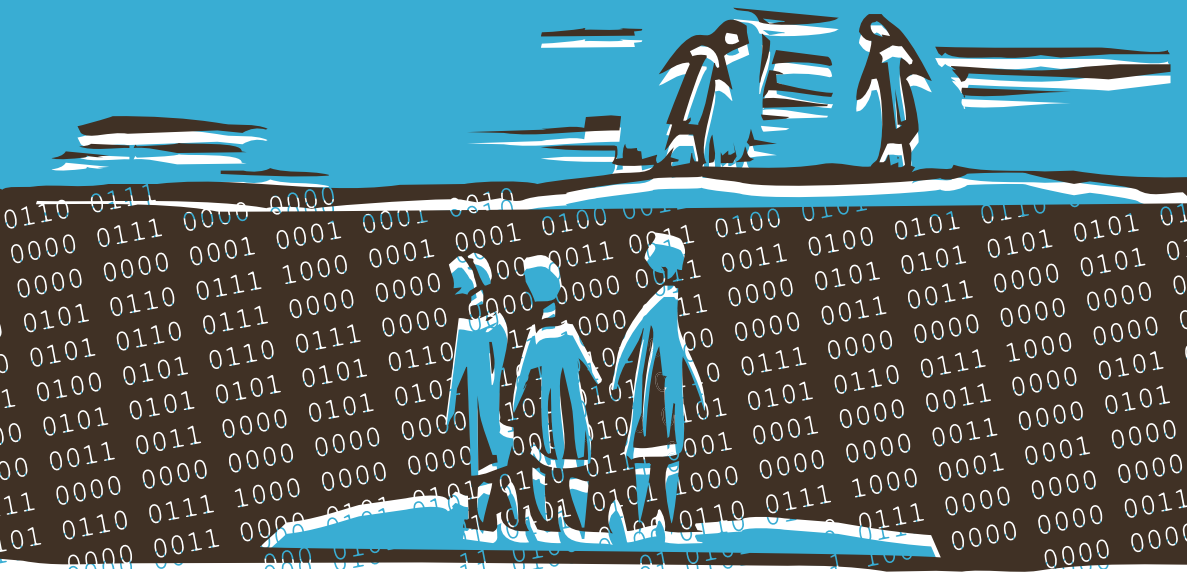


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## EDITORIAL

# Introduction to the Journal

The publication of this first volume of the *International Journal of Online Dispute Resolution* ('IJODR') marks a critical milestone in the evolution of ODR. ODR, as a parallel universe blending information technology and dispute resolution schemes and applications, has grown exponentially since the late 1990s and the advent of the 'fourth party'.

Whilst acknowledging that ODR is a dispute resolution, and possibly dispute prevention, field, it seems manifest that the term 'ODR' is not subject to universal consensus over its scope. However, it is abundantly clear that ODR is a branch of dispute resolution that utilizes technology and artificial intelligence to settle disputes. Traditionally, ODR targeted online disputes of diverse forms and origin. Nevertheless, ODR seems to have outgrown its initially predestined online milieu and is now capable of fulfilling its potential by targeting offline disputes.

In light of the proliferation of technological applications and advent of fully fledged ODR schemes and providers, the *IJODR* signals the creation of the first dedicated global forum for discussion, disputation, and theory-building in the increasingly complex border between 'traditional' dispute/conflict engagement and technology. The *IJODR* offers a truly global and inclusive voice for the ODR universe with a diverse Board of Editors and, we hope, a diverse group of authors.

The content of this inaugural volume demonstrates the breadth of the impact of ODR, and the myriad directions from which one may approach the interaction of ADR and ODR. This volume contains four scholarly contributions covering a myriad of illuminating issues as well as a book review and an indispensable news section.

Rabinovich-Einy and Katsh discuss in their authoritative article entitled 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment' the disruptive nature of technology, particularly as it applies to the concept of justice and justice systems. In particular and notwithstanding the benefits technology provides, Rabinovich-Einy and Katsh assess why ODR is deemed, by some people, as a threat to the principles and values of ordinary dispute resolution and address the qualities of technology that can enhance dispute resolution processes.

Rainey, in his seminal article entitled 'Third Party Ethics in the Age of the Fourth Party,' outlines the profound nature of the impact of technology on the ethics of third party work. Such impact is one that is not revolutionary but rather evolutionary, and brought about by the new technology introduced and induced demands, restrictions and freedoms. Rainey scrutinizes instances where technology affects ethical considerations, such as questions of confidentiality and self-determination and its evolutionary impact.

Philippe in her inspiring article entitled 'ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR' highlights the complexity involved in developing online arbitration for commercial disputes. Philippe argues that notwithstanding the evolution of ODR, some aspects thereof need be examined in order to determine the procedure best adapted to consumer disputes. Philippe focuses on the discussions of the UNCITRAL Working Group III on ODR as related to consumer redress and sheds light on the EU Regulation on ODR published in 2013 and aiming at providing consumers and traders with alternative, out-of-court, fast, simple, cost-effective and efficient fora to resolve their disputes.

Lauritsen in his innovative article entitled 'Boxing Choices for Better Dispute Resolution' explores the nature of decision-making and how technology can assist in dispute resolution environments. Lauritsen tackles technological tools people may rely on when making choices, as well as the principles that should govern designing tools for making correct and efficient choices. Lauritsen created a formula that underlies the process of making choices, and is based on a three-dimensional box metaphor, where one axis represents the options, the second signifies the factors distinguishing such options and the third is that of the perspectives which represent the different evaluative takes.

Zeleznikow makes the first *IJODR* book review by reviewing a recent publication dedicated to a 'Eurocentric' discussion of 'agreement technologies'. He invites readers to hold a liberal view about the definition of ODR, when deciding whether the new monumental book on 'agreement technologies', is an ODR book that addresses the semantic web, norms, argumentation and trust.

Finally, Rule provides a highly insightful tour into the most recent developments in ODR under the 'ODR News' section. Notable news include: the formation of a new UK ODR Advisory Group, the AAA's selection of ODR for its largest volume caseload, a new European online mediation resource, information on new ODR providers, and a succinct update on the recent work undertaken by the UNCITRAL ODR Working Group.

On behalf of the co-Editors-in-Chief for the *IJODR*, we are committed and dedicated to bringing into print and digital media the latest, most critical thinking about ODR, drawn from every corner of the globe – a globe that has, as the cliché goes, been made much smaller by the technology we use to create and resolve disputes.

We do hope that the *IJODR* and this first volume thereof will be of interest to our readership and will mark the glistening path of ODR for years to come.

Dr. Mohamed S. Abdel Wahab

For and on behalf of the co-Editors-in-Chief

# Digital Justice

## Reshaping Boundaries in an Online Dispute Resolution Environment\*

Orna Rabinovich-Einy & Ethan Katsh\*\*

### Abstract

*Digital technology is transforming the landscape of dispute resolution: it is generating an ever growing number of disputes and at the same time is challenging the effectiveness and reach of traditional dispute resolution avenues. While technology has been a disruptive force in the field, it also holds a promise for an improved dispute resolution landscape, one that is based on fewer physical, conceptual, psychological and professional boundaries, while enjoying a higher degree of transparency, participation and change. This promise remains to be realized as the underlying assumptions and logic of the field of dispute resolution have remained as they were since the last quarter of the 20th century, failing to reflect the future direction dispute resolution mechanisms can be expected to follow, as can be learned from the growth of online dispute resolution. This article explores the logic of boundaries that has shaped the traditional dispute resolution landscape, as well as the challenges such logic is facing with the spread of online dispute resolution.*

**Keywords:** ADR, ODR, DSD, digital technology, boundaries, dispute prevention.

### 1. Introduction

Technology is transforming the landscape of disputing. Even more than in the past, 'conflict is a growth industry'<sup>1</sup> as consumers have problems with transactions, citizens worry about preserving their identity, businesses face threats to

\* The issues discussed in this article will be explored in more detail in *Digital Justice: Why Conflict is a Growth Industry and What We Can Do About It*, a book to be published by Oxford University Press.

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1 R. Fisher & W. Ury, *Getting to Yes*, Houghton Mifflin Harcourt, Boston, 1981, p. 17.

their reputations, social networks foster anti-social behaviour, governments struggle with security, patients encounter new health care choices and everyone experiences imperfectly functioning websites. The merger of the physical world with the virtual world has brought with it a broad range of novel, complex and valuable transactions and relationships. It has also brought with it a need for new dispute resolution and prevention processes.

Opportunities are now present for designing powerful systems to both prevent and resolve problems and disputes. This article presents a new perspective on what needs to be attended to in the design of dispute prevention and resolution systems. Thus far, where technology has been embraced, it has most often been viewed as a convenience or efficiency enhancer. These goals adequately capture the current state of penetration of digital technology in the dispute resolution field. They do not, however, reflect the future direction that online dispute resolution (ODR) and online dispute prevention tools and systems can be expected to follow.

New technologies disrupt not only by changing how we do things but by changing how we think about what we are doing, about what needs to be done and what can be done. Alternative dispute resolution (ADR) was not simply a more efficient approach than what happened in court and, over time, it will be clear that ODR is not simply a more efficient process than ADR. ADR brought with it a new mindset, and so will ODR. ADR involved not only new tools and techniques but different assumptions, principles and values, and so will ODR. Today, the logic of the field of dispute resolution largely remains as it was in the last quarter of the twentieth century. That is inevitably going to change as access barriers are reduced, effectiveness is increased, machines become more intelligent, software becomes more powerful and some components and beliefs of the ADR field are challenged.

ODR began its existence as 'Online ADR' and was intended to be a network-based equivalent of offline face-to-face dispute resolution processes, such as negotiation, mediation and arbitration. It attempted to mimic traditional processes but at a distance. The first experiments in ODR used human mediators who employed the network in lieu of meeting face-to-face but used the skills that they had developed and employed offline.<sup>2</sup> While information technologies typically innovate by providing new capabilities for both communicating information and processing information, the initial ODR experiments emphasized the former more than the latter. In general, therefore, while the tools were novel, the model was not. Communication is an element in every dispute resolution process, and new capabilities for communicating and managing the flow of information were viewed by the traditional ADR community as, at best, a necessary add-on where face-to-face meetings were not possible. In that guise, it was not a change agent in any kind of fundamental way.

Despite the growth of ODR systems during this millennium, the traditional dispute resolution field has continued to view ODR as a niche area with limited

2 O. Rabinovich-Einy & E. Katsh, 'Technology and the Future of Dispute Systems Design', *Harvard Negotiation Law Review*, Vol. 17, 2012, pp. 151, 171.

relevance beyond the world of simple, repetitive online conflicts. Some of the resistance by individual mediators related to a concern over a need to learn about and use new online tools and technologies. In addition, however, there was apprehension over the possibility that ODR might indeed be something new in that it would threaten some of the values that were embedded in ADR processes. As we explain below, there is truth to this as boundaries that shape online and offline activities, relationships, concepts and values are indeed eroding as growing numbers of conflicts are being addressed through digital tools. In many respects, this parallels disruptions occurring in other information-intensive industries and professions.

Growth of ODR is slowly moving it beyond the position of new tools providing efficiencies and conveniences to that of a 'disruptive' technology,<sup>3</sup> one that can be expected to challenge some of the most basic assumptions governing the field and around which its logic has been organized. As we show in this article, both courts and ADR mechanisms employ processes and approaches that are shaped by physical, conceptual, psychological and professional boundaries. These boundaries have allowed the dispute resolution field to deal with limited capacity, accommodate preferred values and preferences and generate institutional legitimacy. But it is precisely these boundaries that are being challenged by digital technology. As digital tools are increasingly used to assist parties in conflict, the use of predigital dispute resolution models will appear suboptimal. At the same time, alongside the challenge of growing numbers of disputes is the opportunity to use information technologies in new ways that anticipate and prevent disputes and that may not be consistent with some traditional practices.

In Section 2 of this article, we provide an introduction to the theories, policies, practices and assumptions underlying contemporary dispute resolution and explain how, both in formal and informal arenas, they are organized around a set of boundaries. In Section 3 we offer an explanation for the dominance of boundaries in dispute resolution. Section 4 uncovers the disruptive impact technology is having on the field by blurring traditional boundaries, giving rise to new types of disputes and to a large number of conflicts, for many of which traditional dispute resolution avenues cannot provide redress. By drawing on some innovative examples of the use of technology in addressing disputes through ODR tools and systems, we uncover the contours of an alternative logic for the field of dispute resolution: one that is grounded in a reality with fewer defined and fixed boundaries but with more access, participation and change.

## 2. Dispute Resolution Theory, Practice and Policy as We Know It: A Field Defined by Its Boundaries

Contemporary dispute resolution theory developed in the second half of the twentieth century alongside the enthusiastic adoption of ADR processes. In the

3 J.L. Bower & C.M. Christensen, 'Disruptive Technologies: Catching the Wave', *Harvard Business Review*, Vol. 73, No. 1, 1995, pp. 43–53.



1960s and 1970s, dissatisfaction with the court system grew as caseloads increased substantially and budgets dwindled.<sup>4</sup> Indeed, discontent with the formal avenue led to the convening of the well-known ‘Pound Conference’ in 1976, where leading practitioners, academics and judges discussed the ills of the legal system and potential solutions to the problems.<sup>5</sup> The principal problems raised were the high costs associated with a slow, complex and overburdened system.<sup>6</sup>

Discontent with the court system, however, extended beyond narrow efficiency-based considerations related to the costs and time for litigating a case. Critiques of courts were aimed at the quality of the outcome reached,<sup>7</sup> parties’ satisfaction with the procedure employed<sup>8</sup> and the impact of the resolution on the disputing parties’ relationship and future cooperation, as well as considerations relating to the broader community.<sup>9</sup> In terms of quality of outcome, courts were criticized for their ‘limited remedial imaginations’,<sup>10</sup> with most cases resulting in some form of monetary compensation, typically somewhere between the positions of the disputing parties.<sup>11</sup> Courts were reluctant, and often incapable of, providing more creative solutions, which would actually address what the parties needed, as opposed to what they demanded. Critique of court remedies was, in fact, part of a much broader criticism of a process that was adversarial and position-based, instead of addressing parties’ needs and interests.<sup>12</sup> In this respect, interest-based negotiation and mediation were expected to provide a real alternative, shifting parties’ focus from rights and positions to their underlying needs, allowing parties to brainstorm and devise ‘win-win’ solutions constrained only by the parties’ creativity and imagination.<sup>13</sup>

As of the 1970s, mediation and, to a lesser extent, arbitration were introduced into community and court settings as an avenue for addressing conflict in

- 4 T.D. Rowe Jr., ‘Litigation, Alternatives, and Accommodation: Background Paper’, *Duke Law Journal*, Vol. 1989, No. 4, 1989, pp. 824, 836-838.
- 5 C. Menkel-Meadow, ‘Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the “Semi-Formal”’, in F. Steffek et al. (Eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, 2013.
- 6 J. Auerbach, *Justice Without Law?*, Oxford University Press, New York, 1983, p. 95.
- 7 C. Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR”’, *Florida State University Law Review*, Vol. 19, 1991, p. 3.
- 8 D. Shestowsky, ‘Empirical Evidence for Parties’ Preference for Mediation over Litigation and for Facilitative over Evaluative Mediation: Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea’, *Public Policy & Law*, Vol. 10, 2004, p. 211.
- 9 C. Menkel-Meadow, *Dispute Resolution: Beyond the Adversarial Model*, Wolters Kluwer Law & Business, 2010, p. 228.
- 10 C. Menkel-Meadow, ‘The Trouble with the Adversary System in a Post-Modern, Multicultural World’, *William & Mary Law Review*, Vol. 38, 1996, p. 7.
- 11 M. Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, 1986, p. 10.
- 12 Menkel-Meadow, 1996; Fisher & Ury, 1981, pp. 40-55.
- 13 L.L. Riskin, ‘Mediation and Lawyers’, *Ohio State Law Journal*, Vol. 43, 1982, p. 34; C. Menkel-Meadow, ‘Towards another View of Legal Negotiation: The Structure of Problem-Solving’, *UCLA Law Review*, Vol. 31, 1983.

lieu of, or alongside, the court system.<sup>14</sup> Despite critiques over ‘privatization of justice’ and the ‘vanishing trial’ phenomena, adoption of ADR schemes in the 21st century continued and expanded.<sup>15</sup> In many respects, the debate on privatization, the role of courts and the need for ADR became obsolete. Institutionalization spread beyond courts and agencies, extending to private entities, giving rise to the phenomenon of ‘internal dispute resolution’.<sup>16</sup> Organizations began adopting ‘conflict management systems’ for addressing disputes involving employees and customers.<sup>17</sup> While the seeds for such developments were planted in 1989 with the publication of Ury, Brett and Goldberg’s ‘Getting Disputes Resolved’,<sup>18</sup> the design and adoption of such systems evolved into a field of its own, ‘dispute systems design (DSD)’, only a decade or so later.<sup>19</sup> Interestingly, the rise of DSD was taking place at approximately the same time that Internet communication was growing but, as we shall see, the ADR field has allowed limited penetration of new technologies.

While the ADR movement was united by its call for embracing alternatives to court, it was in fact grounded in diverging rationales and worldviews, ranging from efficiency<sup>20</sup> to party satisfaction<sup>21</sup> and community empowerment.<sup>22</sup> This state of affairs has generated a broad range of practices, but has also meant that the field has become an umbrella term for various theoretical approaches, each grounded in different disciplines and methodologies. The theory of ADR has drawn on multiple disciplines, including law, economics, psychology, sociology, anthropology and organizational behaviour. Despite its diverse roots, however, the writing in the field in the last few decades has followed a similar logic of boundary-setting in both practice and in theory. These boundaries are sometimes referred to as ‘barriers’,<sup>23</sup> and at other times as ‘stages’,<sup>24</sup> ‘categories’<sup>25</sup> or ‘dichot-

- 14 D.R. Hensler, ‘Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System’, *Penn State Law Review*, Vol. 108, 2003, p. 170; J. Sternlight, ‘ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice’, *Nevada Law Review*, Vol. 3, 2002.
- 15 L.L. Riskin & N.A. Welsh, ‘Is That All There Is? “The Problem” in Court-Oriented Mediation’, *George Mason Law Review*, Vol. 15, 2008, p. 870.
- 16 L.B. Edelman, H.S. Erlanger & J. Lande, ‘Internal Dispute Resolution: The Transformation of Civil Rights at the Workplace’, *Law & Society Review*, Vol. 27, 1993.
- 17 D.B. Lipsky, R.L. Seeber & R.D. Fincher, *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals*, Jossey-Bass, 2003.
- 18 W. Ury, J.M. Brett & S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Jossey-Bass, 1988.
- 19 Rabinovich-Einy & Katsh, 2012, pp. 157-158.
- 20 Hensler, 2003, p. 174; L.P. Senft & C.A. Savage, ‘ADR in the Courts: Progress, Problems and Possibilities’, *Penn State Law Review*, Vol. 108, 2003, p. 328.
- 21 Senft & Savage, 2003.
- 22 Hensler, 2003, pp. 170-174.
- 23 K.J. Arrow, R.H. Mnookin & A. Tversky, *Barriers to Conflict Resolution*, W.W. Norton, 1995.
- 24 W. Felstiner, R.L. Abel & A. Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming’, *Law & Society Review*, Vol. 15, 1980.
- 25 R.E. Miller & A. Sarat, ‘Grievances, Claims and Disputes: Assessing the Adversary Culture’, *Law & Society Review*, Vol. 17, 1982.

omies',<sup>26</sup> but in all instances create structures that organize the field – its limits, functions, concepts, values and goals. One way to map the various boundaries that have organized the field is by distinguishing among these physical, conceptual, psychological and professional boundaries.

### 2.1 *Physical Boundaries*

Physical boundaries are integral to the ADR literature. They relate most obviously to contemporary dispute resolution theory's understanding of dispute resolution as occurring in a physical place and being performed in a face-to-face setting, within a particular jurisdiction, subject to a particular body of law, with the force of the state supporting such services and ensuring the enforcement of any decision or resolution reached.<sup>27</sup>

Physical meetings have innate and inevitable limitations. For the provider, operating a physical place comes at a cost, often a high cost, which can effectively screen many disputes from being voiced or addressed. Courts are a particularly costly dispute resolution avenue and one where the physical characteristics of the space are important in that they shape both the symbols and the processes that are present in the space. The expensive and overburdened court system has raised concerns regarding the ability of disadvantaged disputants to bring their disputes before the courts. While all disputants are subject to this state of affairs, disputants of low socio-economic backgrounds are obviously impacted more significantly.<sup>28</sup> When people with disabilities bring their case to court or to an alternative forum, physical access may be denied *de facto* or be extremely difficult to attain.<sup>29</sup> Even where these disputants are able to enter the courthouse, procedural arrangements and practices may unevenly impact them, making it more difficult for such parties to participate and have a voice in the process.<sup>30</sup> Other problems have to do with the geographic spread of legal services and access to such services by disadvantaged disputants.<sup>31</sup>

The desire to reduce costs has been a major concern for the ADR movement grounded both in the court systems' own desire to enhance its efficiency and productivity and in external calls for improved 'access to justice'.<sup>32</sup> The degree to which ADR processes have succeeded in reducing access barriers remains debata-

26 S. Sturm & H. Gadlin, 'Conflict Resolution and Systemic Change', *Journal of Dispute Resolution*, 2007, pp. 2-3.

27 R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press, 2013.

28 D.L. Rhode, 'Access to Justice', *Fordham Law Review*, Vol. 69, 2001, pp. 1785-1786.

29 D.S. Udell & R. Diller, 'Access to the Courts: An Essay for the Georgetown Law Center Conference on the Independence of the Courts', *Georgetown Law Journal*, Vol. 95, 2007, pp. 1139-1140.

30 B. Yngvesson & L. Mather, 'Courts, Moots and the Disputing Process', in K.O. Boyum & L.M. Mather (Eds.), *Empirical Theories About Courts*, Longman, 1983; Udell & Diller, 2007, pp. 1140-1141.

31 K. Cohl & G. Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services-Final Report*, The Law Foundation of Ontario, 2008, pp. 31-35.

32 M. Cappelletti & B. Garth, 'Access to Justice: the Newest Wave in the World Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, 1977.

ble, and is the subject of contradictory empirical data.<sup>33</sup> But even at reduced costs, ADR has remained an activity that comes at a price and that itself presents physical barriers – having to ‘show up’ and participate, and to devote time, resources and energy to the process, all this is still needed even if no litigation process is conducted.

The physical attributes of dispute resolution processes can vary dramatically according to the type of process conducted. Litigation takes place in a highly visible and recognizable courthouse, which commonly has distinctive physical characteristics, such as the symbol of the state, typical architectural and internal design relating to such matters as the placement of the judge, parties and lawyers in the courtroom.<sup>34</sup> Alternative processes, on the other hand, may take place in a courtroom, but also may not. There is a conscious attempt to create a physical setting in ADR processes that is very uncourt-like (even where these processes are conducted in the courthouse) through such measures as informal seating arrangements, and allowing food and beverages.<sup>35</sup> The setting, however, still has the constraints of being a physical place.

The architecture and physical characteristics of a dispute resolution process impact the degree of privacy one can expect. To the extent that the place one enters to resolve his/her problem is a ‘courthouse’, then merely by entering the building he/she is in some sense exposed as being involved with an ongoing case. On the other hand, conducting a private dispute resolution process in an intimate face-to-face setting, encircled by physical boundaries, can create a secure closed setting in which parties feel safe to disclose confidential information. Nevertheless, the impact of these features is not one-directional, and the intimate setting of ADR processes, while designed as a barrier-reducing strategy, has been found hazardous for disempowered parties who under the veil of private proceedings have ignorantly agreed to an unfavourable compromise.<sup>36</sup>

While public proceedings can be described as being ‘open’ and ‘accessible’, they may also serve as a barrier for certain types of parties who would be deterred from bringing their case for fear of public exposure. In those cases, the private nature of ADR processes may be more appealing, serving to reduce access barriers for those disputants while closing off the process to the outside world.<sup>37</sup> At the same time, there are parties who are ‘against settlement’<sup>38</sup> precisely because they

33 P. Cane & H.M. Kritzer, *Oxford Handbook of Empirical Legal Research*, Oxford University Press, 2010, pp. 616-617.

34 O.G. Chase & J. Thong, ‘Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors’, *Yale Journal of Law & the Humanities*, Vol. 24, 2012.

35 Menkel-Meadow, 2010, pp. 274-276.

36 L. Nader, *No Access to Law: Alternatives to the American Judicial System*, Academic Press, 1980, pp. 64-67.

37 This is true for large corporations as well as individual complainants; see J.M. Nolan-Haley, ‘Court Mediation and the Search for Justice through Law’, *Washington University Law Quarterly*, Vol. 74, 1996, p. 54; M. Rowe, ‘People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options’, *Negotiation Journal*, 1990.

38 O.M. Fiss, ‘Against Settlement’, *Yale Law Journal*, Vol. 93, 1983. (We draw on Fiss’ terminology, but it should be noted that his objection to settlement is grounded in the public interest, while we refer here to disputants’ preferences.)

would like to make their problem and resolution known to a broader circle of interested or potentially interested parties.<sup>39</sup>

ADR can be differentiated from courts on the basis of the nature of the physical space in which the proceeding is held, but it is important to be aware that they are both dependent on physical spaces. The differing qualities of the particular physical space used, along with the manner in which information is communicated and processed, shape and reinforce different values, but the fact that both require a physical setting leads them to share some common elements as well, elements that we shall describe below. While some processes may involve higher access barriers than others, all dispute resolution avenues, whether they take place in a courtroom or an office space, carry some costs and screen out certain cases or potential disputes. Furthermore, with the broad institutionalization of ADR in courts, the physical boundaries for each of these categories have become more similar, rendering difference a matter of degree rather than kind.

## 2.2 Conceptual Boundaries

Conceptual boundaries are present in every field and discipline. In ADR, they allow us to distinguish between formal and informal avenues of dispute resolution, between resolution and prevention, and among the different processes within the ADR field. The delineation of conceptual boundaries has served as a backbone for the eager adoption of ADR mechanisms in the twentieth century, as demonstrated in Professor Sander's vision of a 'multi-door courthouse' – a court that would offer a multitude of processes for addressing different types of conflicts involving parties with varying characteristics,<sup>40</sup> and in Lon Fuller's earlier work, which exemplifies an essentialist view of the various dispute resolution processes.<sup>41</sup>

Sander's approach became a leading paradigm for the institutionalization of dispute resolution programmes. The reality of alternatives intertwined with the formal court process generated a wide array of writing on such matters as the unique characteristics of each dispute resolution avenue;<sup>42</sup> the relationship between formal and informal dispute resolution;<sup>43</sup> policy considerations relating to the adoption of ADR mechanisms and the form of institutionalization chosen;<sup>44</sup> criteria for forum selection across dispute types and disputant charac-

39 O. Rabinovich-Einy, 'Balancing the Scales: The Ford-Firestone Debacle, the Internet, and the Future Dispute Resolution Landscape', *Yale Journal of Law & Technology*, Vol. 6, 2003, p. 4.

40 F.E.A. Sander, 'Varieties of Dispute Processing', in A. Levin & R. Wheeler (Eds.), *The Pound Conference: Perspectives on Justice in the Future*, West Publishing Co., 1979.

41 C. Menkel-Meadow, 'The Mothers and Fathers of Invention: The Intellectual Founders of ADR', *Ohio State Journal on Dispute Resolution*, Vol. 16, No. 1, 2000, pp. 14, 37.

42 Sander, 1979; A.K. Schneider, 'Building Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes', *Harvard Negotiation Law Review*, Vol. 5, 2000.

43 R. Mnookin & L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', *Yale Law Journal*, Vol. 88, 1979.

44 Menkel-Meadow, 2010, pp. 351-369, 413-482.

teristics;<sup>45</sup> certification, training and education of third-party neutrals<sup>46</sup> and ethical dilemmas and codes for ADR practitioners.<sup>47</sup>

Sander's basic insight regarding the need to tailor dispute resolution processes to the characteristics of the dispute and the parties also represented an important step in the development of ADR theory in the following decades in the area of DSD. As we shall discuss later, all the categories of dispute resolution processes and, indeed, the differentiation of dispute resolution from dispute prevention are based on differences in how information is used. Implementing a new technology may bring efficiencies but, over time, can prove disruptive in that boundaries that are foundational begin to erode.

Conceptual boundaries in dispute resolution are premised, first and foremost, on a dichotomous opposition between 'courts' and 'ADR'.<sup>48</sup> One is formal, while the other is informal. One operates on a systemic level and can establish standards and precedents, while the other is more focused on individual disputants. One is based on predetermined and fixed procedures and remedies, while the other is flexible and tailored. One is open and public, while the other is confidential and private. One highlights logic and reason, while the other leaves room for discussion of needs and emotions. These distinct characteristics have served to promote different goals. While most dispute resolution processes would describe 'dispute resolution' as a clear goal, courts – being a system – would also commit to the goals of development of law, precedent-setting, dispute prevention and social change, as important, perhaps primary, goals.<sup>49</sup>

Within the ADR field, conceptual boundaries have served to further distinguish between interest and rights-based processes, creating categories and subcategories of process types. Within each category, processes such as mediation have tended to have set, predetermined characteristics, such as confidentiality, flexibility and a skeletal framework for conducting the process,<sup>50</sup> making them distinguishable from other types of processes and creating room for different schools and styles to develop within each process type.<sup>51</sup>

Dispute resolution literature has tended to view the freedom and flexibility to select one's own dispute resolution process as a principal advantage of ADR, and by establishing clear conceptual boundaries between courts and ADR on the one hand, and within the ADR field on the other hand, informed choice became feasi-

45 Sander, 1979.

46 Menkel-Meadow, 2010, p. 26.

47 *Id.*, 2010, pp. 370-379, 498-519.

48 Sturm & Gadlin, 2007.

49 S.D. Smith, 'Reductionism in Legal Thought', *Columbia Law Review*, Vol. 91, 1990; Fiss, 1983.

50 *But see* N. Welsh, 'You've Got Your Mother's Laugh What Bankruptcy Mediation Can Learn From the Her/History of Divorce and Child Custody Mediation', *ABI Law Review*, Vol. 17, 2009, pp. 432-441 (describing the wide range of practices that fall under the definition of 'mediation', which may blur, to some extent, the distinction between mediation and other processes). At the same time, as is apparent from Welsh's writing, most mediation that takes place in court settings (which accounts for a large portion of face-to-face mediations in the United States) tends to meet a particular mould (*see* Riskin & Welsh, 2008, p. 864).

51 Menkel-Meadow, 2010, pp. 257-265.



ble.<sup>52</sup> As the subfield of DSD developed and gained acceptance, these conceptual boundaries were further developed, elaborated and celebrated, highlighting the value of deliberate design.<sup>53</sup> Diversity and creativity were hailed, but were often at odds with a reality in which few process types were actually employed and those processes that were used typically had fixed, predetermined attributes. As DSD evolved and institutionalized ADR in courts and elsewhere spread, the goals of ADR processes also evolved and extended beyond the resolution of individual disputes to include norm elaboration,<sup>54</sup> dispute prevention<sup>55</sup> and even social change,<sup>56</sup> further eroding some of the stark differences between these processes and the court system and providing counterarguments to critics of ADR.

Furthermore, a close examination of the range of processes that fall within the umbrella term of ADR undermines the dichotomous separation between ADR and courts, revealing a spectrum of processes that have varying levels of privacy and flexibility, with some processes being quite similar to litigation, while others being more distinct from the formal venue.<sup>57</sup> Indeed, some of the literature has undermined the perception of courts as a formal, strict and public arena demonstrating how 'uncourt-like' courts often are.<sup>58</sup> It seems that these conceptual boundaries have been questioned practically from the moment they were established. With the literature describing the 'co-optation' of ADR by courts,<sup>59</sup> bargaining taking place 'in the shadow of the law',<sup>60</sup> and courts advancing settlement through flexible and undocumented 'managerial' approaches,<sup>61</sup> similarities were highlighted (although some basic distinctions remained). These subcurrents were buoyed by the broad institutionalization of ADR and the commingling of ADR with courts, which contributed to the erosion of conceptual boundaries between formal and informal dispute resolution processes and of the unique characteristics of each process. As we discuss below, new technologies are playing a significant role in further eroding seemingly firm conceptual boundaries. Nevertheless,

52 *Id.*, pp. 226-227.

53 S. Smith & J. Martinez, 'An Analytic Framework for Dispute Systems Design', *Harvard Negotiation Law Review*, Vol. 14, 2009.

54 Sturm & Gadlin, 2007.

55 Rabinovich-Einy & Katsh, 2012, pp. 181-182.

56 R.A. Baruch Bush & J.P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, John Wiley & Sons, 2004 (describing the goals of transformative mediation as 'empowerment' and 'recognition', in the hope that the educational and moral process individuals undergo in a mediation process will contribute to a broader societal transformation).

57 S.B. Goldberg, *Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes*, Aspen Publishers, 1999, pp. 4-5.

58 Shapiro, 1986, pp. 1-64.

59 Menkel-Meadow, 1991.

60 Mnookin & Kornhauser, 1979.

61 J. Resnik, 'Managerial Judges', *Harvard Law Review*, Vol. 96, 1982.

the clear distinction between courts and ADR has persisted in the literature and in policies on the ground.<sup>62</sup>

### 2.3 Psychological Boundaries

Another type of boundary in the dispute resolution arena is that of psychological boundaries. The process of dispute evolution and transformation has been presented in the literature as a three-stage process, 'naming, blaming and claiming', much of which takes place within the aggrieved person's mind.<sup>63</sup> The first stage, 'naming', has to do with the ability to recognize that an injury has occurred, and the following stage – 'blaming' – involves the ability to connect such injury to a particular source that is at fault. These two phases require knowledge of facts and familiarity with norms. But even the third stage, that of 'claiming', which has to do with the voicing of a grievance before the party at fault, requires psychological resilience on top of financial resources and the backing of a support group. Psychological barriers can, and often do, stand in the way of the evolution of disputes, in some instances because an individual is unaware of the existence of a dispute, while in other cases they prefer to 'lump it'.<sup>64</sup> Psychology acts as a boundary in this context both in the sense that it separates dispute transformation stages from one another, as well as a barrier that may prevent potential disputes from surfacing.

A significant strand of the ADR literature has focused on barriers to dispute resolution<sup>65</sup> that involve cognitive biases in resolution efforts.<sup>66</sup> Cognitive biases, or heuristics, are another form of psychological boundary, shaping our understanding of disputes and dispute resolution efforts.<sup>67</sup> The manner in which information is framed and presented impacts the way we feel about it and react to it (the 'framing effect').<sup>68</sup> We may find an offer to be favourable or unfavourable depending on the identity of the person making the offer ('reactive devaluation'),<sup>69</sup> we view an offer as generous or insufficient depending on whether it belongs to us or not (the 'endowment effect')<sup>70</sup> and may address an easily attained favourable offer with suspicion (the 'winner's curse').<sup>71</sup>

62 One exception might be specialty or 'problem-solving courts' for different kinds of problems. See L. Neyfakh, 'The Custom Justice of "Problem-Solving Courts": A New Kind of Court Is Reshaping the American Legal System – With Little Oversight', *Boston Globe*, 23 March 2014, <[www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQchiefT6MM/story.html](http://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQchiefT6MM/story.html)>.

63 See *supra* note 21 and accompanying text.

64 Miller & Sarat, 1982, p. 52.

65 See Hensler, 2003, p. 174; Senft & Savage, 2003.

66 L. Ross, 'Reactive Devaluation in Negotiation and Conflict Resolution', in Arrow *et al.*, 1995. A. Tversky & D. Kahneman, 'Conflict Resolution: A Cognitive Perspective', in Arrow *et al.*, 1995.

67 C. Menkel-Meadow, 'Legal Dispute Resolution in a Multidisciplinary Context', *Journal of Legal Education*, Vol. 54, 2004, p. 13.

68 J.D. Hanson & D.A. Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation', *New York University Law Review*, Vol. 74, 1999, pp. 684-687.

69 M.H. Bazerman & M.A. Neale, *Negotiating Rationally*, Simon & Schuster, 1994.

70 Hanson & Kysar, 1999, pp. 672-676.

71 R.H. Thaler, 'Anomalies: The Winner's Curse', *Journal of Economic Perspectives*, Vol. 2, 1988.



The above are a few of many examples of the ways in which cognitive biases can give rise to misunderstandings or unrealistic expectations, which in turn generate conflict or escalate existing conflicts after they have erupted. Cognitive biases also colour our reactions and actions during dispute resolution efforts, making resolution more difficult, in particular absent the involvement of a third party. But the third-party neutral is also not immune to the impact of cognitive biases, which may shape his/her understanding of the dispute, as well as his/her interactions with the parties during the resolution efforts and the course of action chosen by him/her in addressing the dispute.<sup>72</sup> This is also true where dispute system designers make design choices, where such choices may be guided by heuristics. Cognitive biases have therefore simultaneously fuelled disputes and dispute resolution efforts and have served as barriers that the field constantly strives to overcome by elaborating dispute resolution process options and design as well as third-party intervention techniques.

Research on procedural justice presented another important layer of psychological boundaries separating legitimate dispute resolution processes from those that are perceived by disputants as being unfair. This research has uncovered the significant, even principal, role procedural elements play in the perceived fairness of the process used to arrive at an outcome, colouring the legitimacy of the outcome and institution.<sup>73</sup> Both qualitative<sup>74</sup> and quantitative<sup>75</sup> research confirmed that in determining the fairness of dispute resolution processes, litigants attach a great deal of significance to the following factors: (1) whether they were given an opportunity to 'tell their story' ('opportunity for voice'), (2) whether the third party considered their views, (3) whether the third party 'treated them in an even-handed and dignified manner' and (4) the 'impartiality of the third party'.<sup>76</sup>

Perhaps counterintuitively, research on procedural justice demonstrated that the procedural elements described above colour disputants' impressions of the fairness of the substantive outcome, meaning that a disputant who 'won' his/her case but viewed the procedure as unfair would be unhappy, while a party who 'lost' their case but underwent a process that met the characteristics associated

72 C. Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality', *Journal of Law & Policy*, Vol. 34, 2010.

73 E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice*, Springer, 1988; N. Welsh, 'Remembering the Role of Justice in Resolution: Insights from the Procedural and Social Justice Theories', *Journal of Legal Education*, Vol. 54, 2004; J.W. Thibault & L. Walker, *Procedural Justice: A Psychological Analysis*, Lawrence Erlbaum Associates, 1975.

74 J.M. Conley & W.M. O'Barr, 'Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives', *Law & Society Review*, Vol. 19, 1985.

75 T.R. Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform', *American Journal of Comparative Law*, Vol. 45, 1997, p. 888.

76 N. Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?', *Washington University Law Review*, Vol. 79, 2001, p. 817. Other studies mention additional, sometimes complementing elements, but the components described by Prof. Welsh seem to be widely agreed upon.

with procedural fairness would be content.<sup>77</sup> This line of research has provided an important prism through which both court proceedings and ADR processes could be evaluated and critiqued,<sup>78</sup> as well as a significant component in the evolution of DSD theory and practice,<sup>79</sup> with procedural justice serving as a ‘fairness heuristic’.<sup>80</sup> Social science has provided several explanations for the significance of procedural justice, ranging from instrumental reasons (‘social exchange theory’) to symbolic ones under which the elements of procedural justice reflect the disputant’s social status (‘group value theory’). While these theories would seem to apply most strongly to decision-based processes such as litigation and arbitration, they have been applied to the mediation process as well, given the role played by the mediator who is often seen as a representative of the court system.<sup>81</sup>

Procedural justice, therefore, has served as a boundary in that it provided a filter through which conceptual boundaries could be strengthened and justified, both on a design level (justifying a certain mix of procedural traits) and on an individual level (justifying choice of one process over another). On a deeper level, this whole line of research served to underscore another important boundary that has defined the dispute resolution field, the division between procedure and substance.

#### 2.4 Professional Boundaries

Dispute resolution has become a professional activity, and the boundary-setting activity has shifted from the professional/layperson realm to the question of what constitutes professional expertise and capabilities for various processes (e.g., mediation or arbitration) and across settings (e.g., courts vs. organizations). One of the principal debates centred on the question of the need for a legal background for ADR practitioners, which was often echoed in the procedural versus substantive expertise debate, but in many respects was really about the legal profession’s battle over its territory and place. In other words, demand for ‘expertise’ served the legal profession’s attempts to create a clear boundary between what was covered under its sole mandate and what was not and to include ADR within such turf.

Many resisted the legal occupation of the ADR field and argued for the need for diverse input in order to maintain the different goals and characteristics of

77 J.M. Connelly & W.M. O’Barr, ‘Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure’, *Law & Contemporary Problems*, Vol. 51, 1998, pp. 184-188; Lind *et al.*, ‘In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences of the Civil Justice System’, *Law & Society Review*, Vol. 24, 1990.

78 Welsh, 2001.

79 Bingham *et al.*, ‘Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace’, *Harvard Negotiation Law Review*, Vol. 14, 2009, pp. 38-42.

80 E.A Lind, ‘Procedural Justice, Disputing and Reactions to Legal Authorities’, in A. Sarat (Ed.), *Everyday Practices and Trouble Cases*, Northwestern University Press, 1998, cited in Welsh, 2001, p. 819, n. 151, stating that ‘process information anchors the fairness judgment to such extent that outcome information can only make relatively minor adjustments’.

81 Welsh, 2001, pp. 830-838.

ADR processes.<sup>82</sup> The majority of ADR processes, however, were conducted in the courthouse or referred from the courts to ADR centres and practitioners, with lawyers present and with the majority of third-party neutrals being active or former legal practitioners.<sup>83</sup> This reality generated, as described above, harsh criticism within the ADR community over certain practices that were deemed by some illegitimate while others saw them as an inherent part of the ADR spectrum and a justification for lawyers' dominant role in these processes.<sup>84</sup>

ADR expertise was further compartmentalized with lawyers showcasing ADR departments and boasting ADR advocacy skills,<sup>85</sup> and some ADR practitioners developing into such areas of expertise as DSD and ombudsmen, delivering such services to and within organizational and court settings.<sup>86</sup> Designers were often trained in ADR or/and organizational development and possessed expertise in conducting the organizational dispute analysis that would underlie the DSD and evaluation. While the literature emphasized the need to consult those affected by the process being designed, the use of an expert designer was generally also seen as necessary.<sup>87</sup> In this environment, internal dispute handlers, such as ombudsmen, became more widely used to oversee these newly established systems.<sup>88</sup> At the same time, the frequency with which ADR services were performed on a voluntary basis in community and court settings undermined somewhat the efforts to portray ADR practice as a field in its own right that involves the delivery of professional services.<sup>89</sup>

Nevertheless, ADR trainings became widespread, with many ADR centres and individuals offering these trainings, also as a way to supplement their income. Over time, ADR also became an area of academic studies, with some courses offered within law schools, while in other cases they have been offered as part of an interdisciplinary programme, often culminating in professional certificates as well as an academic degree.<sup>90</sup> Despite these developments, the argument on the nature of ADR expertise and the requirements for delivering such services was never quite resolved.<sup>91</sup> In practice, in order to receive case referrals and enjoy confidentiality, ADR practitioners had to meet regulatory requirements, and in

82 L.P. Love, 'Top Ten Reasons Why Mediators Should Not Evaluate', *Florida State University Law Review*, Vol. 24, 1997, pp. 941-942.

83 Hensler, 2003, pp. 172, 185, 187.

84 Love, 1997; L.L. Riskin, 'Decision-Making in Mediation: The Old Grid and the New Grid System', *Notre Dame Law Review*, Vol. 79, 2003.

85 This can be evidenced by the large number of law firms that now have ADR departments or employ ADR specialists.

86 *Supra* note 13 and accompanying text.

87 O. Rabinovich-Einy & E. Katsh, 'Lessons from Online Dispute Resolution for Dispute Systems Design', in M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, 2012.

88 H. Gadlin, 'The Ombudsman: What's in a Name?', *Negotiation Journal*, Vol. 16, 2000.

89 S.J. Rogers, 'Ten Ways to Work More Effectively with Volunteer Mediators', *Negotiation Journal*, Vol. 7, 1991, pp. 204-205; S. Oberman, 'Style vs. Model: Why Quibble?', *Pepperdine Dispute Resolution Law Journal*, Vol. 9, 2008, p. 42.

90 Hensler, 2003, p. 166.

91 Menkel-Meadow, 2013, p. 14.

certain cases have specific disciplinary training, with a large portion of ADR practitioners having legal backgrounds.

The various boundaries – physical, conceptual, psychological and professional – are not independent of each other. For example, the question of privacy in dispute resolution involves conceptual boundaries as a trait separating formal from informal processes, but also implicates physical boundaries, as explained above. Similarly, issues relating to professional boundaries, such as substantive expertise of third parties, also operate on a conceptual level. Nevertheless, these boundaries are significant and serve important ends, enhancing dispute resolution mechanisms' legitimacy, appeal and effectiveness, as explained below.

In the following section, we explore further the need for boundaries and why boundary-setting can be seen as providing the infrastructure of a field.

### 3. The Role of Boundaries in Dispute Resolution

Boundaries serve several important ends. They act as constraints on how an institution is used. They serve as an institution's unseen infrastructure and thus shape preferences, capabilities and values. Finally, they help generate consistency and reinforce institutional legitimacy and trust.

In the dispute resolution field, the constraining function limits the number of complaints by screening out and triaging some disputes when institutional and human capacity is limited. Courts, even as costly, inconvenient and intimidating places, suffer from an overload of cases. If access barriers to courts were reduced, absent dramatic changes (that we would argue require a deep change in the implementation of digital technology), they would not be able to handle the added caseload.

Similarly, ADR providers rely on a given institutional and human capacity. For judges and ADR professionals, a case or a dispute requires a certain amount of time to decide or resolve. For the institution, handling a given number of cases requires sufficient personnel, equipment, storage, work space etc. Convening in a physical space, using physical storage and having human third parties address the dispute inevitably place constraints on that person's or entity's dispute-handling capabilities and require that some disputes not be attended to, or, in other words, that access barriers (or boundaries) operate to screen out certain problems, labeling them as *de minimis*, or as not 'constituting a legal cause of action', as 'premature' or 'moot', or as not meeting 'jurisdictional' requirements.

A second set of boundaries in dispute resolution function to accommodate or reflect prevailing values and preferences. Values and preferences represent a particular society's set of favoured choices at a given time and place. It is therefore perhaps not surprising that the model of dispute resolution that underlies much of the contemporary theory and practice in the field reflects American society's cultural preferences. While the roots of the contemporary ADR movement are quite diverse, they nevertheless emerged in the United States at a particular point in time and are reflective of American culture, broadly understood, in that they share some of the following commonalities: these processes are based on an indi-

vidualistic understanding of dispute resolution processes – their logic and goals, they rely on the expertise of a detached, external neutral, and draw on the power of the state for dispute referral and, ultimately, for enforcement of resolutions reached. As Auerbach aptly stated, while these processes seemingly reflect ‘the pursuit of justice without law,’ such a quest is inextricably tied to the central role of law in American culture and society.<sup>92</sup>

Two features of contemporary ADR processes seem particularly representative of predigital era preferences and values: confidentiality and third-party neutrality. Confidentiality has been a core feature of mediation and arbitration processes in the last few decades and a principal source of attraction for disputants, in lieu of the public court system.<sup>93</sup> In mediation, confidentiality has allowed parties to disclose their true concerns and needs, overcoming their fear of strategic use of such information by their counterparts should the dispute end up in litigation.<sup>94</sup> While confidentiality has always posed somewhat of a risk owing to the existence of loopholes, the combination of contractual agreements and legal protection has been viewed as a sufficiently strong guarantee of the privacy of mediated resolution efforts.<sup>95</sup>

Similarly, arbitration presents a discrete avenue for parties who seek to resolve their conflict away from the public view. Such confidentiality is typically protected in the agreement between the parties and has been viewed with suspicion by critics decrying the privatization of justice and the option for powerful repeat player parties to ensure that awards remain unknown to their future adversaries.<sup>96</sup> While some proponents of privacy in arbitration (very much like in mediation) underscore its contribution to party openness,<sup>97</sup> others, more cynically perhaps, view privacy’s main advantage in arbitration as the ability to maintain control over dispute-related information *vis-à-vis* the public, competitors and future opponents.<sup>98</sup> While some question the degree to which arbitration is actually confidential, it remains true that most people view it as such.<sup>99</sup>

Interestingly, in the past, some ADR processes were conducted in a more open manner.<sup>100</sup> Even in the early days of the modern ADR movement, we find experimentation with different models of ADR processes, some of which were conducted in the open as part of a view of these processes as a source of community empowerment and a site in which community norms are defined. Generally

92 Auerbach, 1983, pp. 15-17, 138-147.

93 Section 2.2.

94 O. Rabinovich-Einy, ‘Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation’, *Harvard Negotiation Law Review*, Vol. 11, 2006, p. 265.

95 Menkel-Meadow, 2010, pp. 327-351.

96 A.J. Schmitz, ‘Untangling the Privacy Paradox in Arbitration’, *Kansas Law Review*, Vol. 54, 2006, pp. 1232-1234.

97 *Id.*, p. 1215.

98 *Id.*, pp. 1229-1232.

99 *Id.*, p. 1212.

100 The Buchler court’s arbitration proceedings were broadcast on the radio (a development frowned upon by some). See Auerbach, 1983, p. 85.

speaking, though, most contemporary ADR processes have followed the US model, which enshrines confidentiality.<sup>101</sup>

Equally significant in this context are the changes that have taken place over the years in terms of legal protection of privacy. The concept of privacy itself is a social construct, reflecting accepted values and common expectations, and therefore legal protection of privacy is a rather recent development.<sup>102</sup> It is not surprising that the dispute resolution processes that emerged in a period in which privacy in general and informational privacy in particular are viewed as an important social value, reflect such preference and receive legal backing and protection for such structure.

A similar story can be told with respect to third-party neutrality. While current expectations of a 'fair' and 'just' dispute resolution process are that it be based on 'neutral', 'objective', 'detached' and 'even-handed' decision-making and intervention, this has not always been the case. In the past, when dispute resolution took place in close-knit communities whose members shared common values and maintained close social ties, third-party decision-makers were often chosen because of their familiarity with the parties or the case or the social status and power.<sup>103</sup> These were typically 'strong, white, men', whose wealth and success were seen as indicators of wisdom and problem-solving capabilities, and therefore as ensuring both what would be perceived as a fair outcome and its swift execution.<sup>104</sup>

In their current mode, ADR processes are no longer grounded in the thick local social structures that gave rise to such mechanisms in the past. As a result, a modern conception of an expert decision-maker substituted for the understanding of what would constitute a mediator or arbitrator in traditional societies. Under this contemporary view, mediators and arbitrators, like judges, draw their legitimacy from formal training and expertise, and are expected to apply such expertise in an even-handed and consistent manner across cases.<sup>105</sup> Such a view of third-party expertise and conduct seems to correspond to disputant expectations and values as reflected in the procedural justice research.<sup>106</sup>

Nevertheless, both neutrality and confidentiality are facing pressures from a changing reality, in which the flow of information is becoming more and more difficult to control and the ideals of complete confidentiality or a detached neutral seem increasingly unrealistic, and, for some, undesirable, as these values and preferences are being questioned.<sup>107</sup>

Finally, a third and important rationale for boundaries in dispute resolution mechanisms has been their contribution to such processes' legitimacy. Conceptual boundaries and the dichotomous positioning of formal versus informal dis-

101 Rabinovich-Einy, 2006, pp. 263-264.

102 E. Katsh, *The Electronic Media and the Transformation of Law*, Oxford University Press, 1991, p. 189.

103 Auerbach, 1983, pp. 70-71, 75.

104 Shapiro, 1986, p. 6.

105 *Id.*, p. 5.

106 *Supra* notes 69-77 and accompanying text.

107 Rabinovich-Einy & Katsh, 2012, pp. 52-53.



pute resolution mechanisms have served to enhance these processes' appeal and legitimacy. As was recognized in the literature several decades ago, the legitimacy of informal dispute resolution avenues stems from their consensual and voluntary nature.<sup>108</sup> 'Consent' is what allows parties to continue and trust the process and view the outcome as legitimate even when the resolution is unfavourable to them. In formal avenues, there is a much lower degree of consent, sometimes it is practically non-existent, and, accordingly, such processes' legitimacy stems from a different source – the perceived inevitability of the outcomes under pre-existing rules that are applied consistently across cases and parties.<sup>109</sup> The boundary terminology that has existed between formal, public, structured and uniform processes on the one hand and informal, private, flexible and tailored processes on the other hand has served to reinforce these different sources of legitimacy, even in the face of a somewhat different reality.

Within these process types, the boundary between procedure and substance has served to further reinforce the legitimacy of the various dispute resolution processes and institutions on different levels, including the professional and psychological realms. A distinction was made between substantive and procedural expertise, colouring the procedural know-how gained by mediators and arbitrators with a professional halo, enhancing perceptions of fairness and decreasing impressions of arbitrary and intuition-based decision-making, which do not comport with modern-day expectations of justice. Similarly, as mentioned previously, the distinction between procedural justice and substantive justice theories has uncovered the connection between procedural elements (which comprise some of the physical and conceptual characteristics of dispute resolution bodies) and what constitutes a fair and legitimate dispute resolution process in the eyes of disputants.<sup>110</sup>

In the following section, we show that information technologies are playing an important (albeit not a sole) role in the blurring of these boundaries by operating across geographical distances, processing and collecting data in novel ways, opening up opportunities for lay involvement and lowering costs and other access barriers. They are generating new types of dispute resolution processes that offer a unique mix of traits that defy traditional categorization and goals, and rely on automation, freeing dispute resolution from some of the seemingly inherent constraints it was subject to in the past.

#### **4. A Field in Flux: The Introduction of Digital Technology and the Blurring of Traditional Boundaries**

Originally, the term ODR referred to the resolution of conflicts that arose online (namely in the e-commerce setting or online social forums). Over time, use of such processes has expanded, and technological tools and systems are increasingly being offered for the resolution of traditional offline disputes. Growth of

108 Shapiro, 1986, pp. 2-5.

109 *Id.*, p. 1.

110 *Supra* notes 69-77 and accompanying text.

ODR was evidenced in the development and adoption of ODR in new settings such as government agencies,<sup>111</sup> the EU regulatory framework<sup>112</sup> and international bodies,<sup>113</sup> extending beyond the more predictable milieu of private online entities.

As use of ODR expands, the question arises as to what differentiates ODR from traditional forms of dispute resolution and what impact ODR will have on the various forms of ADR. ODR's unique features revolve around the following: (1) communication at a distance and (2) the intelligence of the machine. These capabilities are attractive because they add flexibility, efficiencies, capabilities and expertise. Online communication and data-driven functionalities can provide both new tools and approaches to managing interactions and performing informational tasks such as brainstorming, identifying options and clarifying interests. The more powerful the tools become and the more familiar parties are with the tools, the less resistant they are likely to be to processes that do not require face-to-face encounters. Developments in the future can be expected to provide screens with finer resolution, thus facilitating the idea that face-to-face communication can occur at a distance. The displacement of ADR by ODR, however, is likely to result more from intelligent software that provides tools that were not present at all with ADR. As this occurs, we can expect challenges to arise to the various boundaries we have discussed above.

While the appeal of ODR for disputes arising out of online activities is often obvious and is related to the lack of real alternatives, in the case of the application of ODR tools for offline disputes, the main advantages of ODR have been perceived to be the accessibility, low cost and speed of communication through such tools.<sup>114</sup> Tools were developed for conducting automated negotiation,<sup>115</sup> online mediation<sup>116</sup> and technology-assisted arbitration.<sup>117</sup> Automated negotiation in particular was offered in various formats such as blind bidding<sup>118</sup> and negotiation support systems,<sup>119</sup> each assisting parties to overcome different types of barriers and promoting different goals and solutions. Over the years additional advantages have been recognized, which extend beyond efficiency-related considerations, and relate to the potential of new technologies to overcome disputant biases and facilitate parties in reaching better, *Pareto-optimal* resolutions.<sup>120</sup> These

111 Rabinovich-Einy & Katsh, 2012, pp. 190-194.

112 P. Cortes, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward', *Legal Studies*, forthcoming 2014.

113 C. Rule, V. Rogers & L.D. Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value – High Volume Claims – OAS Developments', *Uniform Commercial Code Law Journal*, Vol. 42, No. 3, 2010.

114 O. Rabinovich-Einy, 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape', *Yale Journal of Law & Technology*, Vol. 6, 2006, pp. 29-30.

115 See, e.g., <[www.cybersettle.com](http://www.cybersettle.com)>, <[www.smartsettle.com](http://www.smartsettle.com)>.

116 See, e.g., <[www.juripax.com](http://www.juripax.com)>.

117 See, e.g., <[www.wipo.int/amc/en/arbitration/online/index.html](http://www.wipo.int/amc/en/arbitration/online/index.html)>.

118 <[www.cybersettle.com](http://www.cybersettle.com)>.

119 <[www.smartsettle.com](http://www.smartsettle.com)>.

120 E.M. Thiessen & J. McMahon, 'Beyond Win-Win in Cyberspace', *Ohio State Journal on Dispute Resolution*, Vol. 15, 2000.



qualitative advantages are perhaps even more salient in the second domain in which ODR has developed over the last two decades – the realm of ODR systems.

Technological capabilities for creating ODR systems, coordinated collections of tools and resources, are beginning to distance ODR from ADR by breaking down some of the barriers discussed earlier. In such systems, ODR tools are being used within a closed setting by a limited (but potentially very large) number of users who are engaged in ongoing interactions with other users and may experience similar types of problems over time. Originally, ODR systems were developed for online disputes that arose in the context of online communities. The goal, in such systems, was to combine resolution with prevention. The paradigmatic example of an ODR system is the eBay dispute resolution mechanism, which is well known for its high usage and impressive success rates.<sup>121</sup> eBay, by studying patterns of disputes and developing a system that can handle large numbers of repetitive types of conflicts, has managed to resolve such disputes early on and at a low cost (an essential feature given the low dollar value of many, although certainly not all, eBay transactions). No less important, though, has been the contribution of eBay's ODR system to the realm of dispute prevention. By studying the data uncovered in the dispute resolution processes, eBay has managed to identify common sources of problems and to structure information and services on its site so that these problems do not recur.<sup>122</sup>

Another elaborate ODR system that has emerged in the online context is the one established on Wikipedia.<sup>123</sup> The system offers its users a variety of online parallels to traditional ADR processes (*e.g.*, negotiation, mediation and arbitration), as well as some new variants (such as online polling). Interestingly, some of the elements of the Wikipedia system were designed 'bottom up', generated by users with no expertise in dispute resolution. Accordingly, the features of such processes were atypical of the traditional dispute resolution landscape (but reflective of the online culture in general and Wikipedia in particular), providing an open mediation process in which dispute resolution proceedings and resolutions were widely available to public viewing and scrutiny.<sup>124</sup> Alongside its dispute resolution efforts, Wikipedia has also been focused on dispute prevention, drawing on technological tools not only for studying patterns of disputes and effective resolution strategies, but also for automatically detecting such problems as illegitimate editing of content on its site and deleting such content immediately, even before abuse has been reported by users.<sup>125</sup>

Both eBay and Wikipedia understood early on that by offering effective dispute resolution mechanisms that were integrated with the site's (or community's) principal mission, they could not only satisfactorily address individual disputes but were able to prevent problems, thereby enhancing trust in the site and improving its content and performance. In this mission, technology was not only

121 Rabinovich-Einy & Katsh, 2012, pp. 169-175.

122 *Id.*, p. 181.

123 See the Wikipedia entry on dispute resolution, <[http://en.wikipedia.org/wiki/Wikipedia:Dispute\\_resolution](http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution)>.

124 Rabinovich-Einy & Katsh, 2012, p. 49.

125 *Id.*, p. 56.

a by-product of such sites' online operations but proved to be an invaluable tool in detecting problematic patterns and instituting effective, often automated, solutions. These lessons learned by online entities that had no choice but to think in terms of a dispute system are not likely to be confined to such entities in the future, obscuring the traditional dichotomous view of formal dispute resolution as one that operates on a systemic level and advances broad goals, as opposed to ADR processes that operate on an individual level and promote the resolution of individual disputes. This process has already begun with some offline organizations and companies establishing internal conflict management systems, as described above.<sup>126</sup>

Over the years, ODR has gradually become accepted as part of the ADR field, with its use covering both offline and online disputes. For a field, such as ADR, that has always emphasized the value of resolving problems face-to-face, acceptance of the idea of using technological tools to work with parties at a distance has been a challenge.<sup>127</sup> Even the adoption of tools to supplement traditional processes has occurred only little by little. Increasingly, however, practitioners have come to understand that software applications can enhance their skills and provide new opportunities and processes for effective and efficient intervention.<sup>128</sup>

We can expect the use of ODR to expand even further in light of three developments: (1) changing views towards the online medium and digital communication, (2) development of ever more powerful software and (3) ongoing dissatisfaction with the functioning of courts and ADR. The first development has to do with the growing reliance on digital communication in people's lives in modern-day society. Initially, these tools were used to communicate with and shop from distant strangers. We currently use digital communication to interact with those closest to us, touching on mundane but also more sensitive and complicated matters. As the online–offline distinction continues shifting and the line separating the online 'space' from the physical surroundings is being blurred, our under-

126 Familiar examples include The USPS, which established a transformative mediation program called REDRESS for employment discrimination disputes (see Bingham *et al.*, 2009, pp. 24–47) and the NIH's ombudsman office headed by Howard Gadlin (see Sturm & Gadlin, 2007).

127 Indeed, the ODR literature has devoted a fair portion of attention to this question. See, generally, e.g., C. Rule, *Online Dispute Resolution for Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, Jossey-Bass, San Francisco, 2002, pp. 83–84; L.E. Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution', *Fordham Law Review*, Vol. 70, 2001; J. Goodman, 'The Pros and Cons of Online Dispute Resolution', *Duke Law & Technology Review*, Vol. 2, 2003; D.A. Larson, 'Online Dispute Resolution: Do You Know Where Your Children Are?', *Negotiation Journal*, Vol. 19, 2003; M.C. Tyler & S.S. Raines, 'The Human Face of Online Dispute Resolution', *Conflict Resolution Quarterly*, Vol. 23, 2005.

128 See, e.g., M.C. Tyler, 'Online Dispute Resolution', in M. Malkia & A. Anttiroiko (Eds.), *Encyclopedia of Digital Government*, 2007, pp. 1268–1274, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=934947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934947)>. This is also evidenced in the growing attention to ODR as a tool for training students in ADR. See *Ohio State Journal on Dispute Resolution*, Vol. 25, 2010, devoted to the topic.

standing on what can be performed online is also changing, making ODR more appealing for offline, potentially more complex and intimate disputes.<sup>129</sup>

The second development concerns evolving, indeed accelerating, innovation in the use of data. The rapidly growing field of Big Data focuses on finding meaning in data that in the past was never collected or examined.<sup>130</sup> In the ADR field, data was routinely discarded when a dispute was resolved, and in the dispute prevention arena data was often not available. As we have stressed in this article, information processing is at the heart of both conflict resolution and prevention, and new software can be expected to increasingly empower the 'fourth party'<sup>131</sup> and influence small as well as large disputes.

The third development has to do with the potential of technology to remedy some of the persistent problems we have been experiencing with our justice system. Despite hopes that informal justice and the concept of a 'multi-door courthouse' could improve court efficiency and result in more satisfactory processes and imaginative outcomes, the institutionalization of ADR was accompanied by fierce critiques ranging from the dangers posed to parties belonging to disadvantaged groups<sup>132</sup> to the curtailment of law development and precedent-setting.<sup>133</sup> Criticism extended to proponents of ADR who were disappointed as hopes of increased speed and efficiency remained unrealized<sup>134</sup> and the quality of ADR processes was questioned.<sup>135</sup> In recent decades it has become evident that technology could dramatically enhance the efficiency of both court proceedings and alternatives through automation and 24/7 access to files from afar. Over time, other features of ODR that were initially viewed as shortcomings, such as documentation, have been seen as potentially advantageous in remedying some of the other problems associated with traditional ADR processes by allowing better monitoring, quality control, consistency and a higher degree of transparency.<sup>136</sup>

The boundaries we have identified form a strong and largely unnoticed infrastructure and support system of both ideas and processes. As we show below, how information is employed and communicated can shape the nature of the bounda-

129 E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, 2001, p. 7.

130 V. Mayer-Schönberger & K. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think*, Houghton Mifflin Harcourt, 2013.

131 Beverly Woolf *et al.*, *The Fourth Party: Improving Computer-Mediated Deliberation through Cognitive, Social and Emotional Support*, <[www.nsf.gov/awardsearch/showAward?AWD\\_ID=0968536](http://www.nsf.gov/awardsearch/showAward?AWD_ID=0968536)>.

132 T. Grillo, 'The Mediation Alternative: Process Dangers for Women', *Yale Law Journal*, Vol. 100, 1991; Delgado *et al.*, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution', *Wisconsin Law Review*, 1985.

133 Fiss, 1983; D. Luban, 'Settlements and the Erosion of the Public Realm', *Georgetown Law Journal*, Vol. 83, 1994.

134 L. Bernstein, 'Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs', *Pennsylvania Law Review*, Vol. 141, 1993.

135 J.J. Alfini, 'Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation"?', *Florida State University Law Review*, Vol. 19, 1991; Riskin & Welsh, 2008; Hensler, 2003.

136 The decrease in privacy due to documentation and record preservation can assist in quality control, dispute prevention and monitoring performance. The intelligence of the machine can enhance efficiency and consistency through automation and, in many cases, supplement, if not replace, the expertise of the third party.

ries we have identified and, as a result, the nature of the institution, in this case the long-term evolution of dispute resolution.

#### 4.1 *Physical Boundaries*

‘The rule of law’, Paul Kahn has written, ‘is always over a defined territory’.<sup>137</sup> Less formal modes of dispute resolution can ignore territorial borders but, in the past, could not ignore the constraints of the physical world. When meetings and interactions become virtual and physical meetings are displaced, dispute resolution is transformed from a service occurring in a place to one not dependent on location.<sup>138</sup> This erosion of the physical has many consequences.

This transition, for example, lowers barriers for voicing complaints and concerns and to initiating a dispute resolution process. Merely placing forms online or providing easy access to customer service phone numbers tends to increase the number of complaints. When eBay adjusted its website to require an additional mouse click to reach a complaint form, the overall number of complaints decreased. When it moved the resolution page closer to the home page, the number of complaints increased.

While an increase in complaints may sound alarming in a reality in which dispute resolution mechanisms are facing heavy backlogs, the efficiency of ODR mechanisms coupled with the potential of ODR to detect patterns of disputes ‘upstream’ may actually contribute to a long-term decrease in full-blown conflicts. It is reasonable to assume that the use of technology provides ODR with more opportunities to identify systemic contributors to conflict and systemic opportunities to reduce conflict. In this sense, it is appropriate to characterize ODR processes as being more involved in conflict management than are ADR systems that are focused on resolving individual cases. The growth in use of ODR can therefore be expected to shine more light on the variables that underlie the emergence of conflicts and lead to efforts to respond to causes of problems, thereby blurring conceptual, and not only physical, boundaries. The separation of dispute prevention and dispute resolution, which seemed natural in a world that did not stress the sharing of information, begins to feel unnatural in an environment that revolves around processing and communicating data. When SquareTrade shifted its focus from providing dispute resolution to consumers to providing insurance for consumers, it was not really changing industries but reducing risk and providing online expertise in dispute prevention.

While dispute resolution theory has traditionally been more focused on full-blown disputes and what is happening ‘downstream’, the capability to obtain information from persons or groups who do not yet perceive themselves as parties is a valuable by-product of enhanced communications capabilities and, hopefully, a contributor of much more effective dispute prevention strategies. Technology allows those who offer dispute resolution services on- and offline to systematically study patterns of disputes and the effectiveness of avenues for addressing them due to the ease of gathering data and analyzing it through multi-

137 P.W. Kahn, *The Cultural Study of Law*, University of Chicago Press, Chicago, 1990, p. 56.

138 R. Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, OUP, Oxford, 2013.

ple lenses on an ongoing basis. As stated above, while online entities offering ODR services such as eBay have had a head start in recognizing this potential, there is no reason why these benefits should not be extended to those offering ADR services face-to-face and indeed, more broadly, to courts, which have also been increasingly adopting technology into their case management and filing operations, even if not as a substitute to face-to-face proceedings.

The erosion of physical boundaries can also be expected to impact the role of confidentiality in dispute resolution, traditionally a central feature of ADR processes and a core element distinguishing ADR from the public court system. While contemporary dispute resolution theory has highlighted the significance of a physical space as being either public (and transparent) or private (and confidential), technology has blurred this distinction.

The introduction of ODR has challenged the common expectations regarding confidentiality in ADR. While parties may commit to maintaining such information secret, the difficulty of regulating party actions over such data has led at least some ODR services, such as SquareTrade when it handled eBay disputes, to forego such demands altogether.<sup>139</sup> Furthermore, as organizations collect data on complaints and disputes internally, such information can be expected to become increasingly integrated with other data gathered by such organizations, as well as shared among various organizations, rendering such disputing data less and less private.

With this risk, however, also comes an important benefit in terms of quality control over the process – its fairness and effectiveness. The fear that access to dispute information may impact the integrity and success of alternative processes can be compensated in the online setting through increased documentation and transparency regarding the content and enforceability of dispute resolution outcomes. Since communications are documented and parties (as well as others) can access them in real time as well as later on, this serves as a check on third-party intervention. Through in-depth study of particular cases as well as aggregate data on the outcomes delivered under specific third parties or ODR providers, improper conduct, poor performance and problematic process design can be uncovered.<sup>140</sup>

In many instances, current use of ODR has been restricted to ‘simple’, non-emotional disputes where the reduction of privacy has been viewed as insignificant. Over time, the privacy barrier to the use of ODR will further decline. Already, social attitudes towards privacy are changing dramatically with the younger generation willing to disclose an abundance of personal, sensitive information online. While some have viewed these developments as a consequence of ignorance, it seems that the trend is a strong one, most likely irreversible, and its impact will inevitably be a dramatic change in our attitudes towards privacy.<sup>141</sup>

139 Rabinovich-Einy, 2006, pp. 274-276.

140 *Id.*, pp. 278-280.

141 D.M. Moscardelli & C. Liston-Heyes, ‘Teens Surfing the Net How Do They Learn to Protect Their Privacy?’, *Journal of Business and Economic Research*, Vol. 2, 2004, pp. 43, 51.

The introduction of technology has served to lower many of the barriers associated with dispute resolution taking place at a physical location – costs, access, time and hassle. The elimination of a physical ‘place’ in which dispute resolution efforts take place also impacts the degree to which confidentiality can be attained, a development which in the short term could be viewed as a drawback that restricts the applicability and scope of ODR, but in the long term will, in all likelihood, prove to be less significant than some may think.

The shift from a physical space to a virtual one, while lowering certain barriers, can raise others. Much has been written about the technological divide, and the impact of what until now has been textual communication in ODR on various types of disputants. As technological capabilities become richer and are increasingly offered through mobile technology as opposed to computers, we believe that these barriers will decrease in significance, making the impact of the lowering of physical barriers all the more dramatic.<sup>142</sup> In no physical dispute resolution system could we imagine the massive figure of 60 million annual disputes faced by eBay being raised and addressed overwhelmingly in a satisfactory manner and for nominal cost.

#### 4.2 *Conceptual Boundaries*

The field of dispute resolution has been premised on a separation between ADR and formal court-based processes. Thirty years ago, Owen Fiss’ ‘Against Settlement’ argued that ‘[t]o be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone’.<sup>143</sup> Justice, in Fiss’ view, required authoritative decisions based on principles that resulted from a public clash between parties with equal expertise and resources. If the role of law is to secure rights and protect liberties, to set standards and shape public and private behaviour, what happens in open court, even in cases seemingly involving two individuals, can be publicly important. What judges rule, he argued, have implications for both the individual litigants and for the rest of society. ADR might provide some relief from court dockets and, for the individuals directly involved, some measure of satisfaction. Peace, however, was not the same as justice, and Fiss urged that we opt for ‘justice rather than peace’.

Processes that migrate to cyberspace, however, often change as they discover and begin to employ new capabilities for communicating and processing information. As we have noted, the first attempts to establish online models of dispute resolution tended to mimic offline approaches, but subsequent efforts have begun to move ODR processes away from traditional models. In the move from offline to online, one can expect to see unintended consequences, in this case new expectations about courts, or even the emergence of new modes of cyberspace-

142 *The State of Broadband 2013, Universalizing Broadband, a Report by the Broadband Commission for Digital Development*, September 2013, available at <[www.broadbandcommission.org/Documents/bb-annualreport2013.pdf](http://www.broadbandcommission.org/Documents/bb-annualreport2013.pdf)>.

143 Fiss, 1983, pp. 1983-1984.



based rule-making processes that do not adhere to boundaries familiar to the ADR field.

For example, many assume that law emerges first with rules and, at some later time, institutions are set up to enforce or interpret the rules. The experience of online dispute resolution, even in its early stage, suggests a more complicated sequence, one in which the question 'where does law come from' has multiple answers. There are certainly instances in which the making of rules, the interpretation of rules and the application and enforcement of rules will occur in that order. In other instances, however, a starting point may be attempts to resolve problems that occur in the absence of rules, an activity that may later lead to the development of new rules or, at times, to new ways of thinking about methods for shaping behaviour and protecting rights. There are linkages between law and informal methods of social control, and, as Robert Ellickson has written, 'lawmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order'.<sup>144</sup> Systems for social ordering, in other words, should be appropriate for the culture and community involved, and the Internet, with a still developing culture and community, is likely to be an ongoing challenge.

ODR may, in some cases, be a way of compensating for the vacuum or slow movement in rule making. It is, in addition to endeavouring to resolve disputes, being employed to do some of the tasks we expect to come from law. For example, trust is often built by enacting and publicizing enforceable standards, but it can also be achieved by providing assurances to parties in any relationship or transaction that they will have opportunities to resolve any problems that might arise. This is not to suggest that there is no need for authoritative, clear and even uniform rules, but only that some of the same ends can be achieved through a variety of means and new means can emerge as new information technologies are employed. Nor is it to say that all strategies to pursue some ends are equally effective. Indeed, the pressure for a rule-making authority in cyberspace may be heightened as a result of inadequacies of some of these substitute methods.

The late law professor Lon Fuller pointed out that 'just as a society may have rules imposed on it from above, so it may also reach out for rules by a different kind of inarticulate collective presence'.<sup>145</sup> Laws, rules and standards begin life via informational processes that identify problems, values and desired standards of behaviour. We have increasingly sophisticated sensors for generating feedback about problem areas, and we are acquiring increasingly sophisticated informational tools for building responses to problems that are identified. As noted earlier, it is hard to predict exactly what the path is from ODR to mechanisms that embody group expectations, but the short experience with ODR suggests that the old model in which rules came from courts and all other forms of dispute resolution are private, affecting the parties but not the public, was linked to information handling practices and information segregation practices that can be

144 R. Ellickson, *Order Without Law*, Harvard University Press, 1991, p. 286.

145 L. Fuller, 'Human Interaction and the Law', in R.P. Wolff (Ed.), *The Rule of Law*, Simon and Schuster, 1971.

managed differently in cyberspace. ODR, in this view, is not simply a shaper of preferences and a force for weakening law but a response to a need for a new vision of law, one that provides stability but also recognizes that change, in some instances accelerated change, is a constant.

It may be too early to predict what kinds of novel ordering, trust enhancing and dispute resolution institutions will emerge in cyberspace, but it is not too early to be confident that the need and demand for such institutions will continue to grow. It may be true, as one critic has written, that '[T]he possibilities for private legal ordering are not limitless',<sup>146</sup> but it is quite possible that information processing capabilities will expand the various models of private ordering and even, at times, allow public law models to emerge. Under such a scenario, rule making may emerge tentatively and gradually over time rather than with a single act of recognition. Rules may also emerge from shared spaces rather than sovereign spaces and from a concept of distributed authority<sup>147</sup> rather than a model of a supreme authority.

'Legal scholars', Paul Schiff Berman has written, 'have an unfortunate tendency to assume that legal norms, once established simply take effect and constitute a legal regime'.<sup>148</sup> We are in a period in which assumptions about the impact and effectiveness of state law are particularly perilous. Cyberspace has a different dynamic, one where events are driven both by data and by people. It is this new relationship between the human and the machine that is likely as well to shape the relationship between the state and virtual.

Donald Norman has written that:

Technology is not neutral. Each technology has properties – affordances – that make it easier to do some activities, harder to do others. The easier ones get done, the harder ones neglected. Each has constraints, preconditions, and side effects that impose requirements and changes on the things with which it interacts, be they other technology, people, or human society at large. Finally, each technology poses a mind-set, a way of thinking about it and the activities to which it is relevant, a mind-set that soon pervades those touched by it, often unwittingly, often unwillingly. The more successful and widespread the technology, the greater its impact upon the thought patterns of

146 J.L. Goldsmith, 'Against Cyberanarchy', *The University of Chicago Law Review*, Vol. 65, 1998, p. 1209.

147 B.S. Noveck, in a path-breaking article, writes that "This technology is enabling people to engage in complex, socially contextualized activities in ways not possible before. While it used to be that geography determined the boundaries of a group and the possibilities for collective action – I had to be near you to join you – now technology is revolutionizing our capacity for purposive collective action with geographically remote actors [...]. New social and visual technologies are emerging to facilitate the work of groups. What was an "information revolution" is becoming a social revolution. As a result, groups will increasingly be able to go beyond social capital building to law-making'. B.S. Noveck, 'A Democracy of Groups', *First Monday*, November 2005.

148 P.S. Berman, 'From International Law to Law and Globalization', *Columbia Journal of Transnational Law*, Vol. 43, 2005, p. 498.



those who use it, and consequently, the greater its impact upon all of society.<sup>149</sup>

ODR is challenging not only the formal/informal and public/private court/non-court boundaries. It is also likely to reshape conceptual boundaries within ADR by redefining a traditionally fixed set of processes, each with its own commonly accepted features.

The introduction of technology into the design of the process in the form of the technological 'fourth party'<sup>150</sup> has both generated completely new types of processes unimaginable in the face-to-face era and separated some familiar dispute resolution processes from qualities and traits previously considered significant, if not essential, to their design and operation. A clear example of a new process is the emergence of automated and technology-assisted negotiation/mediation approaches, which include problem identification processes (eBay), mechanisms for matching problems and solutions (SquareTrade), automated negotiation support systems (SmartSettle) and blind bidding tools (CyberSettle). These processes escape previously accepted clear-cut distinctions between direct negotiation and third-party dispute resolution, giving rise to another *sui generis* category in which the 'fourth party' displaces the third party. These applications have been employed mainly in relatively simple disputes but can be expected to evolve and play a useful role and be a force for change in the managing of highly complex disputes.

In other cases, ODR processes are offered under the same title as their offline equivalents but may in fact possess very different qualities. The Wikipedia dispute resolution system offers several examples with a somewhat non-traditional arbitration process in terms of mandate and procedures for reaching a decision,<sup>151</sup> and an open, informal mediation process that also challenges the widespread current notion that mediation should and needs to be offered confidentially.<sup>152</sup> Indeed, as this last point suggests, there is another conceptual boundary, perhaps several boundaries, that have been blurred by the shift to digital technology. Not only have dispute resolution processes changed, but our perceptions of what constitute formal versus informal or private as opposed to public dispute resolution have been challenged by developments in the ODR field. Similarly, in terms of third-party neutrality, another trait of contemporary dispute resolution processes, while we may be sacrificing the original means for ensuring independence (mainly through separation and distance), we have opened the door for a different kind of quality control mechanism, operating on both the individual and aggregate levels. We see how physical and conceptual barriers are intertwined

149 D.A. Norman, *Things That Make Us Smart*, Addison-Wesley, 1993, p. 243.

150 Katsh & Rifkin, 2001, pp. 93-95.

151 D. Hoffman & S. Mehra, 'Wikitruth through Wikiorder', *Emory Law Journal*, Vol. 59, 2010, pp. 174-175.

152 Of course there are exceptions to this rule offline as well, but they are rare. Mediation is defined and understood to be a confidential process and indeed one in which confidentiality constitutes an essential feature. See, e.g., Section 8 of the Uniform Mediation Act, available at <[www.mediate.com/articles/umafinalstyled.cfm](http://www.mediate.com/articles/umafinalstyled.cfm)>.

with the shift from a physical to virtual space being complemented by a change in social values and preferences, and resulting in a dramatically different understanding of the workings and essential qualities of dispute resolution processes.

As we can see, developments in the ODR field have undermined what have seemed like firm distinctions between process types, dispute resolution system goals and third-party activities and responsibilities. The realization that dispute resolution processes can be structured differently than they have been, not only because they must be structured differently when delivered online owing to technological constraints, but because it may actually prove to be a better way to design the process in a given context, has blurred conceptual boundaries on several fronts: (1) accepted distinctions between ADR process types and the set of characteristics and assumptions each of these processes has been associated with; (2) common distinctions between formal and informal, confidential and public, flexible and structured are revisited as new hybrid combinations emerge and (3) the line between the different goals of the system – dispute resolution versus dispute prevention – are increasingly being blurred with intervention taking place very early on, often without being prompted by a complaint.

#### 4.3 *Psychological Boundaries*

The above-described developments have implications for psychological boundaries as well as conceptual ones. Technology, by assisting in the automatic detection of problems, obviates the need to passively wait for complaints to arrive and allows proactive remedying of a problem, even before a potential complainant has been made aware of its existence. In effect, technology can obviate the three-stage psychological process of maturation of complaints described above. This is evidenced in Wikipedia's use of bots that locate instances of infringement of its policies by editors who abuse content and harm the accuracy and reputation of the content on its site<sup>153</sup> and in review sites use of algorithms to detect fraudulent content in hotel or restaurant ratings.<sup>154</sup> In these cases the 'naming, blaming, claiming' process becomes a single stage, often automatic (or at least technology-assisted) 'detecting' process.

Cognitive biases have not vanished, but ODR tools have generated new ways to overcome them, such as automated negotiation processes that overcome disputants' strategic conduct (*e.g.* Cybersettle's blind bidding process), uncover assumptions that have generated suspicion and animosity (*e.g.* eBay's 'Item not as described' process) or change the information relevant to negotiations (*e.g.* Lex Machina).<sup>155</sup> Where heuristics have prevented parties from reaching a Pareto-optimal resolution, the all-knowing software may offer parties to improve their outcome at no cost to either party (*i.e.* Smartsettle's optimizing feature).

153 Hoffman & Mehra, 2010, pp. 207-208.

154 K. Johnston, 'Review Websites Try to Thwart False Customer Ratings', *Boston Globe*, 25 September 2013.

155 <[www.lexmachina.com](http://www.lexmachina.com)>.

Needless to say, technology is not 'neutral'.<sup>156</sup> It was designed by people who have their own set of biases, assumptions and values, and their impact needs to be uncovered and analyzed. But the capability that software affords for flexibility when needed or added structure when appropriate can help uncover the biases in the design and guide parties through a thoughtful process, uncovering their interests and questioning their biases and assumptions. Where biases cannot be prevented or uncovered on an individual basis, the documentation afforded through ODR allows problematic outcome patterns to be detected, exposing potential biases in the design or in specific third parties' decision-making.

Given the dearth of academic research on the implications of digital technology for procedural justice theory, it is difficult to fully analyze what we can expect in this domain.<sup>157</sup> However, the few experiments that have attempted to measure procedural justice-related factors among ODR users have found that disputants continue to expect dispute resolution processes to fulfil criteria associated with procedural justice – to allow for voice, to treat them with respect, to be neutral. Interestingly, what this research seems to suggest is that at least for facilitative processes (as opposed to decision-based ones), disputants adjust their expectations regarding the fulfilment of such criteria when delivered through automated systems. In other words, when such disputants know that a facilitative process is performed by software, as opposed to a human, they still expect the process to comport with procedural justice components, but have different expectations as to what would fulfil such criteria.<sup>158</sup> eBay has found that its automated negotiation processes have contributed to enhanced trust in the site, resulting in increased activity on the site, which seems to support the notion that users adjust their expectation of procedural justice to the medium through which dispute resolution services are offered.<sup>159</sup>

#### 4.4 Professional Boundaries

Finally, professional boundaries, as in other domains, are facing significant challenges as ODR systems have often been developed by people from outside the ADR and legal milieu, involving entrepreneurs and computer scientists as well as lay users of websites such as Wikipedia. In addition, the massive use of inexpensive automated systems that obviate the need for a human third party and do not require representation by lawyers has further limited the professional turf of ADR professionals and lawyers.

156 H. Nissenbaum, 'Values in Technical Design', in *Encyclopedia of Science, Technology and Ethics*, 2005, pp. 66-70.

157 A. Sela, 'Can a Computer Be Fair? Disputants' Experience of Procedural Justice in Automated and Facilitated Online Dispute Resolution', unpublished manuscript (on file with author), 2011; L. Klaming, 'Quality of ODR Procedures', in M. Gramatikov (Ed.), *Costs and Quality of Online Dispute Resolution*, Maklu Publishers, 2012, pp. 137-145.

158 Sela, 2011.

159 C. Rule, 'Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost Benefit Case for Investing in Dispute Resolution', *University of Arkansas Law Review*, Vol. 34, 2012.

Professionals have often been slow to embrace new technologies, and where they have mastered such technologies, they have tended to overlook their disruptive impact, instead embracing their short-term promise for enhanced efficiency. In the longer term, however, reduced control over legal information and increased access to online information about procedural and substantive aspects relating to dispute resolution are threatening professional turf. Professionals, lawyers and ADR experts among them, are required to demonstrate their added value in an age in which individuals may rely on information, tools and systems available online to address the problems they face.

In the short term, the emergence of ODR has offered lawyers and others in the field of ADR yet another realm in which they can demonstrate their expertise. For potential users, the lowering of physical boundaries in ODR has allowed access to a larger pool of third parties, bypassing distance and obviating the need to meet in person. In the longer term, however, as people's preferences and values evolve, these developments will inevitably be disruptive and undermine the professionalization of ADR. This can be expected to happen for two reasons. First, the field of dispute resolution will have to open up to additional professions that did not traditionally have voice in the design and delivery of dispute resolution (*e.g.* computer scientists) as well as laypeople, who will move from the position of passive recipients of dispute resolution services to having a voice and input in the design and evaluation of such processes. Second, these developments can be expected to moderate the legal professions' hold over the ADR field. The volunteer phenomenon has not disappeared in ODR as lawyers and other professionals are substituted for with lay crowdsourcing.

## 5. Conclusion: Shifting Boundaries in the Shadow of the Network

The introduction of digital technology and the rise of ODR are undermining boundaries that support the different forms of dispute resolution. This development reflects the deeper changes that have rendered such boundaries less necessary. Automation and the efficiencies of digitization have relaxed, and in some cases obliterated, the institutional and human constraints that have made dispute selection necessary. The shorter time frames, lower costs and efficiencies associated with occupying a digital space have increased both the capacity of dispute resolution providers to handle disputes and of humans to render decisions or help resolve disputes. In other cases, dispute volumes are so high that automated processes have handled with great success numbers of cases that in the past were unfathomable.

Similarly, the stark opposition between formal and informal processes on the one hand and the fixed structures of the various informal processes offered on the other have been dimmed because these structures were no longer necessary to generate legitimacy, nor reflective of existing preferences and values. Technology has not only made it necessary to design ADR processes that were more 'open' and less 'private', but such design, over time, also seemed to (1) better reflect and also actively shape the change in societal views towards privacy and the goals of

private dispute resolution (with dispute prevention and norm generation as equally, if not more significant than resolution of individual disputes) and (2) offer an alternative basis for institutional legitimacy.

As the experience with ODR systems and tools has shown us, digital technology has allowed us to build systems that can handle what was previously impossible in terms of quantities of disputes. This change in capacity has meant that problems, grievances, disputes and conflicts that were not dealt with in the past could now surface and receive redress. Furthermore, such redress would be accessible and efficient – it could be provided from the convenience of one’s own home, 24 hours a day 7 days a week, without a need for legal counsel or advice, through easy-to-use, largely automated or software-facilitated processes.

Disputants using such systems would not only be able to access them more easily, but as the brief history of ODR shows us, but would also have a more meaningful opportunity than in the past to have input in such processes’ design and to provide feedback on satisfaction, fairness and accountability of these mechanisms. Finally, the automatic, seamless documentation that initially seemed to be a major drawback of ODR has over time come to be seen as an asset, allowing ODR providers and businesses to study both positive and problematic patterns and improve the performance of the dispute resolution system and that of third parties, as well as uncover sources of disputes and propose or implement elements for preventing them from recurring in the future. In this way, new technologies have the potential to generate dispute resolution systems that better deliver the original promise of ADR as portrayed in the previous century: access to justice, creative process design, tailored processes that meet party needs and preferences, and expertise and efficiency.

This is not to say that digital technology is a panacea for the ills of traditional dispute resolution or that the future evolution of ODR will be friction-free; behind software programmes are individuals, with values and preferences, and whose choices are grounded in their own worldview and reflect societal power structures and individual biases. Alongside efficiency, dispute resolution mechanisms will have to ensure fairness if they are to sustain their legitimacy. Whether they succeed remains to be seen. What seems clear is that the means for ensuring fairness and generating trust follow a new logic and challenge some of our deepest preconceptions and understandings about dispute resolution. The old model had assumed that dispute resolution operated ‘in the shadow of the law’<sup>160</sup> in that the law strongly influenced the context in which dispute resolution occurred. Our new boundaries reflect the network’s reach and our thoughts about what is possible, desirable and even just, are more oriented around the technological context than the legal context, around data as well as rules, and around ‘a new boundary made up of the screens and passwords’ and everything that they link to.<sup>161</sup>

160 Mnookin & Kornhauser, 1979; R. Cooter, S. Marks & R. Mnookin, ‘Bargaining in the Shadow of the Law’, *Journal of Legal Studies*, Vol. 11, 1982.

161 D.R. Johnson & D. Post, ‘The Rise of Law on the Global Network’, in B. Kahin & C. Nesson (Ed.), *Borders in Cyberspace*, MIT Press, 1997, p. 3.

# Third-Party Ethics in the Age of the Fourth Party\*

Daniel Rainey\*\*

## Abstract

*'Third Party Ethics in the Age of the Fourth Party' presents and discusses some of the ethical impacts of the use of information and communication technology (ICT) in third party practice (mediation, facilitation, arbitration, etc.). The article argues that all of the ethical requirements related to third party practice have been affected by the use of ICT, that ethical standards of practice must be reviewed in light of the use of ICT, and that changes in ethical requirements based on the use of ICT will be evolutionary, not revolutionary*

**Keywords:** ODR, ethics, fourth party, ADR, standards of practice.

## 1. Introduction: The Influence of the Fourth Party

At a recent American Bar Association Section of Dispute Resolution Annual Spring Conference, one of the presenters asked a series of questions to his audience regarding the use of online dispute resolution (ODR) technology.<sup>1</sup> The first question was simple: 'How many of you in the audience currently use online dispute resolution tools?' Of the approximately forty people in the room, only a few raised their hands, and those few were practitioners who were known as long-time advocates of ODR technology. He then asked a series of follow-up questions: 'How many of you use the telephone?' 'Smart phones?' 'Email?' 'Skype?' 'Google Docs or some other document storage in the cloud?' In response to the follow-up questions, most of the hands in the room went up.

More recently, the author posed similar questions to another group involved in the law and alternative dispute resolution (ADR).<sup>2</sup> In answer to the question

\* The term 'Fourth Party' was coined by Ethan Katsh and Janet Rifkin in their 2011 book *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, cited later in this essay. The Fourth Party refers to technology used in the practice of conflict engagement, and specifically refers to the influence that technology has on the conflict engagement process.

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1 ABA Section of Dispute Resolution 15th Annual Spring Conference, Chicago, 3-6 April 2013. The questions were asked by Colin Rule at a session that was part of the Symposium on ADR and the Courts.

2 ABA Section of Labor and Employment Law, Railway and Airline Labor Law Committee, Midwinter Meeting, Coronado, 12-14 March 2014.

'how many of you use information and communication technology (ICT) in your practice?' every hand went up. When he asked, 'How many of you have thought about the impact technology may have on the ethics of your practice?' only one hand out of sixty went up.

Responses to the presenter's questions make two points that will frame this essay. First, ICT has become an integral part of the practice of conflict engagement in all its forms, just as it has become integral to social interaction generally. Second, most practitioners of ADR in all its forms seem not to have overtly faced the ethical changes and challenges brought with the increased use of ICT.

There is more awareness now than there was just a few years ago. The 'comprehensive guide' to dispute resolution ethics published in 2002 (and still in use today) does not mention technology at all, even though the technology that is now ubiquitous was beginning even then to make inroads into the way we communicate and practise dispute resolution.<sup>3</sup> The recently published 'advanced' guide for mediators treats technology issues under the heading of 'advanced ethical issues for mediators'.<sup>4</sup>

The integration of technology into all kinds of third-party work does not mean that the ethical standards developed for 'traditional' third-party work must be thrown out and rewritten. It does, however, mean that each of the ethical considerations common to third-party work must be reinterpreted in light of the impact of technology. The adjustment in ethical standards will be evolutionary, not revolutionary, and will be accomplished over time through dialogue with practitioners who are facing the new demands, restrictions and freedoms brought to third-party practice by technology. The goal of this article is *not* to rewrite all of the ethical guidelines, or even to address all of the possible ethical issues raised by the use of ICT. The goal of this article *is* to point out some concrete instances in which technology affects ethical considerations, and to add to the evolutionary transformation from the assumption of face-to-face processes to the common use of processes integrating ICT.

The international, or a-national, nature of communication and interaction produced in the online world confronts practitioners of all kinds with challenges that are new.

One important practical effect of globalization [fueled by the use of ICT] is that clients regularly expect [practitioners] to handle matters that involve multiple jurisdictions, domestic and international. [...] [not] contained by national borders. [...]<sup>5</sup>

The borderless nature of virtual interactions guarantees that those involved in conflict engagement will encounter work that involves customs, cultures, expectations and demands that are heterogenous in nature.

3 P. Bernard & B. Garth (Eds.), *Dispute Resolution Ethics: A Comprehensive Guide*, ABA Section of Dispute Resolution, Washington, DC, 2002.

4 S.N. Exon, *Advanced Guide for Mediators*, LexisNexis, 2014, Chapter 7.

5 J. Podgers, 'Closing Act', *ABA Journal*, January 2013, p. 21.



A Google search on the phrase 'how social media has changed us' yields 536,000,000 hits.<sup>6</sup> Some people (perhaps a half a billion of us) seem to think that social media has made a change in the way we interact. It is common to hear the argument that technology isolates us and drives us apart. But an equally, if not more, persuasive argument is that technology brings us together in different ways.

Lee Rainie and Barry Wellman argue that, like earlier communications technology (the telephone, television, etc.), ICT has brought us closer and has changed, not eliminated, our social interaction. As they argue:

[...] we wonder about the folks who keep moaning that the Internet is killing society. They sound just like those who worried generations ago that TV or automobiles would kill sociability, or sixteenth-century fears that the printing press would lead to information overload. [...] none of these technologies are isolated – or isolating – systems. They are being incorporated into people's lives much like their predecessors were. People are not hooked on gadgets – they are hooked on each other.<sup>7</sup>

In the mid-1990s, some ADR practitioners realized that the emerging online communication channels were having an impact, mostly in the commercial arena. They coined the term 'Online Dispute Resolution (ODR)' to describe and differentiate what they were seeing as a new venue for dispute resolution.<sup>8</sup>

The classic definition of ODR comes from those early days of e-commerce. When the U.S. National Science Foundation (NSF) lifted the ban on commerce online in 1992, there quickly began to appear disputes unlike disputes we had created before: disputes with parties in far-flung geographic locations, engaging in conflict created online with no reasonable ability to pursue resolution in traditional ADR or legal channels.

Into this new conflict environment came a number of ODR tools designed to handle the high volume of disputes with as little human intervention as possible. We are now at a point, 22 years later, at which eBay, the poster child for ODR, is handling over 60 million disputes per year, 90% of which are handled with no human intervention, and in which the American Arbitration Association (AAA) has announced a partnership with an ODR provider to handle as many as 100,000 arbitrations per year in New York state alone.<sup>9</sup>

By 2001, Katsh and Rifkin were able to observe the rise of online commerce and the rise of technology to address the disputes created in online commerce,

6 Search results on Google, 25 March 2014.

7 L. Rainie & B. Wellman, *Networked: The New Social Operating System*, MIT Press, Cambridge, 2012, p. 6.

8 See E. Katsh, 'ODR a Look at History', in M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution Theory and Practice: A Treatise on Technology and Dispute Resolution*, Eleven International Publishers, The Hague, 2012.

9 In March 2014, the AAA and Modria announced their relationship. To see the basic information related to Modria's arbitration work with the AAA, go to this URL: <[www.modria.com/newsroom/american-arbitration-association-selects-modria-power-new-york-fault-caseload/](http://www.modria.com/newsroom/american-arbitration-association-selects-modria-power-new-york-fault-caseload/)>.



and to describe the technology that was being used to handle conflict online as the 'fourth party'.<sup>10</sup> The fourth party as an active participant in the dispute resolution process is still very much alive and kicking, as witnessed by the eBay and AAA statistics cited above.

As time has passed and ICT has burrowed its way into the fabric of society far beyond e-commerce, another more contemporary and nuanced definition of ODR and of the fourth party has emerged. That definition of ODR, the one used throughout this article, is that ODR is simply the intelligent application of ICT to any of the processes that make up the universe of conflict engagement practice.

Why has ICT become a routine element of conflict engagement practice? At least in part, it is because some of the basic functions or activities of conflict engagement practitioners are basic functions or capabilities at the core of ICT. At a very general level, conflict engagement efforts require that practitioners engage in three basic activities, whether those activities occur 'at the table' with divorcing couples or in dispersed locations involving multiple groups.

Conflict engagement requires that we: (1) facilitate communication among the parties, (2) assist in the handling of information and data and (3) manage group dynamics. ICT: (1) opens new communication channels, (2) offers new ways to handle information and (3) creates new ways to manage group dynamics (and even allows the practitioner to redefine 'group').

If three of the core functions of conflict engagement are also three of the core innovations of ICT, how could dispute resolution not be changed by the ubiquitous nature of ICT in the contemporary world? As we operate in this wired/wireless world, the influence of the 'fourth party' goes far beyond the algorithm-driven programmes used in e-commerce and the artificial intelligence programmes that are being used to 'build a better mediator'. The fourth-party influence can rightly be seen any time a third party uses technology to communicate with or share information with the parties. And every time technology, the fourth party, enters the process, there are ethical issues either raised or altered.

## 2. Technology and the Ethics of Conflict Engagement

What are the standards of practice that govern ODR? If one takes as a starting point the idea that technology has been integrated into the entire range of practice in ADR, it would seem reasonable to argue that any of the ethical standards that apply to the practice of conflict engagement must be interpreted in the light of the impact of technology – to account, in other words, for the fourth party.

There are many ongoing discussions of ethics as they relate generally to the practice of conflict engagement.<sup>11</sup> For purposes of this article, standards of prac-

10 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, San Francisco, 2001. See, particularly, 'Introducing the Fourth Party: The Critical Role of Technology', p. 93 *et seq.*

11 For example, see L. Kriesberg, 'Moral Judgements, Human Needs and Conflict Resolution: An Alternative Approach to Ethical Standards', in K. Avruch & C. Mitchell (Eds.), *Conflict Resolution and Human Needs: Linking Theory and Practice*, Routledge, New York, 2013, p. 77.

tice and ethical guidelines created for mediation will serve as the basis for discussion of ethical considerations generally. It is convenient, and perhaps necessary, to use mediation as a focus for at least two reasons.

First, mediation offers a base of theory and practice that is reflected in many other conflict engagement venues. At all levels and in all venues, practitioners engage with human beings interacting in stressful and, perhaps, dangerous situations. Ellen Waldman offers three core values that drive mediation ethics: disputant autonomy, procedural fairness and substantive fairness.<sup>12</sup> At the most general level, these values would probably be accepted by practitioners in most venues.

Second, much has been written about mediator ethics. The range of ethical statements or standards of practice for mediation make up a large part of the literature on ethics and third-party practice.<sup>13</sup> This article will refer to standards of practice statements and/or ethical standards from a cross-section of organizations dealing with conflict engagement issues, including the AAA, the American Bar Association (ABA), the Association for Conflict Resolution (ACR), the Judicial Arbitration and Mediation Services (JAMS) and two state organizations, from Virginia and Texas, where the author regularly works.<sup>14</sup>

### 3. The Standards and their Relationship to Technology

As a note to start this discussion of the impact of technology on standards of practice, all of the traditional requirements expressed by the various statements remain untouched by the use of technology. For example, the need to be and remain free from favouritism, bias or prejudice remains just as essential for an

12 See E. Waldman, *Mediation Ethics: Cases and Commentaries*, Jossey-Bass, San Francisco, 2011.

13 Some discussions of ethics address the relationship between mediation and the formal justice system, and indeed the concept of justice itself. See A. Wellington, 'Professional Ethics for Mediators: Tensions Between Justice and Accountability', *Social Philosophy Today*, Vol. 17, 2001, pp. 125-150. Some compare standards of practice, assessing similarities and differences. See S. McCorkle, 'The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct', *Conflict Resolution Quarterly*, Vol. 23, No. 2, 2005, pp. 165-183. The continuing friction between mediator ethics and legal ethics is an ongoing subject. See A.C. Yang, 'Ethics Codes for Mediator Conduct: Necessary But Still Insufficient', *Journal of Legal Ethics*, Vol. 22, 2009, p. 1229. Wilson's recent essay takes the ethics discussion back to basic texts that have helped define the field of conflict resolution: B. Wilson, 'Mediation Ethics: An Exploration of Four Seminal Texts', *Journal of Conflict Resolution*, 2011, p. 119.

14 The AAA standards can be found at: <[www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG\\_0104098&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_0104098&revision=latestreleased)>.

The ABA standards can be found at: <[www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)>.

The ACR standards for Family and Divorce mediation can be found at: <[www.acrnet.org/Page.aspx?id=633](http://www.acrnet.org/Page.aspx?id=633)>.

The JAMS standards can be found at: <[www.jamsadr.com/mediators-ethics/](http://www.jamsadr.com/mediators-ethics/)>.

The Virginia standards can be found at: <[www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf)>.

The Texas standards can be found at: <[www.txmca.org/ethics.htm](http://www.txmca.org/ethics.htm)>.

all-online ODR process, or a mixed ODR and face-to-face process as it does for an all-face-to-face process. Essentially, the mediator, or any third party in any intervention venue, faces the same problems, the same choices and the same requirements for practice whether or not technology is introduced.

Put another way, the *questions* facing third parties remain the same, although the *answers* may change a bit on the basis of the additional elements added by the use of technology. In recognition of this, the ABA Ethics 20/20 Commission report suggests that questions relating to technology and ethics should continue to be addressed in an ongoing manner as '[...] virtual practice becomes clearer and as relevant technology continues to evolve'.<sup>15</sup>

Part of the evolutionary progress of technology involves the development of technology that is specifically designed for use in the practice of conflict engagement. Up to the present, much if not most, of the work done using technology has employed applications and platforms designed for more general communication or information-handling purposes. For example, commercial products like WebEx or Central Desktop were developed to enhance group work and communication across geographically dispersed groups in synchronous and asynchronous modes. These platforms are easily adapted to conflict engagement work.<sup>16</sup>

There have been platforms designed specifically for conflict engagement work, but they have either tended to be proprietary in nature (e.g. eBay's internal system) or have not been able to attract a sufficient number of users to maintain commercial viability. That is beginning to change,<sup>17</sup> but it is still the case that most technology used by practitioners has been designed for more general online group work. In either case, the use of ICT provides the impetus for the 'evolution' of practitioner ethics.

This article will focus specifically on a few of the ethical imperatives that, through conversations with a wide range of conflict engagement practitioners, seem to be most obviously and immediately affected by technology.

### 3.1 Confidentiality

Practitioners and parties alike look to the third party's *right* to maintain confidentiality, and his or her *ability* to maintain confidentiality, as a cornerstone of the intervention process. The reliance on confidentiality allows for free expression of ideas and options that, for many reasons, might not surface in a proceeding where the exchanges become part of the public record or may be used as evidence of 'intent'.

15 ABA Ethics 20/20 Report, p. 10. Available for download at: <[www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20121112\\_ethics\\_20\\_20\\_overarching\\_report\\_final\\_with\\_disclaimer.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf)>.

16 The U.S. National Mediation Board has used WebEx to conduct online arbitration and online mediation synchronously, and Central Desktop to provide asynchronous platforms for complex collective bargaining.

17 For example, the agreement between Modria and the AAA features a 'bespoke' dispute resolution platform.

The actual right to maintain confidentiality is expressed, on the basis of venue, by state statutes and guidelines,<sup>18</sup> and by federal guidelines,<sup>19</sup> and it is incumbent on the mediator to know what rules apply to the mediation he or she is conducting in a specific venue.<sup>20</sup>

The JAMS confidentiality standard states:

It is crucial that the mediator and all parties have a clear understanding as to confidentiality before the mediation begins. Before a mediation session begins, a mediator should explain to all parties (a) any applicable laws, rules or agreements prohibiting disclosure in subsequent legal proceedings of offer and statements made and documents produced during the session, and (b) the mediator's role in maintaining confidences within the mediation and as to third parties.<sup>21</sup>

The requirement for the mediator to know, understand and communicate the elements of confidentiality and information safety online exists when technology becomes part of the process.

The most common first question about ethics and technology seems to be 'How do I, as a mediator, maintain confidentiality and the security of party information?' A second and equally important question should be 'How do I *describe* the right of confidentiality and the actual safety of their information in an online environment accurately, and in a way that allows for the parties to make an informed choice about whether to consent to online work?'

First, there are questions about what our general responsibility and capability is regarding confidentiality. We have a hard enough time in the face-to-face world explaining under what conditions mediators can assert confidentiality, but adding technology does not really change any of the conditions of confidentiality.

If, in a process labelled mediation, a party says something to a mediator in a caucus, out of the hearing/sight of the other party, it is likely that the mediator can assert the right to confidentiality. That, it is assumed, holds true for statements made (orally or in writing/text) in private or caucus sessions online. In theory, it may be possible to argue that the very act of passing the information over an online communication channel is 'publication'. To date, this argument has not surfaced, but because it is theoretically possible to make the argument, it and other arguments related to the special nature of discourse online will probably be made by someone at some point.

Outside the actions of the parties themselves, and the third party who has made the promise of confidentiality, there are fourth-party considerations that loom large. There is reasonably long-standing guidance regarding the use of off-

18 See, e.g., Maryland Senate Bill 859, 'Maryland Mediation Confidentiality Act', at <[www.courts.state.md.us/macro/pdfs/mmcach309sb0856e.pdf](http://www.courts.state.md.us/macro/pdfs/mmcach309sb0856e.pdf)>.

19 See Alternative Dispute Resolution Act of 1998 (28 USC §652).

20 For a brief discussion of confidentiality and a recent Federal Court decision on mediator confidentiality, see S. Leasure, 'Mediation Confidentiality Rules Have Teeth', *Eminent Domain ADR*, 8 June 2012, at <[http://blog.edom-adr.com/?p=800#\\_ftn1](http://blog.edom-adr.com/?p=800#_ftn1)>.

21 JAMS, Standard IV.

line paper and electronic information storage managed by contractors. There is a growing body of guidance related to online storage of information. The New York State Bar says that:

An attorney may use an online storage system, provided the attorney exercises reasonable care to ensure that confidential information will remain secure.<sup>22</sup>

The problem for third parties, once again, is that translating guidance for offline systems to guidance for online systems is not automatic.

While it may be clear what constitutes reasonable care in the context of traditional third party storage, these same practices do not seamlessly transfer to online storage.<sup>23</sup>

The second set of questions has to do with the *safety* of information passed through online channels, regardless of whether the information was offered publicly (e.g., in a mediation session with all parties present) or privately (e.g. just to the mediator in a caucus 'room' online). Not to belabour the point, the questions tend to be something like 'how likely is it that my information will be 'hacked' and stolen by someone?'

Before addressing that question from an ethical point of view, how likely is it, generally, that private information will remain private once it is exchanged online?

The answer is complicated. Before the public revelation of the extent of digital surveillance conducted by the United States and other countries, the common answer would have been that your information could be considered fairly secure. The revelations of and the notoriety gained by Edward Snowden, and the extent of the government surveillance he exposed, have made it more difficult for the general public to believe in the privacy of information exchanged online. Following close on the heels of the Snowden information, the publicity surrounding the compromised personal information contained on the U.S. retailer Target's servers during the past Christmas shopping season did nothing to increase general confidence in the safety of online information.

From an ethical viewpoint, the third party is faced with two responsibilities: to understand the risks and to communicate the risks realistically to the parties. It may be, in fact, highly unlikely that information exchanged during conflict engagement work online will be compromised, but the devil really is in the details, and is linked to the type of online system being used.

Email is the worst form of online communication that is least secure, easiest to accidentally misuse and most likely to be 'hacked'. Basically, no mediator or party should use it for anything they would not be willing to see on the front page

22 New York State Bar Association Committee on Professional Ethics, Opinion No. 842, 2010.

23 ABA Section of Labor and Employment Law Ethics Flash: available at <[www.americanbar.org/newsletter/groups/labor\\_law/ll\\_flash/1105\\_aball\\_flash/1105\\_aball\\_flash\\_ethics.html](http://www.americanbar.org/newsletter/groups/labor_law/ll_flash/1105_aball_flash/1105_aball_flash_ethics.html)>.

of the local newspaper. For confirmation of this, just ask any public figure whose 'private' email messages have wound up in the public media.<sup>24</sup>

Cloud applications such as Google Docs, Google Drive or the Amazon cloud space offer open applications and data storage, which generally means that your data is mixed in with other people's data. But you can password-protect your information, and you can control who sees it, and organizations like Google have a built-in incentive to make sure your information is not misused or stolen.

Of course, anyone at Google with Admin rights can get to information on their servers, but, again, they have a built-in incentive to be very careful with that ability. At one point, the fact that information moved to and from Google servers was encrypted was a comfort to users. The revelation that the National Security Agency (NSA) had found a way to grab information between encryption processes brought a reasonable level of concern to even the safety of encryption.

What could be called 'bounded cloud' applications may be, arguably, safer. Commercial, bounded cloud applications treat information in a way that further separates 'your' data from the rest of the world.<sup>25</sup> The information put into a bounded cloud is on servers used only by paying customers, and is generally SSL-encrypted in addition to being password-protected. Still, the administrators of the bounded cloud systems have access to the data, and are constrained by the same business incentives as any administrators working in systems reliant on the trust of their customer base.

So how does the third party reasonably describe the online world in terms of data security and client confidentiality? First, it is incumbent upon every mediator who wants to use online tools to educate himself or herself about the realistic risks that parties take when they work online. As a matter of ethics, mediators should understand how the technology works on at least a basic level, and should make choices about what technology they recommend for use on the basis of that knowledge.

Second, mediators should carefully consider how to describe the risks to the parties. There are always some risks, even with paper documents, and parties will always have to make choices about what venues and channels they are willing to use. The responsibility of the mediator is to describe the risks and benefits in a way that allows for a truly informed decision by the parties.

As a final note on confidentiality and information safety, all of the egregious breaches of confidentiality and security the author has witnessed as a mediator came as a result of parties copying and passing around paper they should have not shared, not from hacking or losing information online.

24 Not all email systems are created equal. Some are encrypted, some are not. Some are well protected, some are not. Generally, email systems are more vulnerable than data storage applications and are among the first targets of those trying to break into online systems.

25 There are numerous examples of bounded cloud environments. SydneyPlus built its reputation by handling data for law firms and building online libraries <<http://sydneyplus.blogspot.com/>>. CentralDesktop is one of many 'group work' sites that offer appealing features for ODR use, and offer a high level of security <[www.centraldesktop.com/](http://www.centraldesktop.com/)>. Modria.com offers software designed for dispute resolution, with data resident on its servers in a protected environment <[www.modria.com/](http://www.modria.com/)>.

### 3.2 *Self-Determination*

The mandate for self-determination is at the centre of the practice of mediation. Under the headings of self-determination and impartiality, the AAA/ABA/ACR and JAMS Model Standards require that:

[...] A mediator should endeavor to provide a procedurally fair process in which each party is given an adequate opportunity to participate.<sup>26</sup>

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.<sup>27</sup>

If we take as given that technology is now an integral part of the ADR world, the standard probably should state:

Parties may exercise self-determination at any stage of a mediation, including mediator selection, *platform selection*, process design, [...] <sup>28</sup>

In face-to-face practice, third parties have developed many strategies to ensure that parties have access to the process, have input into the 'ground rules' that govern sessions and have a high degree of ownership in the process to which they agree. What impact does the use of ICT have on the concept of self-determination?

A common issue with which the author often has been confronted has to do with the role of the third party's comfort with technology. In short, is the fact that the third party is partial to certain online tools unduly influencing him or her to push the parties to use those online tools? The analogue to this issue in face-to-face work can surface when the third party is challenged to adapt his or her process to fit the comfort zone of the parties.

How much should a third party 'flex' his or her process? If the process mode is mediation, most third parties enter the process inclined to frame issues, discuss interests, develop options and discuss options in an attempt to craft a resolution. Generally, the approach is to do the work together, speaking in turn, in an environment where the third party has attempted to 'level the playing field'. What if one of the parties is uncomfortable with a level playing field? What if the party is acutely conscious of and wants to acknowledge the power imbalance as part of everyday life outside of mediation? Traditional ethical guidelines suggest that the third party should at least consider a process whereby the power imbalance is considered and integrated into the session. Failing that, ethical guidelines suggest

26 JAMS Mediator Ethics Guidelines, Standard V. <[www.jamsadr.com/mediators-ethics/](http://www.jamsadr.com/mediators-ethics/)>.

27 Model Standards, Standard I: Self-Determination.

28 *Id.*, italicized words added.



that at least the third party should not insist on running the session his or her way in the face of obvious discomfort on the part of the parties themselves.

In a process that may involve ICT, the ethical imperatives involve attention to the parties' preferences and comfort levels in relation to the use of technology. In short, the third party needs to be sure that both parties are equally willing to use whatever online tools (or ICT tools offline) are available, and that they have reasonably equal facility to use those tools. And, turning the lens in the other direction, there may be a higher comfort level with technology among the parties than with the third party. Is there an ethical issue involved with dissuading parties to use communication channels with which they are comfortable, but in which the third party has no faith?

A recent iteration of an old argument has been made, asserting that 'cyber mediation cannot work'.<sup>29</sup> It is a continuation of an argument that has accompanied the development of ODR since the earliest incursion of technology into traditional practice. Leaving aside observations that 'cyber mediation' *is* working and *has been working* for some time, and that other 'cyber interventions' have been found equally practical, what is the ethical imperative for a third party who accepts the 'cannot work' view of ODR? If the parties would be comfortable using ICT in all or part of the process, and if the use of ICT would advantage them in terms of cost, or convenience or safety, would the third party's refusal to use ICT be unethical?

Generally, this question has to do with the parties' expressed preferences (for all face-to-face work or for some use of technology), and perhaps involves the classic issue of computer literacy. At one time, not too many years ago, computer literacy was the number one response on informal surveys about barriers to the use of ODR technology.<sup>30</sup> As online communication has become more and more a regular part of the everyday lives of a majority of people, with grandparents and great-grandparents using Skype and FaceTime to 'visit' with the grandkids, the issue of computer literacy has been replaced by the loss of non-verbal as the most often expressed barrier to the use of technology.

But computer literacy is still an ethical issue for mediators. One organization devoted to teaching computer literacy defines it in terms of user facility:

Computer literacy is the knowledge and ability to use computers and technology efficiently. [...] The highest goal of a computer-literate person is to be

29 B.A. Friedman, 'Online Mediation – Press Delete?', posted in the ABA Section of Dispute Resolution Linked In Discussion Group, 9 September 2013, available at: <<http://friedmanmediation.com/mediation/online-mediation-press-delete-2/>>.

30 The author regularly teaches ODR courses for universities and community mediation centres, and at the beginning of each course he polls the students on their perceptions of the barriers and advantages inherent in the use of ODR technology. For many years the top answer was 'computer literacy', followed closely by 'loss of non-verbal'. The non-verbal response remains at the top of the list, but computer literacy has fallen off almost altogether. For a brief discussion of this and other issues in the teaching of ODR methods, see: D. Rainey, 'Teaching Online Dispute Resolution: Results from a Survey of Students', via Mediate.com, at <[www.mediate.com/articles/RaineyD1.cfm](http://www.mediate.com/articles/RaineyD1.cfm)>.

able to learn and use new computer programs without large amounts of help.<sup>31</sup>

The phrase 'without large amounts of help' is key to the dilemma facing the mediator. Put simply, every minute the mediator has to spend paying attention to managing and learning the technology, the less time he or she has to focus on the parties and their problem. The more the parties have to focus on using the technology, the less effective they may be in addressing their problem. The ethical imperative here is to choose technology wisely, describe it to the parties realistically, prepare them to use the technology and monitor their use for signs that one party or another may be having problems or may be disadvantaged through the use of a particular platform. Although most of the available online tools are very simple and can be picked up and used by parties with very little in the way of training, there is still a need for the mediator to create an environment in which the parties feel treated fairly, and in which they do not feel that the process itself is negatively influencing a possible outcome.

There are a number of ways in which third parties have dealt with these issues. Where possible, having a private conversation with each party before beginning mediation gives the mediator the ability to talk with the parties about their comfort level, their computer literacy and their interest in using ICT as part of the mediation process. Usually it is possible to get a very good idea about the comfort level and the computer literacy from a short conversation, and it is possible to determine whether the use of technology is a subject that would be comfortable for both parties to discuss together with the mediator.

Best practices in ODR would suggest that the mediator conduct some training for the parties before beginning any use of ICT with their issue(s). Training need not be formal training. In fact, for the author most often this training takes the form of an exercise that has no risk, but which has the parties using all of the functions of the ICT tools they will see in the mediation process.

For example, to 'train' parties in the use of online brainstorming tools and rating and ranking tools, the mediator can have them go through a short exercise naming and ranking the greatest rock and roll songs of all time, or the best movies of all time or some such topic. By having a little fun and using the technology, the parties become familiar with all of the functions and can use it for real issues without having to figure it out as they go along.<sup>32</sup> After the low-risk exercises, it is possible to do a second round of discussions with the parties to make sure everyone is still comfortable using the technology for the mediation, and on the basis of the follow-up discussions, it is possible to default to a face-to-face process or to use a more friendly technology.

In terms of accessibility, ODR platforms face issues beyond basic access to the Internet or to specific platforms. The need to adapt to language barriers, hearing

31 Technology Fluency Institute, at <[www.techfluency.org/computer-literacy.htm](http://www.techfluency.org/computer-literacy.htm)>.

32 The author is quite aware that 'having fun' together is not possible for many parties, but it is usually possible to craft some kind of low-risk use of the technology before beginning to work on the hard issues.

impairment, vision impairment etc. remain, but the manner in which they may be dealt with changes with the introduction of the variety of text, audio and video communication channels available for ODR.

Finally, it is necessary to monitor the parties' use of the platform during whatever conflict engagement process is underway. If one party is perceived to be participating less or having some trouble with the platform, the third party can do a process check and perhaps abandon or adjust the technology at that point.

Again, the basic ethical responsibility of the mediator as it relates to impartiality and self-determination is to make sure that the process is open to input from the parties, to make sure that neither of the parties is disadvantaged by use of technology and to make sure that the mediator's own preferences are not being pushed on the parties. It is obviously the case that one of the reasons parties come to third parties is to get advice on process and to have an expert help them manage discussions about difficult topics. In that context, suggesting online technology is perfectly acceptable, and in fact may be a preferable option as long as the mediator does not cross the line to using or not using technology as purely personal preference.

### 3.3 Mediator Competence<sup>33</sup>

A mediator should have sufficient knowledge of relevant procedural and substantive issues to be effective.<sup>34</sup> A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation. A mediator should have available for the parties information relevant to the mediator's training, education, experience and approach to conducting a mediation.<sup>35</sup>

This is an interesting and thorny question, both with technology and *sans* technology. There's a pretty sad history of debate among mediators and other third parties about credentials, accreditation and competence, the upshot of which is that it is possible to hang out one's shingle and declare competency as a mediator with no mandatory training or preparation.

In the United States, if a mediator works with court-referred systems or with other special venues, it is likely that he or she will have to complete a forty-hour skills course, which may or may not be recognized in another jurisdiction. In this specific court-related context, a graduate degree in dispute resolution carries no more weight than a forty-hour course as far as formal credentialing goes. In fact, in most court-referred venues, a dispute resolution degree, *de facto*, carries less weight than a forty-hour skills course. The issue of licensing or accrediting mediators and other third parties is one that has been debated from the earliest days of the ADR movement. The title of a panel discussion at a recent dispute resolution

33 Mediator Competence is found in the standards from AAA, ABA, ACR, JAMS and Virginia.

34 JAMS Guidelines, Standard III: A Mediator Should Be Competent to Mediate the Particular Matter.

35 Model Standards, Standard IV: Competence.

conference succinctly states one polar position: ‘Cosmetologists are Licensed: Why Aren’t Mediators?’<sup>36</sup> The other polar position is that creativity in the approach to the mediation process would be negatively affected by having one standard for licensing or accrediting. Whatever the merits of either argument, the current state of affairs is that there are several measures of competence, none of which adequately address the issue of technology and third-party ethics.

As a practical matter, how do we ask the self-reflective question ‘Am I competent to engage in this enterprise?’ Most of us recognize the need to engage in formal training, work with lead mediators, co-mediators or mentors, and to work at maintaining currency regarding developments in the world of dispute resolution. But where do you go to become ‘competent’ to use ODR technology? Most training programmes do not offer any ODR training, and most formal degree programmes either do not address ODR or address it in one semi-skills, semi-theory course. The ethical imperative here is to search out ways to learn from those who have engaged in the use of ODR technology over a period of time, to devote time and energy to working with technology away from parties and to do one’s best to really become competent. In the broadest sense, most of the questions that we ask about the use of technology and the problems we raise in the use of technology are the same problems that we see and discuss in face-to-face environments – we just face them in new communication channels and with new ways of dealing with information.

Second, there is an ethical element to the way we describe to potential parties the areas in which we are ‘expert’. We can use formal training and education as a measure of our expertise – ‘I have completed my State Supreme Court’s approved 40-hour mediator training’, or ‘I have a degree in Dispute Resolution from a reputable university’. I am not sure either would prove competence, but certainly either could be a publicly declared element of competence. We can use experience as a measure – ‘I’ve done a thousand mediations in the last year’. Of course, we could have done a thousand mediations *badly*, but volume is some measure of competence. We could use associations with acknowledged experts – ‘I’ve studied and worked with Mediator X, one of the masters of online dispute resolution’.

Ultimately, mediator competency is tied closely to creation of trust – trust that the parties place in the mediator – and, to a great degree, trust is generated by the ability of the mediator to demonstrate knowledge. So we come back to the ethical requirement that the mediator conscientiously engage in self-development related to the use of technology before presenting to the public a declaration of competency.

As ICT continues to insinuate itself into the everyday lives of people in all walks of life, in all locations, the challenge for third parties is to seek opportunities to learn from colleagues, and to teach colleagues, in subjects related to ODR. A recent survey of the responsibilities of third parties to understand and address issues arising from the use of ICT suggests that:

36 ABA Section of Dispute Resolution Spring 2014 Conference, Miami, 2-5 April 2014.

While advances in technology and communications may leave an attorney scratching his or her head as to the application of the ethics rules, this need not be the case. The essence of the ethics rules remains unchanged. By applying common sense and remembering that the rules do not cease to apply simply because technology is involved, an attorney can tackle the challenges of practicing law in the 21st Century with confidence.<sup>37</sup>

This approach is probably overly optimistic. It is more likely that we will, as a field of practice, need to develop specific standards of knowledge and measures of competence that go beyond 'common sense'.

### 3.4 *Quality of Process and Withdrawal*

A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, procedural fairness, and mutual respect among all the participants. [...]<sup>38</sup>

[...] a mediator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have undermined the integrity of the mediation process.<sup>39</sup>

The ethical requirement to end a mediation if there is 'gross inequality' or 'substantive unfairness' is the same for online and offline work. The difference introduced by the use of technology centres on the need for the mediator to monitor the parties' participation for signs that, informed consent notwithstanding, one party or the other seems to be disadvantaged by the use of technology. Seeing this possibility, it would seem reasonable for the mediator to pause the proceedings, caucus with the parties, and make a decision about whether and how to continue in a way that is acceptable to both parties and that guarantees 'procedural fairness'.

Issues involving conflicts of interest differ a bit between lawyer mediators and non-lawyer mediators, primarily in that there are formal and enforceable standards for what constitutes a conflict of interest for lawyer mediators, whereas there are only guidelines for non-lawyer mediators. The existence of social media and the ability to 'associate' with someone in a virtual manner has complicated the issue of conflict of interest. The formal and enforceable standards used by various state bars help lawyer mediators a bit, but are clearly still in a state of evolutionary development and are not consistent across jurisdictions.

37 C.E. Greene, 'Do Lawyers Have an Ethical Duty to Understand Technology?', American Bar Association Section of Labor & Employment Law National Symposium on Technology and Labor and Employment Law, Co-sponsored by the UC Berkeley Center for Labor Research and Education and the Berkeley Center for Law and Technology, 21-23 April 2013, p. 19.

38 Standards of Ethics and Professional Responsibility for Certified Mediators, Office of the Executive Secretary of the Supreme Court of Virginia, 1 July 2011, Standard K: Quality of the Process.

39 JAMS Guidelines, Standard VII: A Mediator Should Withdraw Under Certain Circumstances.

The ability to ‘friend’ is a case in point. Narrowing the issue to the relationship between judges and lawyers, there are three basic questions that model standards of conduct address. Three different state bars offer seemingly contradictory, or at least partially contradictory, guidance.

First, can a judge be a member of a social media community? Florida rules suggest ‘maybe’, depending upon who the ‘friends’ are. California standards also offer a qualified ‘yes’, as do the standards from Kentucky.

Second, can judges be ‘friends’ with lawyers who may at some point appear before them? Florida rules say ‘no’. California and Kentucky guidance offer a qualified ‘yes’.

Third, can a judge be a ‘friend’ with a lawyer who is currently appearing in the judge’s court? Florida and California both firmly say ‘no’. Kentucky rules offer a qualified ‘yes’.

Some ethical issues are left untouched by any of the guidelines. If a judge friends a lawyer who then moves into practice in the judge’s jurisdiction, does ‘un-friending’ constitute enough to keep from causing ethical problems? If a judge ‘friends’ a lawyer who at some point appears before the judge, is ‘un-friending’ enough to stave off the need for recusal?<sup>40</sup>

These questions are asked in the context of formal standards of conduct that can be enforced for lawyers, but the same kinds of questions can be asked of non-lawyer mediators and third parties: is an online social relationship with any party enough to suggest that the mediator should withdraw from a case? Certainly in the eyes of some parties ‘friending’ could create a perception of bias that would be hard to overcome.

### 3.5 ODR Tools in General Practice

The focus of this article has been a few of the many ethical considerations created when new communication channels, new ways to handle information and new ways to conceive of group work are created by the growth of ODR platforms and ICT platforms adaptable to ODR work. Especially in the legal profession, there is also a growing body of commentary and action related to the use of ICT by practitioners.

Is it, for example, a violation of the Model Rules of Professional Conduct if someone endorses an attorney on LinkedIn when that person has not been directly in a client relationship with the attorney? Is it ethically questionable for a mediator, whether a lawyer or not, to have endorsements on a LinkedIn site from friends and colleagues who may have clicked ‘yes’ on the ‘Does X have these skills or expertise?’ without the prior knowledge of the lawyer/mediator? This is, currently, an unsettled issue. Michael Downy, a litigator speaking from the point of view of an attorney, suggests that ‘the Internet remains the newest ethical frontier’, and that ‘This is, in a way, still like the Wild West’.<sup>41</sup>

40 See *Domville v. Florida* – 103 So. 3D 184 (Florida 4th DCA), 2012; California Judges Association Formal Opinion No. 66, 2009; Kentucky Judicial Ethics Opinion JE-119, 2012.

41 In A.W. Lasker, ‘LawPulse: Lawyers and LinkedIn Endorsements’, *Illinois Bar Law Journal*, Vol. 101, No. 1, 2013, p. 10.

How does one present oneself as ‘competent’ on websites and social media sites? The Model says:

A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services, and fees. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.<sup>42</sup>

In any transitional period there will be a tendency to apply existing rules, created and refined in one environment, to the new environment. One example is the application of legal advertising limits to the use of online communication and social media. A suit by a Florida firm<sup>43</sup> seeks to overturn rules limiting the use of the Web and social media, arguing that applying advertising rules to Internet communication amounts to making ‘it effectively impossible for Florida lawyers to write blogs, publish their results in past cases, or to participate in social media sites like LinkedIn’.<sup>44</sup> Non-lawyer mediators do not face the same level of oversight or restrictions, but it is imperative that, as a profession, those who engage in conflict engagement of all kinds discuss how and in what way online communication channels may be used ethically. As attorney Steve Mason noted, ‘Times have changed, and technology has changed everything’.<sup>45</sup>

Another area in which the boundary between the legal ADR world and the rest of the conflict engagement world may be affected by technology is the area involving the practice of law.

A mediator should ensure that the parties understand that the mediator’s role is that of neutral intermediary, not that of representative of or advocate for any party. A mediator should not offer legal advice to a party. [...] If a mediator assists in the preparation of a settlement agreement and if counsel for any party is not present, the mediator should advise each unrepresented party to have the agreement independently reviewed by counsel prior to executing it. [...] A mediator should make an effort to keep abreast of developments within the mediator’s jurisdiction concerning what constitutes the practice of law.<sup>46</sup>

As one possible wrinkle introduced by technology, does the production of a merged set of bullet points into a draft text document by the mediator constitute

42 Model Standards of Conduct, Standard VII: Advertising and Solicitation, Parts A, A1, and A2.

43 *Searcy v. Florida Bar*, U.S. District Court for the Northern District of Florida, Tallahassee Division.

44 Cited in D.L. Hudson, ‘A Net Loss’, *ABA Journal*, March 2014, p. 22.

45 *Id.*, p. 23.

46 JAMS Guidelines, Standard VI: A Mediator Should Refrain From Providing Legal Advice.



the drafting of a contract? Is that offering counsel? Is that ethically forbidden? These issues, added to the debate over lawyers engaging in non-law practices, and non-lawyers investing in law practices, will continue to be a source of ethical dialogue.

Most parties would not consider the use of a third party's office or meeting room, which comes at an overhead cost to the third party, as a conflict of interest. But is it a conflict of interest to invest in an ODR platform and then channel clients towards using that platform? The Model Standards indicate that:

A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.<sup>47</sup>

Does a financial stake (such as ownership of a platform, or investment in a service from a particular platform) that could influence the recommendation of a particular platform constitute a conflict of interest? We buy flip charts and we use flip charts to brainstorm in face-to-face sessions. Is that the same as paying a yearly service fee to an online provider and pushing that platform to the clients as a good way to conduct sessions? Doctors who have invested in MRI equipment and who refer patients to use that MRI equipment are generally not seen to be in violation of ethical guidelines, but they assume liability in the event that harm is done to the patient. Does the investment in and use of an ODR platform bring similar liability to the conflict engagement practitioner? If I, as a third party, have parties use a platform that is then compromised and their personal information exposed, am I liable for legal action from the parties? At some point, one of these examples will surface in practice somewhere, and the outcome of the litigation will establish an answer *post facto*.

The use of technology creates possibilities that break through the boundaries that currently define the practice of conflict engagement. For example, it is possible, when using ODR platforms, to store and analyse data drawn from individual cases handled on the platforms. This makes it possible to describe trends in the creation of disputes, and trends in the resolution of disputes. The obvious advantage is that algorithms can be created to handle repeating disputes, as has been the approach for most e-commerce organizations. But it could also mean that third parties could have access to the 'most likely' resolutions for certain kinds of disputes, and could carry that knowledge into resolution sessions. Is this an appropriate use of the data that is created by the use of online platforms? Is gathering and using this type of data different from the gathering and use of user data that is currently the focus of many commercial online organizations?

Finally, there are questions about the ethics of the fourth party. ODR applications do not spring into being spontaneously – they are created by designers and

47 Model Standards of Conduct, Standard III: Conflicts of Interest.

programmers to specifications addressing the needs of conflict engagement practitioners. As Rainey and Abdul-Hadi Jadallah noted, '[...] the fourth party brings cultural assumptions and biases to the table just like any other party'.<sup>48</sup> The decisions made by the designers and the programmers have a direct impact on accessibility and many other elements of the conflict engagement environment. Is it necessary to establish a separate code of ethics for ODR developers? The National Center for Technology and Dispute Resolution Fellows developed a set of standards for ODR development that include accessibility, affordability, transparency and fairness,<sup>49</sup> but there are no 'binding' rules to govern the development of ODR applications. Whether there should be has not been a topic of open conversation at any of the professional organizations whose membership would be the users of the ODR platforms.

#### 4. Conclusion

As a way to sum up the state of ethics and technology, as third parties we are at our most 'dangerous' – most likely to make mistakes and engage in inappropriate behaviour – when we take for granted our own expertise.

A healthy dose of insecurity is not a bad thing for a third party. Questioning one's initial impulses and probing to see if what you want to do, or what you do by default, is the right thing to do for the parties in a particular situation is a prudent ethical self-check. This is especially true when the use of ODR technology is involved.

Technology-assisted dispute resolution, be it mediation or some other form, is not just an analogue of a face-to-face process. There are changes in the nature of the interaction and the skills needed to manage communication and information exchange, all of which may have an impact on the parties with whom we work. That ODR is not merely an analogue of offline dispute resolution was reinforced by work on a U.S. NSF grant in the early 2000s. The project sought to create a definitive description of the offline mediation process, a description that could then be used to create an online platform built around the precise description of the offline mediation process. One of the most interesting early realizations, at least for the author, was that taking a well-defined offline process (mediation) into an online environment actually created something new – an online process that looked on the surface like the offline process but that was subtly and significantly changed during the transition.<sup>50</sup>

Not harming the parties is the aim of creating ethical standards, so if we are going to use technology (which we all do to some degree) it is incumbent upon us as practitioners to understand what technology is out there, how to use it, how to explain it and how to manage it.

48 D. Rainey & A. Abdul-Hadi Jadallah, 'The Culture in the Code', International ODR Forum, Cairo, 2009, available at: <[www.mediate.com//articles/culture\\_in\\_code.cfm](http://www.mediate.com//articles/culture_in_code.cfm)>.

49 Available at: <[www.icann.org/en/help/ombudsman/odr-standards-of-practice](http://www.icann.org/en/help/ombudsman/odr-standards-of-practice)>.

50 National Science Foundation Grant Number 0429297, 2004-2007, 'Process Technology for Achieving Government Online Dispute Resolution'.

A good start would be to formally examine each of our accepted standards of practice, updating and revising them to take into account the impact of the fourth party.

# ODR Redress System for Consumer Disputes

## Clarifications, UNCITRAL Works & EU Regulation on ODR\*

Mirèze Philippe\*\*

### Abstract

*Despite the evolution and the experience in the field of ODR, it appears that some aspects remain to be clarified in order to attempt to determine which type of procedure would be best adapted to consumer disputes. What does online arbitration mean and is this ODR? What is the profile of the users making use of ODR? What mechanisms are adapted to business disputes and to consumer disputes? Are procedural issues for disputes resolved through mediation similar to those resolved through arbitration? The article discusses about indispensable clarifications which may have an impact on the choice of procedure: mediation or arbitration. It then raises issues related to the UNCITRAL ODR WG discussions on a redress system for cross-border consumer disputes and questions whether types of disputes and potential mechanisms are not confused. Finally, the European Union which adopted a Regulation on ODR for consumer disputes may have found a solution.*

**Keywords:** consumer redress, B2C v/ B2B, ODR, UNCITRAL, EU Regulation.

Online dispute resolution (hereinafter 'ODR') refers to the settlement of disputes in an electronic environment using information technology. When ODR was booming towards the end of the 1990s, people involved in the field of ODR started meeting once a year since 2000 to discuss various issues related to settlement of disputes in the electronic environment, share experience, report on new developments, suggest best practices and contribute to building this field.<sup>1</sup> The ODR meetings mainly bring together dispute resolution experts, academics, Internet industry leaders, government officials and members of the judiciary. They will be referred to as 'actors' in this article.

At the 12th annual international congress of the Online Dispute Resolution Forum, in June 2013 in Montreal, the author shared some thoughts about clarifications that are indispensable before proceeding with discussions on instruments for settlement of disputes online. As indicated on the ODR 2013 Montreal web-

\* The views expressed are those of the author alone and should not be regarded as representative of or binding upon the ICC, the Court or its Secretariat.

\*\* Special Counsel at the Secretariat of the ICC International Court of Arbitration.

1 For information about the history see E. Katsh, 'ODR: A Look at History', in M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice – A Treatise on Technology and Dispute Resolution*, Eleven International Publishing, The Hague, The Netherlands, 2012, p. 21.

site,<sup>2</sup> the goal of the meetings is to set forth an institutional framework of the future of cross-border ODR systems. It was therefore the perfect setting for raising matters that need to be clarified as they may have an impact on the choice of a procedure as opposed to another – mediation or arbitration.

The subject of consumer redress in e-commerce was also debated since 2000 by several organizations, including the Organization for Economic Co-operation and Development (OECD), the Hague Conference on Private International Law (HCPIL), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and Consumers International. In a report from Consumers International of 11 December 2000,<sup>3</sup> it was concluded that:

While we are pleased to see so much activity aimed at resolving consumer disputes online, so far none of the services we found met all of the criteria for effective consumer dispute resolution in the global electronic marketplace.

Consumer redress in cross-border e-commerce transactions remains one of the main concerns, as no consensus between the various actors has so far been found about the system to put in place for dealing with low-value, high-volume claims.

Despite the evolution in the field of ODR and the experience gained in the last decade, it appears that some aspects remain to be clarified in order to attempt to determine which type of procedure would be best adapted to consumer disputes.

This article will address in turn necessary clarifications (Section 1), before focusing on the discussions of the UNCITRAL Working Group III on Online Dispute Resolution (hereinafter 'UNCITRAL ODR WG') related to consumer redress, as well as discovering the European Union Regulation on ODR, to examine whether the contributors and various actors are on the same wavelength (Section 2).

## 1. Necessary Clarifications: Are We Talking about the Same Animals?

Following the trend of ODR, dispute resolution practitioners called 'online arbitration' any procedure using a Web-based programme. But what does online arbitration mean, and is this ODR (Section 1.1)? What is the profile of the users making use of ODR (Section 1.2)? What mechanisms are adapted to business disputes and to consumer disputes (Section 1.3)? Are procedural issues for disputes resolved through mediation similar to those resolved through arbitration (Section 1.4)? Are we talking about the same animals? The answers to these questions require defining and distinguishing some aspects.

2 See <<http://odr2013.org>>.

3 Document no longer available on <[www.consumersinternational.org](http://www.consumersinternational.org)>.

### 1.1 First Issue to Clarify: What Is Meant by Online Arbitration?

Online arbitration or e-arbitration<sup>4</sup> – as opposed to arbitration procedures using information technology facilities – is normally a procedure exclusively conducted online. This type of procedure is feasible mainly in consumer disputes that do not involve complex issues and in domain names disputes. Arbitration procedures, on the other hand, involving issues and amounts at stake that are different from the straightforward consumer disputes are unlikely to be conducted exclusively online for the time being. Such arbitration procedures are more likely to use information technology facilities for communications between the arbitrators and the parties, as well as the dispute resolution provider if any.

This was the case of the arbitration procedures administered by the ICC International Court of Arbitration under its Rules of Arbitration. The ICC has benefited for several years from an information technology facility called Net-Case.<sup>5</sup> NetCase is a platform offering the parties and the arbitrators the possibility to manage their case online and exchange documents and messages through a secure environment.<sup>6</sup> Information technology was used, but this was not a procedure conducted exclusively online. Arbitrators and lawyers continued meeting in person, and some documents, such as spreadsheets, were transmitted in hard copies.

Is such a type of arbitration – which is not conducted exclusively online but where information technology is used only as a means of communication – considered an online arbitration? The author is of the opinion that whenever a Web-based programme is utilized, it can be considered an online arbitration.

Can these procedures be called ODR? As long as the programme is Web-based, the terminology ODR may be used. As such, NetCase is ODR, the various platforms used by dispute resolution centres – for example AAA, LCIA, WIPO – are ODR, the dispute resolution service offered by Modria<sup>7</sup> is ODR and the online settlement procedures offered by merchants (e.g. eBay) are ODR.

This approach is also adopted by the UNCITRAL ODR WG, which provides some definitions interesting to highlight, although the work is still in progress, and the latest drafts may be modified.<sup>8</sup> ODR '[...] means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology,' and an ODR platform is further defined as being '[...] a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic com-

4 For information about issues at stake in e-arbitration, see M.S. Abdel Wahab, 'ODR and E-arbitration', Abdel Wahab *et al.*, 2012, p. 399.

5 See for the services that NetCase offered articles by the author: 'NetCase: A New ICC Arbitration Facility', *ICC Bulletin, Special Supplement on Using Technology to Resolve Business Disputes*, No. 667, 2004, p. 53; 'New Upgrades to ICC NetCase', *ICC Bulletin*, Vol. 19, No. 1, 2008, p. 23; 'NetCase: Keep Going Where Progress Leads You', *University of Toledo Law Review*, Vol. 38, No. 1, 2007, p. 417.

6 The URL address is <[www.iccnetcase.org](http://www.iccnetcase.org)>.

7 For information, visit <[www.modria.com](http://www.modria.com)>.

8 See Report A/CN.9/WG.III/WP.123, Para. 19, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

munications used in ODR, and which is designated by the ODR provider in the ODR proceedings.’ Therefore, irrespective of the mechanism used and as long as information technology is used, the service offered for settlement of disputes is ODR. Finally, an ODR provider is considered to be ‘[...] the online dispute resolution provider specified in the dispute resolution clause referring disputes to online dispute resolution under these Rules. An ODR provider is an entity that administers ODR proceedings [...].’

### *1.2 Second Determination: What Is the Profile of the Users Making Use of ODR?*

Settling a dispute exclusively online depends on the profile of the parties in dispute. The reason for this important distinction is the fact that the procedure is in general different in a business dispute and in a consumer dispute.

Disputes opposing businesses, called business to business (B2B) disputes, usually involve higher value than business to consumer (B2C) or consumer to consumer (C2C) transactions, and may also involve more complex disputed issues than the straightforward consumer dispute. They are in general settled through classical arbitration procedures, during which information technology facilities may be used for the communications, as explained above. Some typical B2B disputes do, however, settle exclusively online, for instance disputes between insurers. A dispute arising out of a purchase of a product or a service by a business for its own consumption may be considered a consumer dispute and settled exclusively online using a simple process.

Conversely, disputes opposing businesses and consumers are normally small-value claims compared with the business disputes, although their value may be important for the consumers. Business disputes and consumer disputes should not be placed on the same level; the latter are considered to be straightforward, low-value claims. Consumers are persons acting for their personal needs, unlike businesses who act for commercial purposes. Thus, consumer disputes must be treated differently.

Having drawn the line between the profiles of businesses and consumers and between what is considered to be a business dispute and a consumer dispute, the next issue that requires clarification is the type of mechanism used for business and consumer disputes.

### *1.3 Third Distinction: What Mechanisms Are Adapted to Business Disputes and to Consumer Disputes?*

As highlighted above, consumer disputes and business disputes seem to be treated the same way although the issues at stake are different. It is recommended that straightforward consumer disputes be solved through mediation rather than arbitration. In business disputes, either of both dispute resolution mechanisms may be afforded.

In B2B disputes, resolution of disputes under the auspices of arbitration institutions that have their own set of arbitration rules like the ICC is usually the mechanism used. The dispute resolution clause is normally negotiated between the parties who may choose an institution to which potential disputes may be submitted or who decide to submit any dispute to an *ad hoc* arbitral tribunal. The



procedures may last between a few months and a few years, they may be costly, the parties are usually assisted by lawyers and an award is rendered at the end of the procedure. A party may have to enforce the award under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in one of the 150 signatory countries.

Consumers do not need such long and complicated procedures. They want to obtain redress when they consider that the product or the service they purchased is not satisfactory, most commonly because it is not in conformity with what they ordered, or for late or failure of delivery. The UNCITRAL ODR WG considered that consumer disputes submitted to state courts are difficult to handle mainly because of the low-value, high-volume claims, and because of the contrast between the value of the transaction and the high cost of litigation. Consumers need to have a fair redress system, including for cross-border transactions, which will allow any person, whether familiar or unfamiliar with dispute resolution, to use a simple online mechanism, fast, effective and possibly for no costs. They expect a consumer-friendly service and interface, as well as to be guided swiftly through an online system. A good example is the settlement process offered by eBay for consumers' complaints.

If the mechanism is complicated and if the redress system is an arbitration procedure with all the complications it may entail, the consumers may end up dropping the complaint and the redress. In this event, the redress system that merchants wanted to offer to consumers would serve no purpose. In addition, consumers may lose confidence in online transactions.

Mediation is best suited for such types of disputes. The consumer is unlikely to be assisted by a lawyer to plead his/her case or to make submissions. The consumer will express his/her position in his/her own words. He/she wants the dispute resolution provider to understand the problem and suggest a solution through a simple mechanism (whether automated or otherwise). The consumer expects neither an award nor to have to apply for enforcement of the decision. Therefore, for consumer disputes it is inconceivable to impose an arbitration procedure: the poles of the battlefield between businesses and consumers are entirely apart.

In a case where a consumer purchased software following which a dispute arose, and where the dispute resolution clause in the general conditions imposed on the consumer to submit disputes to the ICC, a state court decided that the ICC arbitration clause was unconscionable in consumer contracts and that the arbitration could not be imposed on the buyer.<sup>9</sup>

As a result, there seems to be confusion between the services to be put in place for consumer disputes. Arbitration is probably not the process desired for small-value, straightforward disputes requiring swift settlement, although it should remain open. If arbitration is the process to be used, there is no need to create a new arbitration process, as some of the contributors of the UNCITRAL ODR WG seemed to be suggesting. Arbitration institutions already exist and have procedures administered in accordance with their rules. However, if the proposal

9 *Day Brower v. Gateway 2000*, 246 A.2d 246 (N.Y.App. 1998).

is to offer a centralized system proposing mediation and arbitration to consumers with the possibility to file their claims and conduct the procedure online, then indeed generic rules may be suggested for mediation procedures and for arbitration procedures. The latter may take inspiration from simplified procedures such as the expedited arbitration procedures or arbitration procedures for small claims offered by several arbitration institutions. A two-tiered procedure may also be offered, starting with mediation. If mediation and arbitration is the avenue to travel, the other issue that needs to be addressed is to know whether the centralized system will be an ODR provider handling consumer disputes under both types of mechanisms – mediation and arbitration – or if the centralized system will only be a clearing house that will be transferring the disputes to existing ODR providers who will apply both generic rules, for mediation and arbitration procedures. The latter system is what the European Union is suggesting to put in place, as will be mentioned below, although arbitration is not proposed. Another example is ICANN, which has rules for domain names disputes applied by ODR providers designated by ICANN.

This determination leads to the next clarification. If mediation is the redress mechanism to be used, do issues of choice of court, applicable law, place of arbitration and enforceable award need to be addressed?

#### 1.4 *Fourth Clarification: Are Procedural Issues for Disputes Resolved through Mediation Similar to Those Resolved through Arbitration?*

Confusion also exists when the contributors and the actors discuss issues of choice of court, applicable law, place of arbitration and enforceable award.<sup>10</sup> Either the debate is about mediation or about arbitration, in which case whether the arbitration procedure is conducted online or offline makes no difference: the choice of the dispute resolution mechanism, the applicable law, the place of arbitration and the enforceability of the award will be interpreted the same way whether the procedure is conducted online or offline. The only difference resides in the fact of conducting a procedure in an online environment using Web platforms that allows users to benefit – among other advantages – from swift communications and instantaneous access to information. If the debate is about mediation, there should be no debate over the place of arbitration, choice of court, choice of law and enforceable award.

The focal point must be the redress mechanism to be offered to unsatisfied consumers, whether through assisted negotiation, automated mechanism or something else. Issues in consumer disputes are more of facts rather than law. Decisions are not based on law, but on solutions that may be standard and adapted to typical problems.

Likewise, if the discussions are about mediation, the decision or solution provided to an unhappy consumer is not an award rendered by an arbitrator who

10 See in this regard, M. Philippe, 'Where Is Everyone Going With Online Dispute Resolution (ODR)', *Revue de Droit des Affaires Internationales*, No. 2, 2002, p. 167 at pp. 171-178, and also 'Now Where Do We Stand With Online Dispute Resolution (ODR)', *Revue de Droit des Affaires Internationales*, No. 6, 2010, p. 563 at pp. 571-575.

heard the parties, deliberated and rendered a decision. The decision may not be binding on the consumer like an award. The consumer retains the right to submit a dispute to state courts, although this is not recommended considering the courts' workload and the constraints of court proceedings. The purpose of an ODR redress system is precisely to avoid overloading the courts with low-value, high-volume disputes and to stay away from lengthy and costly proceedings. Consumers usually do not travel this avenue, taking into account the complication state courts proceedings may represent and the fact that they may be unaware of the procedures to follow. Therefore, efforts should be concentrated on offering ODR user-friendly and fair redress mechanisms.

Mindful of the distinctions made in the first part of the article, the next part will address mainly some aspects of the discussions of the UNCITRAL ODR WG.

## 2. Are Contributors and Actors on the Same Wavelength?

UNCITRAL has been discussing cross-border e-commerce transactions since 2009. In 2010 it decided to create a working group entrusted with the drafting of a set of rules for a global ODR system to handle low-value, high-volume claims.<sup>11</sup> The various reports of the working group available on the UNCITRAL website<sup>12</sup> give the impression that the discussions of some contributors depart from the purpose of creating a simple redress system for low-value, high-volume disputes. Contributors and actors may sometimes not be on the same wavelength, which is understandable considering the multitude of their backgrounds and cultures.<sup>13</sup> The purpose of the second part of this article is to consider whether some aspects of the discussions – without getting into details – of the UNCITRAL ODR WG may be confusing in light of the clarifications made in the first part (Section 2.1). It will then be interesting to see how the new European Union Regulation on ODR tackles the issues of a redress system for consumer disputes (Section 2.2).

### 2.1 Discussions of the UNCITRAL ODR WG

The issue of a normative instrument for ODR was raised a few times at the UNCITRAL meetings. The UNCITRAL Secretariat had concluded in 2003 that it was too early to engage in the preparation of any normative instrument and that it would be best to continue analysing the various experiments, gather information and prepare studies to enlighten further debate on how these issues might be addressed.<sup>14</sup> In 2009 the United States recommended that the UNCITRAL Secre-

11 See the excellent summary of the issues at stake in 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', *Uniform Commercial Code Law Journal*, Vol. 42, 2010, p. 221, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635463](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635463)>.

12 <[www.uncitral.org/uncitral/en/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html)>

13 See on this subject D. Rainey, 'ODR and Culture', in Abdel Wahab *et al.*, 2012, p. 197.

14 See Report A/CN.9/681/Add.2, p. 1, <[www.uncitral.org/uncitral/en/commission/sessions/42nd.html](http://www.uncitral.org/uncitral/en/commission/sessions/42nd.html)>.

tariat be asked to prepare a study on possible future work that UNCITRAL might engage on the subject of ODR in cross-border e-commerce transactions.<sup>15</sup>

Pursuant to that request, the UNCITRAL Secretariat organized a colloquium in March 2010 in cooperation with the Pace Law School Institute of International Commercial Law and the Penn State Dickinson School of Law,<sup>16</sup> during which the evolution of e-commerce and the initiatives related to resolution of disputes originating from B2B and B2C transactions were discussed. The views were that the traditional judicial mechanisms are not adapted to cross-border e-commerce disputes and that a global ODR system for low-value, high-volume B2B and B2C disputes is needed, which should 'not impose costs, delays and burdens that are disproportionate to the economic value at stake'.<sup>17</sup> It seemed clear from the outset that the need for a system to be put in place was different from the classical arbitration system. Participants concluded that it may be timely to deal with the matter internationally and to design generic rules that, 'consistent with the approach adopted in UNCITRAL instruments (such as the Model law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments'.<sup>18</sup> The author is not convinced that both environments should be handled in a similar way as will be discussed.

At the same session, the Commission agreed that a Working Group III should be established to undertake work in the field of ODR relating to cross-border e-commerce transactions. It was further indicated that the work of such a group would not overlap with Working Group II on arbitration and conciliation, as ODR raises separate issues '[...] particularly those associated with the need for rapid resolution of high-volume, low-value disputes arising primarily from transactions carried out by way of electronic communications [...]'.<sup>19</sup> Therefore, and although the discussions concern the resolution of disputes, it seemed clear that ODR standards may be separate from the conciliation and arbitration standards. Undeniably, disputes originating from transactions through electronic communications involve issues at stake different from the issues of purely business transactions, which usually submit disputes to arbitration. Classical arbitration is not adapted to low-value, high-volume disputes. During the discussions it was also recommended that '[...] the consensus-based system should be friendly to consumers, cost-effective to business and fair to consumers, and be consistent with local consumer protection mandates'.<sup>20</sup> The emphasis was clearly put on the consumers.

15 *Id.* p. 1.

16 See details in Reports A/CN.9/706 and A/CN.9/WG.III/WP.111, <[www.uncitral.org/uncitral/en/commission/sessions/43rd.html](http://www.uncitral.org/uncitral/en/commission/sessions/43rd.html)>.

17 *Id.* p. 50.

18 *Id.* Para. 51.

19 See Report A/CN.9/716, Para. 15, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

20 See details in Report A/CN.9/706, Para. 48, <[www.uncitral.org/uncitral/en/commission/sessions/43rd.html](http://www.uncitral.org/uncitral/en/commission/sessions/43rd.html)>; see also A/CN.9/769, Para. 18.

At a subsequent session,<sup>21</sup> it was further mentioned that the '[...] enforcement was less of an issue in cases dealt with through conciliation, which was in fact the majority of low value transaction cases'. This again demonstrates that reference was clearly made to consumer disputes, and it is interesting to note that conciliation was referred to as being the technique for resolving low-value transactions. Contributors were therefore aware of this important distinction.

The UNCITRAL ODR WG was entrusted with the drafting of generic rules for a global ODR system in low-value, high-volume, B2B and B2C cross-border disputes. Typically, the B2B referred to would be small-value disputes. The generic rules are normally meant to offer consumers a uniform set of rules to enable any consumer to understand what mechanisms can be used and learn about the rules of the game for resolving consumer disputes.

Like many actors, the author welcomed this project on ODR because its main purpose is to offer a standard and uniform system, easy to access and to implement by consumers from all over the world looking for a simple redress system. The author had suggested on a few occasions that standards and model rules be established to avoid striking differences between the services and to offer the users predictability; lists of criteria were also provided for the establishment of uniform rules and of standards to be applied by providers.<sup>22</sup>

When reading the reports of the UNCITRAL ODR WG, the reader is sometimes under the impression that the contributors are drafting a text similar on some aspects to the UNCITRAL Model Law or Model Rules on Arbitration. While consistency is recommended to remain in the same spirit of generic rules adapted to generic situations and to offer an instrument adapted to consumer disputes, the question is to know whether it is necessary to create a new instrument for business disputes, unless the question as to how these generic rules will be used is answered as raised above. Likewise, is there a need for creating an instrument for consumer disputes similar to the instrument for pure business disputes, not to speak about the complications related to consumer protection rules, which will not be discussed in this article?<sup>23</sup> A single instrument seemed to be created at one point for two different types of disputes despite the fact that it was clearly pointed out that '[...] ODR procedural rules might be different from arbitration rules [...]',<sup>24</sup> and despite the reference clearly made to buyers who will be offered the choice to accept the procedural rules.<sup>25</sup> The choice given to buyers means that the adoption of the ODR procedural rules may not have been negotiated between the parties prior to the transaction, and thus may not be binding upon them like any dispute resolution agreement negotiated and adopted, and which becomes binding upon the parties.

21 See Report A/CN.9/716, p. 17, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

22 See in this regard, Philippe, 2002, pp. 183-188, and also Philippe, 2010, pp. 565-569.

23 See the interesting Report A/CN.9/706, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/531/00/PDF/V1053100.pdf?OpenElement>>.

24 See Report A/CN.9/721, Para. 69, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

25 *Id.* Para. 92.

The reports of the UNCITRAL ODR WG reflect at some points a complicated process for simple, small-value, consumer disputes, or were referring to classical arbitration procedures. It seemed to depart occasionally from the initial purpose aimed at offering consumers redress at low cost or no cost and a simple procedure that does not require legal assistance. If the goal is to deal with low-value, high-volume consumer disputes, it is to be doubted that pure business disputes should be merged with consumer disputes and treated the same way.

Even though emphasis was put on the need for a redress system for consumer disputes, the discussions referred from time to time indistinctly to businesses and consumers, or to conciliation and arbitration. On other occasions, it was suggested that no mention of B2B, B2C or C2C nor of consumer and business be made, to avoid problems relating to definition of the parties,<sup>26</sup> and that 'most consumers would choose to proceed by way of ODR rather than the costly and less attractive route of litigation in the courts'.<sup>27</sup> This shows again that contributors were aware of the fact that consumers are a different species and so are the disputes involving them.

Further, the draft procedural rules as they currently stand are clearly defined in the preamble as being the UNCITRAL ODR rules '[...] intended for use in the context of cross-border, low-value, high-volume transactions conducted by means of electronic communication'.<sup>28</sup> Hence, the rules for business disputes and consumer disputes cannot be the same. Business disputes usually of higher value than the consumer disputes involve businesses who may be familiar with arbitration as opposed to consumers, and who are not concerned by the ODR redress system designed for consumers. Dispute resolution institutions exist, as discussed above, and deal with pure B2B disputes. When reading the reports, the reader is sometimes under the impression that discussions, now and then, end up being the same as in any arbitration forum, although the issue here is supposed to be limited to low-value, high-volume disputes.

The hesitation on the form of the procedure is also reflected in the fact that contributors refer in the draft procedural rules to the issuing of a decision or an award, both words being still in brackets meaning that this issue remains to be determined.<sup>29</sup> As discussed above, are low-value, high-volume claims supposed to be resolved through mediation or through arbitration?

The same remark goes for the discussion on the enforcement of arbitral decisions which only concern arbitration.<sup>30</sup> Although arbitration may remain open for consumers if they agree to bring a claim to arbitration, it is unlikely that consumer disputes would be submitted to arbitration. Consumers are not expected

26 See Report A/CN.9/721, p. 7, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

27 *Id.* p. 8.

28 See Report A/CN.9/WG.III/WP.123, Para. 11, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

29 See Report A/CN.9/WG.III/WP.109, Para. 72, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)> and A/CN.9/762, Para. 26-28, <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

30 See Report A/CN.9/WG.III/WP.125, point V, p. 8.



and will probably not go through a classical arbitration procedure for small-value claims, considering the costs and time it may involve. They are even less expected to go through the hurdle of enforcement of decisions. Incidentally, the statement that '[...] it was generally agreed that ODR arbitral decisions should be final and binding, with no appeals on the substance of the dispute [...]' may seem surprising,<sup>31</sup> as the final and binding arbitral decision principle applies to arbitral decisions, whether the arbitration is conducted online or offline.

It is true that some underdeveloped and developing countries expressed the concern that decisions should be final and binding and enforceable, considering the lack of basic legal frameworks in their countries. Yet it is difficult to see how a simple redress system staying away from complicated procedures and enforcements at courts can reconcile with the need for such a purely arbitration system with enforceable arbitral decisions, not to speak about the fact that such dispute resolution services already exist and need not be included in the generic procedural rules. In the author's view, both needs and concerns cannot be addressed in the same instrument. The need for binding and enforceable decisions may be addressed by submitting, for instance, the consumer disputes to expedited arbitration procedures or arbitration procedures designed for small claims that several arbitral institutions offer. Also, as discussed above, the question on how potential generic rules for mediation and generic rules for arbitration will be used needs to be answered.

Finally, the work so far achieved by the UNCITRAL ODR WG is significant as it is important that uniform practices be put in place, although some issues remain to be defined and the work to be completed.

In addition to UNCITRAL, another project was achieved by another body with respect to a consumer redress system, although a process already existed in the year 2000 (the EEJ-Net<sup>32</sup>). The European Union adopted in 2013 a Regulation on ODR.

## 2.2 *The European Union Recent Regulation on ODR*

The Council of the European Union (hereinafter 'Council') adopted a directive on alternative dispute resolution (ADR) and a regulation on ODR (hereinafter 'Regulation'), which were published in the Official Journal of the European Union on 18 June 2013.<sup>33</sup> A few salient points of the Regulation<sup>34</sup> are interesting to note.

The new legislation on ADR and ODR are aimed at providing consumers and traders the possibility to solve their disputes out of court, in a fast, low-cost and simple way. Consumers will be able to submit any type of contractual disputes with traders, except disputes related to health and higher education, irrespective

31 See Report A/CN.9/716, Para. 99, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/801/48/PDF/V1180148.pdf?OpenElement>>.

32 For further information, see <[http://europa.eu/legislation\\_summaries/other/l32043\\_en.htm](http://europa.eu/legislation_summaries/other/l32043_en.htm)>.

33 See <[http://ec.europa.eu/consumers/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm)>.

34 Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>>.



of the fact that the product or the service is purchased domestically or across borders, provided it is purchased online.

A European ODR platform (hereinafter 'Platform') for all Member States will be set up by the end of 2015 to allow for online settlement of disputes. It will offer a free-of-charge electronic case management tool. Online traders established within the Union will have to provide on their website a link to the Platform so as to ensure consumer awareness about the existence of such a service. The Platform will be a single point of entry for consumers and traders seeking out-of-court resolution of disputes covered by this Regulation. It should build on existing ADR entities in the Member States. ADR entities to which a complaint is transmitted through the Platform will apply their own procedural rules, but this Regulation establishes common rules applicable to all.

The Regulation lists the services that the Platform will offer.<sup>35</sup> It is interesting to see that similar services to those suggested a decade ago by the author will be adopted.<sup>36</sup>

The Council considered that '[...] consumers are key players in the internal market and should therefore be at its heart [...]', and that '[...] consumers and traders should feel confident in carrying out transactions online so it is essential to dismantle existing barriers and to boost consumer confidence'.<sup>37</sup> These statements summarize the reason for putting in place a system that enhances online transactions by offering a viable settlement mechanism. The Regulation clearly states that ODR is not intended to replace court procedures, nor deprive consumers or traders from seeking redress before state courts.

This project probably benefited from the experience gained by the various actors with building various platforms and sharing their experiences in the ODR field during the yearly meetings. ODR actors look forward to this Platform and to the success of this service, which will hopefully inspire other initiatives worldwide.

### 3. Conclusion

To conclude, clarifying certain issues was indispensable for trying to speak the same language. (1) Online arbitration may be understood as a procedure exclusively conducted online, for instance in consumer disputes and domain names disputes, as opposed to arbitration procedures in business disputes using information technology as a facility; however, irrespective of whether the procedure is conducted partially or exclusively online, it may be considered online arbitration whenever a Web-based programme is utilized for a given service, and this is ODR. (2) Settlement of disputes opposing B2B is different from settling disputes in B2C, as the first type of disputes may be settled through an arbitration procedure, whereas the second need not go through the complications of an arbitration procedure. (3) Therefore, the mechanism best adapted to consumer disputes is medi-

35 *Id.* Arts. 5 (4), 7 (2), 9.

36 Philippe, 2002, pp. 183-188, and also Philippe, 2010, pp. 565-569.

37 Regulation, Para. 6.

ation as opposed to arbitration, although arbitration should remain a possible mechanism. (4) The direct consequence of a mediation procedure is the fact that the choice of court, applicable law, place of arbitration and enforceable award are non-issues.

Bearing in mind the clarifications made, this article raised some issues related to the discussions of the UNCITRAL ODR WG for consumer redress where contributors seemed not to be on the same wavelength on certain aspects. In the author's view, a simple redress system and an arbitration system leading to enforceable arbitral decisions cannot be addressed in the same instrument. The need for binding and enforceable decisions may be addressed by submitting consumer disputes to expedited arbitration procedures or arbitration procedures designed for small claims. If the proposal is to offer a centralized system proposing mediation and arbitration to consumers, then two sets of generic rules may be suggested for the mediation and the arbitration procedures, or a two-tiered procedure. If this is the proposal, will the centralized system be an ODR provider handling consumer disputes under both types of mechanisms, or will it only be a clearing house transferring the disputes to existing ODR providers who will apply the generic rules?

Finally, it was interesting to note that the European Union adopted a Regulation on ODR for consumer disputes in 2013 and will put in place a European ODR Platform for all Member States.

A redress system for consumer disputes has been discussed for a decade and is clearly needed; the various initiatives undertaken to respond to this need demonstrate that the ODR field continues to be built and new services to be offered, which will contribute to the development of online transactions.

# ‘Boxing’ Choices for Better Dispute Resolution<sup>\*</sup>

Marc Lauritsen<sup>\*\*</sup>

## Abstract

*Choosing among alternatives that vary in multiple ways you care about is one of the most fundamental mental activities, and one that is part of nearly all forms of cognition. Decisional processes often primarily involve balancing competing considerations. When multiple parties with conflicting interests are present, strategic interactions add to the complexity. This article explores opportunities for interactive visualizations in support of such processes, using as background a current software project that is developing systems for collaborative deliberation about choices.*

**Keywords:** dispute resolution, decision support, interactive visualization, collaborative deliberation, choice making.

## 1. Introduction

People face choices throughout their personal and business lives. Some are nearly invisible and instantaneous; others involve extended deliberation and debate. Some are made by one person alone; many involve consultation with others. By many accounts they are becoming more frequent and complex. We deal with choices all the time, although few of us are very good at them.

It is notable that most people do not use technology creatively or aggressively to support decision-making. That has something to do with how unreflective we tend to be about our deliberations. Most of us are woefully unsystematic and tech-challenged when it comes to decisions, despite their being among our most pervasive and consequential activities.

This article considers the software tools we use and might use to make better choices – alone, or in strategic interaction with others – and explores the principles that should guide the design of such tools. It is a wide-ranging but admittedly preliminary foray into this vast subject.

The article is organized as follows. Section 2 summarizes general ways in which technology can support decision-making. Section 3 lays out a particular methodology the author has been developing. Section 4 describes an effort to

<sup>\*</sup> A version of this article was presented at the American Bar Association’s Dispute Resolution Section’s 2012 Spring Conference in Washington, DC.

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field online choice support environments that leverage interactive visualization and collective intelligence. Section 5 considers their application to strategic bargaining and dispute resolution contexts. Section 6 covers related work. Section 7 poses questions and summarizes guiding principles. Section 8 concludes.

## 2. Choice Support Technologies

Decisions often involve careful judgment, delicate balances of considerations and high-quality communication. Professionals pride themselves on their ability to handle complex decisions, and to counsel clients effectively to appropriate resolutions. Technology has generally taken a back seat, mostly appearing in the form of email and word processors. Many people are reluctant to go beyond yellow pads and white boards for certain issues. But there are more modern decision support technologies worth considering.

### 2.1 *Gathering Storm*

We surely do not lack means to gather information and opinions pertinent to a decision. Say you are considering a new piece of technology. A few minutes with Google or Bing can yield hours of eerily relevant material. Posts on an email discussion list will often surface options, considerations and viewpoints. If vendors or other interested parties are involved, they will happily shower you with literature and demonstrations.

What we *do* seem to lack are good tools for filtering through and sorting our options, and for managing the processes by which we rate and rank them. We can use word processors, spreadsheets, outliners or 'mind mappers' to collect and document relevant considerations, but they are not of much help in reaching conclusions.

Four kinds of tools help more directly with the ultimate act of *selecting*. These correspond to four kinds of decisions: (1) those that can be made by rules or formulas, (2) those that are reached in negotiations with opponents or counterparties, (3) those that involve assessments of probabilities and (4) those that require trading off the pros and cons of options.

### 2.2 *By the Rules*

Sometimes there is a reasonably clear formula or algorithm for figuring out which of a set of options makes most sense (or is required); for example, whether you should file the long or short financial statement form in a divorce proceeding, or whether you need to pay the alternative minimum tax for US federal income tax purposes.

When formulas or rules are involved, decision-makers can be assisted by applications that have been programmed to ask the right questions, accept inputs and compute results. Expert systems can excel in rule crunching. Less exotic technologies often suffice. Scripting tools used for website development, for instance, can be used to model decisions that are rule-governed, and that take users down the appropriate path in a decision tree.

### 2.3 *By Agreement or Mandate*

When the rules or facts are in contention, and parties find themselves in an incipient or full-blown dispute, they may not think of themselves as involved in a common 'choice', but eventually they or some decision-maker has to reach conclusions that will affect them all.

For an early exploration of computer-aided dispute resolution possibilities, see Lauritsen 1996.<sup>1</sup> Section 5 below discusses how the technologies outlined in this article can be productively applied to bargaining situations.

### 2.4 *Playing the Odds*

Many decisions of course involve thinking through uncertainties and predictions. Risk analysis software can be of great value. We humans are notoriously bad at understanding cascades of probabilities.

Those who need or want to go beyond home-grown spreadsheets for understanding or presenting the likely outcomes, costs and benefits of different litigation and settlement strategies can use specialized risk analysis software. Two packages illustrate what's available:

- TreeAge Pro from TreeAge Software ([www.treeage.com](http://www.treeage.com)) helps you build decision trees, influence diagrams and other models to analyze problems that involve uncertainty.
- PrecisionTree ([www.palisade.com/PrecisionTree](http://www.palisade.com/PrecisionTree)) is an add-in to Microsoft Excel that performs similar functions.

In these kinds of systems, decisions, chance events and end results are represented by nodes and connected by branches. The resulting tree structure has a root, and various pay-offs are on the leaves. By specifying estimated probabilities of events and their associated costs or benefits, net pay-offs of particular branches at any part of the tree can be computed.

### 2.5 *Balancing Act*

Another form of decision support software is more focused on juggling pros and cons than on managing uncertainties. Such software helps to characterize the advantages and disadvantages of options being examined, and assists in balancing the inevitable trade-offs. Once you get beyond two choices, or beyond a couple of factors that 'cut' in different directions, it can be hard to do the balancing effectively with the unaided mind. When multiple decision-makers are involved, or you need to document and justify your decision, software that helps you record and massage your evaluations and relative priorities can make the process much more satisfying and effective.

One illustrative player in decision support software of this kind is Expert Choice ([www.expertchoice.com](http://www.expertchoice.com)). It now offers a Web-based solution called Comparison Suite, which helps people define goals, structure decisions, assign roles and collaboratively deliberate.

1 M. Lauritsen, 'Settling Differences Through Interactive Multimedia Networks', in *Materials for NCAIR Conference on Electronic Dispute Resolution*, Washington, DC, May 1996.

My own work in this area has centred around a methodology I call 'choiceboxing', which involves expressing the options, factors and evaluative perspectives at play in a decision in an imagined three-dimensional (3D) box that you can manipulate and share online. This is described in Section 3.

### 2.6 *Choice Management*

Document management, project management, knowledge management and change management are familiar concepts in most organizations. We would do well to also pay attention to *choice* management. So many of our decisions involve ineffective, even painful, processes, and produce suboptimal results. The above technologies and more should be exploited for better processes and outcomes. They can assist in ensuring that all relevant options and factors have been considered, that all stakeholders have had an opportunity to be heard and that there is a rationale that stands up to scrutiny.

But tools are just a start. Choosing well is hard work. It can be made easier by shared knowledge and social support.

My emerging view of an ideal choice management system involves a rich online environment that leverages interactive visualization and social production ('crowdsourcing') within a Wikipedia-like repository of codified knowledge that learns as it is used. A public such system could draw sustenance from a vibrant ecosystem of sponsors and contributors. In most decision contexts there is a critical mass of 'providers' and 'guiders' who recognize their enlightened self-interest in having 'deciders' make informed, autonomous choices. And there are often plenty of choosers who will happily leave a legacy of guidance for fellow choosers if fair, secure and effective mechanisms for doing so are at hand. One effort in this direction is described in Section 4.

## 3. **Choiceboxing**

### 3.1 *Anatomy of a Choice*

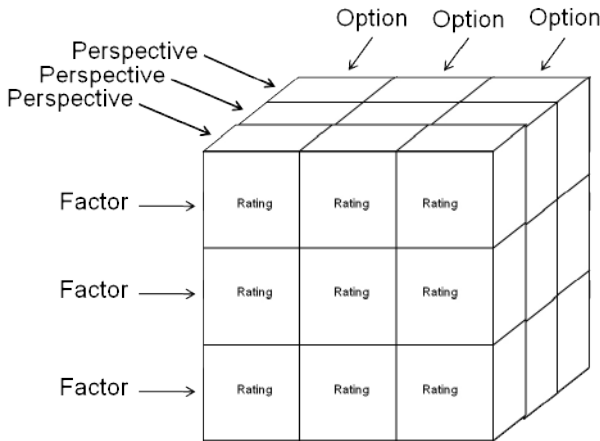
A choice is a special kind of decision, where one selects from a group of discrete options.<sup>2</sup> To deliberate (from the Latin *libra*, a scale or balance) is to balance alternatives. While choices come in many shapes and sizes, and can present endlessly different kinds of things among which to select, it turns out that there *are* generic methods that work well to support the distinctive forms of deliberation involved in all of them. I have come to the conclusion that a 'universal grammar' underlies choice-making, and that understanding it can both enhance the quality of our choices and drive the design of knowledge tools to support them.

Choices have a characteristic geometry that lends itself to a 3D box metaphor. One dimension is that of *options* – the things among which one is choosing. A second dimension is that of *factors* – the qualities that distinguish options from one another. A third dimension is that of *perspectives* – the different evaluative

2 This section is largely adopted from the *Choosing Smarter* chapter in M. Lauritsen, *Lawyer's Guide to Working Smarter With Knowledge Tools*, American Bar Association, Chicago, 2010, <[www.abanet.org/abastore/productpage/5110706](http://www.abanet.org/abastore/productpage/5110706)>.

takes that one or more people can have of how the options fare on the various factors. Each option can be rated on each factor from each perspective. Imagine something like Figure 1:

Figure 1



While there are many different terms for these key dimensions (for instance, alternatives, considerations and viewpoints; or possibilities, goals and evaluators), all choices lend themselves quite well to being characterized in such a framework. This is hardly a surprise to anyone who has drawn a matrix of job candidates and hiring criteria on a whiteboard, or organized the pros and cons of alternative legal strategies on a yellow pad. What is interesting is the rich edifice of insights and tools one can build on this geometric foundation.

### 3.2 Multicriteria Decision-Making

Weighted factor analysis and related techniques for assessing options on criteria with differing degrees of relative importance have been around for a long time. The variation presented here seems to provide a substantially more powerful and easy way to deliberate about choices. By iteratively refining each of the dimensions mentioned earlier, ‘choiceboxing’ helps deal with choice overload.

Here are some of the key concepts. (Most are simple and familiar. This abbreviated account does not get into all the interesting possibilities.)

### 3.3 Choices and Options

Choice-making involves selecting from groups of alternatives. Each possible selection is an *option*. (‘What are my options?’) I use ‘choice’ to refer to the overall decision or one of the particular selections ultimately made, and ‘options’ for the things *among* which one chooses.

Some choices involve picking a single best option from a group; others involve picking several, or even ordering an entire set from most preferred to least.



### 3.4 Categories

A given choice generally involves options that share certain kinds of characteristics, making it possible to compare them in terms of common factors. Those characteristics define the *category* or categories of things within which one is choosing. For example, the category might be 'digital camcorders', 'possible birthday presents for Jane', or 'rental apartments in downtown Chicago'.

By categorizing their choice in a standardized way, people can more easily access options, factors and other information identified by others as worth considering in such a choice.

### 3.5 Factors

While a wide variety of techniques and approaches are used to make choices, they usually involve the consideration of multiple factors in terms of which the candidates differ. *Factors* are *kinds* of qualities or characteristics in terms of which options may be described and compared. They are answers to questions like 'what makes a good \_\_\_?' and 'what makes a bad \_\_\_?'

Factors often have differential weights in a particular choice – the relative degree of importance or significance attached to each by each perspective being considered in a decision.

Weighted factor analysis is one common method for systematically comparing options in a choice situation. Each option is rated with respect to each factor, each rating is turned into a normalized score and the weighted total of scores across all factors is used to reflect its relative 'goodness'.

### 3.6 Ratings

A *rating* is the information entered with respect to a given factor for a given option. This term is most apt for factors that can be evaluated in quantitative terms and that involve some judgment or opinion, but you can think of it more generally as 'what there is to say about this option in terms of this factor'.

### 3.7 Scores

In order to fairly compare and combine ratings across different factors, and across different perspectives – in order, in other words, for them to be commensurable – they should be normalized to a common scale. For example, the price of items may range from \$300 to \$3,000, and their ease of use may be judged on a scale of 1–5. For the respective contribution of ratings on these factors to contribute to total scores only as much as those factors are explicitly weighted – and not be affected by the units in which they may happen to be measured – they both should be converted to a common scale, such as percentage of optimality or units of goodness. I use the word *score* to refer to the normalized value of a rating.

### 3.8 Perspectives

There can be more than one *perspective* at play in a given choice context. A sole decision-maker may have more than one way of looking at the options and factors, and each member of a deciding group will typically have at least one of his or her own. Helpers may have perspectives that vary in at least some respects from

the decision-maker(s). There can also be perspectives of candidates, suppliers or other 'choosers'.

Perspectives are distinct informational or evaluative takes on a choice. They capture different voices and viewpoints, for instance from different people or time frames.

Each perspective can have its own view about the relative importance of the various factors, and its own weight(s) relative to other perspectives (potentially differing by factor). In other words, each *factor* has a weight *in* each perspective, and each *perspective* has a weight *for* each factor. The latter ability (to weight a perspective differently by factor) can be used *e.g.* to reflect someone's expertise in a certain aspect of a decision, or a given user's entitlement to disproportionate impact on one or more aspects. (The managing partner might be given double weight in a hiring decision about an executive director.)

### 3.9 Choiceboxes

A *choicebox* involves mapping one or more options, one or more factors and one or more perspectives to imagined *x*, *y* and *z* axes respectively. The choice can be envisioned as a 3D box. There is a column for each option, a row for each factor and a layer for each perspective. Each cell at the intersection of such a column, row and layer represents the characterization of some option in terms of some factor according to some perspective. There are also columns for factor and perspective weights.

Each perspective layer can have a total score row showing the weighted average of scores for all options on the factors present. When there are multiple perspectives present in a box, a summary layer is available to show weighted averages of weights, ratings/scores and totals from across the perspectives.

For example, imagine that Jane and John are partners in a law firm that is deciding which case management system to buy. They have narrowed it down to three products: Ace, Acme and Apex. After lots of discussion, the choice seems to hinge on three factors: completeness of features, quality of interface and ease of learning.

Figure 2 depicts how this matrix of options, factors and perspectives might be represented in a choicebox. We are seeing Jane's perspective up front. The factors are matters of opinion, so her ratings and those of John may well differ. (In a real-world case, of course, other factors would be present, including some 'objective' ones like price.) Weights and scores are omitted in these figures.

**Figure 2**

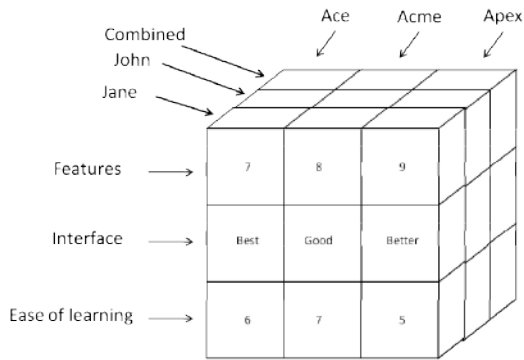
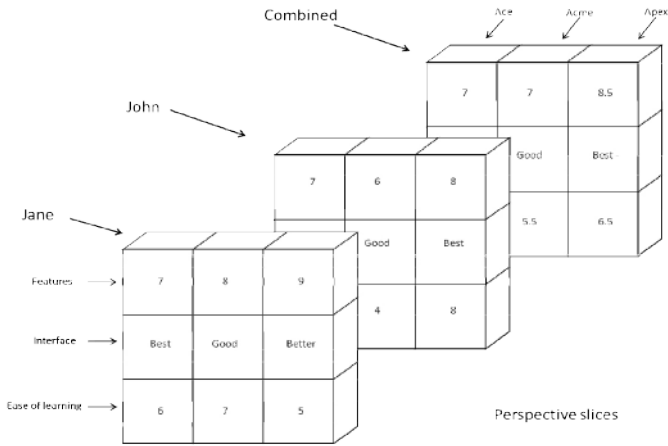


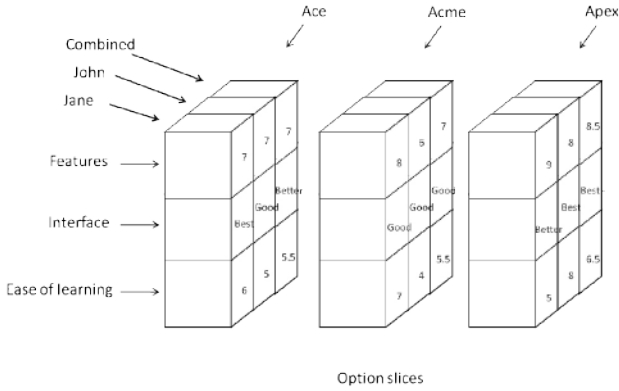
Figure 3 makes the separate perspective layers clearer. Now we can see some of John's different ratings, as well as average ratings on the combined layer.

**Figure 3**



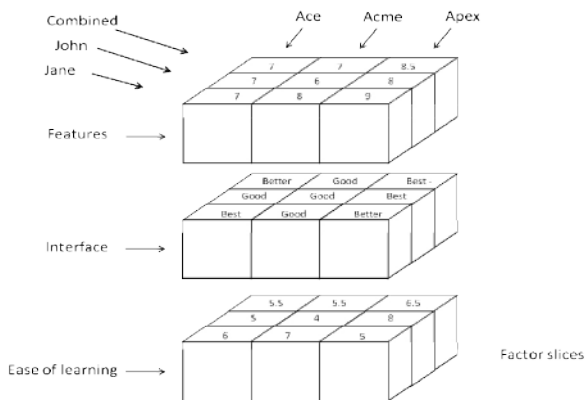
Note that the box can be 'sliced' in other ways. For instance, Figure 4 shows how a single option is rated across the several perspectives:

Figure 4



Or you might want to see how all the options are rated on all the perspectives on a single factor, as in Figure 5.

Figure 5



You can get a sense of how the options rank on each of the factors from the ratings on the various layers. Some rank first on some factors from Jane’s perspective; some rank first from John’s perspective. But how do they rank overall?

To answer that, you need to add scores and weights.

A common scoring strategy is to use percentages. Since two of the factors are expressed in a simple 0–10 scale, with 10 being best, you can just multiply the rating by 10 to get an appropriate percentage. For the interface factor, expressed in this case by words like ‘good’ and ‘better’, you might associate scores with possible ratings as in Table 1:

**Table 1**

Best	100
Better	80
Good	70
Ok	50
Bad	30
Worse	20
Worst	0

Given this set-up, and adding factor weights, you can compute scores for each perspective and for the overall box as in Table 2:

**Table 2**

<b>Jane</b>		<b>Ace</b>		<b>Acme</b>		<b>Apex</b>	
<i>Weight</i>		<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>
5	Features	7	70	8	80	9	90
8	Interface	Best	100	Good	70	Better	80
10	Ease of learning	6	60	7	70	5	50
Total score for Jane		76.09		72.17		69.13	
<b>John</b>		<b>Ace</b>		<b>Acme</b>		<b>Apex</b>	
<i>Weight</i>		<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>
10	Features	7	70	6	60	8	80
5	Interface	Good	70	Good	70	Best	100
2	Ease of learning	5	50	4	40	8	80
Total score for John		67.65		60.59		85.88	
<b>Combined</b>		<b>Ace</b>		<b>Acme</b>		<b>Apex</b>	
<i>Weight</i>		<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>	<i>Rating</i>	<i>Score</i>
7.5	Features	7	70	7	70	8.5	85
6.5	Interface	Better	85	Good	70	Best minus	90
6	Ease of learning	5.5	55	5.5	55	6.5	65
Overall score		71.87		66.38		77.51	

The weight and rating cells above contain information entered by a box participant; other cells are computed. Total scores are calculated as weighted averages

Note that Ace comes out on top for Jane, given her ratings and her emphasis on ease of learning over features. Apex comes out best for John. When the two perspectives are given equal weight, as here, Apex also comes out as best overall. Were Jane given disproportionate weight – e.g. because she is the senior partner with the largest financial stake in the decision – the result might be different.

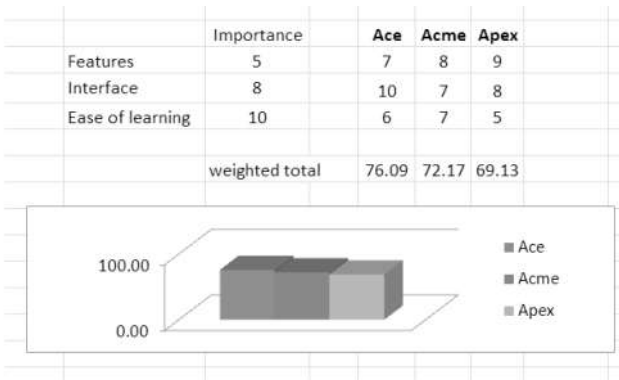
With an analysis like this in front of them, she and John can productively discuss why they feel differently about which factors are most important, or whether some of their ratings of the options should be adjusted.

3.10 Interactive Visualization

One key aspect of choiceboxing is the utilization of graphical methods to express and consume information. We believe that such methods promote the transparency of rationale, among other things.

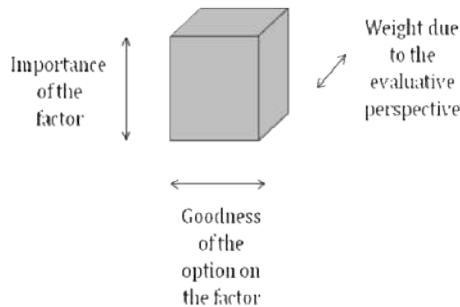
One could of course express an overall assessment of the above options like Jane’s with a simple Excel chart (Figure 6).

Figure 6



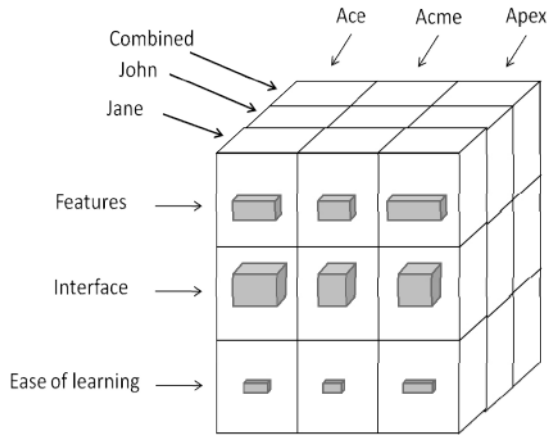
Taking this a couple of steps further, one can express each assessment of each option from each perspective in a separate block of ‘goodness’ like that shown in Figure 7.

Figure 7



And then one can position each such block within the overall framework of a choicebox, as in Figure 8. (Shapes here are *not* meant to correspond to the numbers in the preceding figures.)

Figure 8



Through volumetric interfaces such as this (and associated concepts, like ‘cubic betterness’), one can enable direct manipulation of visual representations, automated totalling and comparison of blocks, and rich insights into decisions in progress, especially when teams are involved.

There does seem to be an inescapable *double* 3D-ness to collaborative choice-making in this conception – the outer box being a matrix or array of cells allowing separate values (and comments) at the intersections of options, factors and perspectives, and the inner boxes being representations of goodness/badness, sized and shaped to reflect the dimensions of option score, factor importance and perspective weight. Interfaces that make it easier to render such frameworks interactively intuitive will foster adoption.

An alternative interface is a ‘slide box,’ shown in Figure 9.

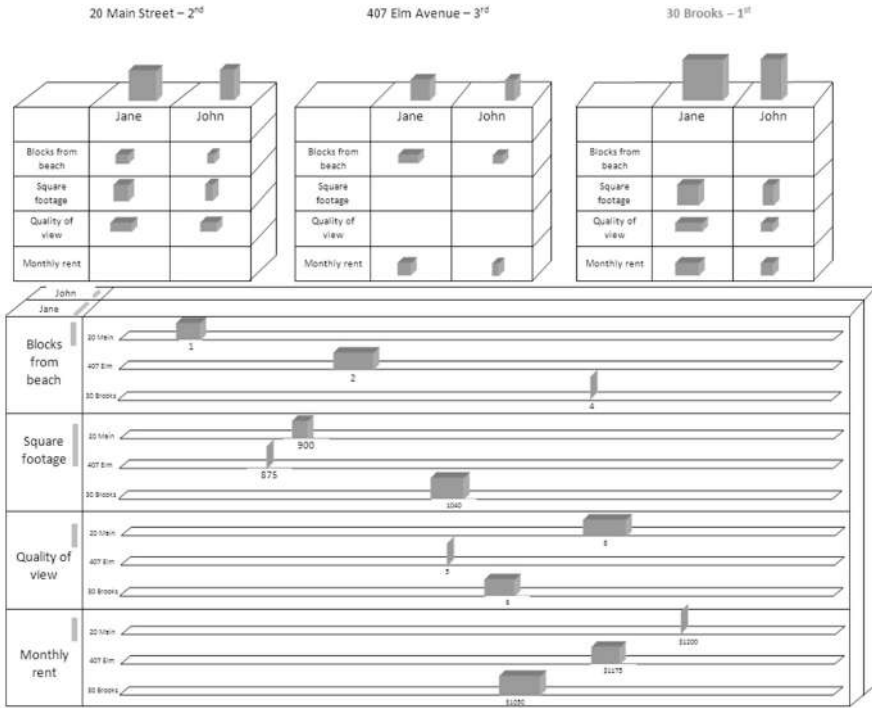
In this interface, each of the options has a conceptual ‘lane’ for each factor on which a sliding box signifies both ratings and scores, where its horizontal position reflects the rating of an option on a factor, its width is proportionate to the normalized score corresponding to that rating, its height is proportionate to the weight assigned to the factor on the perspective and its depth is proportionate to the weight assigned to the perspective on the factor. The boxes can be moved along the lane to change a rating, and are automatically resized and repositioned as a user changes ratings and weights. (The example shown in Figure 9 is a variant in which relative betterness is used for box widths, rather than absolute scores. Note that choiceboxes make rich use of colours, which are not rendered here.)

### 3.11 Acknowledged Limits

Before moving on, let us acknowledge some common reactions to this kind of approach. It may seem both too simplistic and too complex. Too mathematical. Too rational. Misleadingly precise. Where is the emotion? Is reality not much fuzzier? Do you expect *me* to decide like that?!



Figure 9



Behavioral economists delight in exposing how *irrational* most decisions are, how seemingly independent factors can influence each other and how supposedly irrelevant considerations can make a difference. Game theorists remind us of the endless complexity that can emerge as parties to a decision or dispute interact strategically. Choiceboxing does not purport to address all those challenges. It adopts an admittedly ‘naïve utilitarian’ model for the sake of usefulness and usability. Its results are approximate and only as good as the inputs. They are fodder for deliberation and conversation, not definitive pronouncements.

Emotional considerations, by the way, are hardly foreclosed. You can explicitly include ‘soft’ factors like overall impression or gut reaction, and weight them as you see fit.

### 3.12 The Value-Add of Choice-Making Tools

Choiceboxing can be done, in principle, with little more technology than a pencil and paper. (Non-trivial choices worth ‘boxing’ present too many options, factors and trade-offs to keep reliably in your head.) But choiceboxing is not practical without better tools. Scoring functions and related bookkeeping cry out for software.

You can perform basic weighted factor analysis using Word tables and functions. Choiceboxes can be implemented as 3D spreadsheets in applications like Microsoft Excel (using multiple sheets and lots of tricky formulas.)

Specialized software is required to realize the full potential of choiceboxing. Such software can make it easy to reconfigure options and factors, perform useful analytics and document your decisions. There are sophisticated (and expensive) applications that are best suited for experts, and also modestly priced desktop tools that you can find by Googling 'decision support software'. The following section describes an effort to build a system for collaborative choiceboxing on the Web using interactive visualization and crowdsourcing techniques.

#### 4. All About Choice

All About Choice (AAC) is a start-up company that is building online systems to help people make better personal and business choices. Its focus is on open and collaborative environments, radically simplified for non-specialists, backed by knowledge bases that learn as they are used. The goal is to make effective choice-making widely available through intuitive technologies that leverage collective wisdom. Our company seeks to deliver a suite of choice support services that can be used by anyone anywhere at any time. We want to provide the very best solutions for choice-making, and to serve as a steward for robust communities of collaborating decision-makers.

AAC has chosen to tackle hard problems in both user interface and back-end knowledge processing. Its initial research objectives are to validate assumptions and confirm the feasibility of several key components. These include a Web-based application that makes weighted factor analysis compellingly easy, a dynamic ontology that captures evolving correlations of decision contexts and considerations and tools that help manage semantic heterogeneity within and across domains. AAC has basic working systems under way and has drawn up a road map for development.

Intelligent online decision support environments have significant potential. Vendors and consumers alike are greatly benefited when goods, services and plans of action are effectively matched to authentic preferences. Heavy costs flow from inadequately informed or examined decisions. A powerful infrastructure for structured collaboration among the deciders, providers and advisers active in most choices will require both cutting-edge technology and business innovation, but yield high pay-offs when achieved. Academic and research institutions will be among the beneficiaries of that infrastructure.

AAC plans to operate at the intersection of artificial intelligence and intelligence augmentation. By seeking to field systems that do justice to the deep structure of everyday decision-making, AAC hopes to enhance scientific and technological understanding. Applying folksonomy and machine learning techniques to the choice context will yield new practical insights that should be broadly useful elsewhere as well.

AAC also promises meaningful societal impacts. Systems that enable collaborative deliberation about important decisions strengthen both individual and collective effectiveness. Transparent systems promote accountability. By making such systems easily and inexpensively available, AAC hopes to raise the overall quality of decisions made.

A Web-based system will enable distributed teams to review alternatives and fine-tune their decision-making processes. Individual users will draw upon extensive stores of objective and subjective information that leverage the collective learning of those who have been similarly situated.

Current research objectives are to test the following assumptions:

- A Web-based application can be delivered that makes weighted factor decision analysis compellingly easy, relying largely on interactive visualizations.
- A dynamic knowledge base can be constructed and administered in ways that capture evolving correlations of decision contexts and considerations – efficiently and scalably.
- Effective tools for managing semantic heterogeneity (e.g. in how people frame their choices and considerations in different contexts) can be deployed both on a server for knowledge base optimization and in user sessions.

Our ultimate success will also depend on the validity of more fundamental assumptions, namely (1) that a substantial number of people are sufficiently deliberative to use a well-designed tool for a meaningful subset of their choices and (2) that weighted factor analysis, supplemented with qualitative and ordinal modes, and delivered via compelling graphical interfaces, is an effective foundation for such a tool. *Those* assumptions are best validated by fielding choice support systems and seeing how they are received.

Our platform has three components:

- ChoiceBoxer is a browser-based *tool*. It supports weighted factors, multiple perspectives and many strategies for comparing options. On the basis of an intuitive 3D model, it helps people make choices more easily and confidently. ChoiceBoxer will also give advisers and providers a useful medium for quality communication with decision-makers.
- Integrated with ChoiceBoxer is an evolving fabric of server-side *content* – resources about choices and choice-making, including context-specific suggestions of factors and options. This shared repository unobtrusively learns from its users, as considerations and preferences are expressed, while vigilantly respecting privacy and neutrality.
- Collaborative deliberation features are integral to ChoiceBoxer, as are mechanisms that let people easily find others with common concerns. These *social networking* facilities enable users to involve friends and advisers in their choices, and to participate in communities of related interest – locally and globally.

We believe that a universal resource that substantially improves both choice-making processes and results – while ensuring autonomy, neutrality, privacy and transparency for participants – is within reach and highly worth achieving.

## 5. Boxing and Bargaining

A geometrical choicebox model is a useful framework for conceptualizing many kinds of choices. Negotiation and other dispute resolution processes involve considerations and balances of multiple attributes and perspectives quite similar to those involved when an individual or a collaborative group is seeking an optimal solution to a decision problem. Interactive visualizations of the competing value assessments, and collectively evolved inventories of relevant considerations, can be leveraged creatively in support of such processes.

There are good uses for structured approaches to choices beyond choice itself. Once you have a solid framework for approaching the assessments and trade-offs involved in a choice situation, you can use it as an instrument for understanding yourself and others better. Boxing can surface unarticulated expectations, and educate your instincts.

You can engage in 'shadowboxing' by anticipating the preferences of counterparties or decision-makers. Put yourself in their shoes and draft a set of ratings and weights that likely represents their perspective. What do they care most and least about? Where are their views most different from your own? If they seem to assess an option inadequately or disproportionately on certain factors, how might you influence them to change?

When it comes to negotiation, understanding the different preference profiles of the parties will sometimes yield win-win solutions you might otherwise miss. One party can frame its positions and arguments in terms that address the likely motivating concerns of the other.

### 5.1 An Example

Brams and Taylor<sup>3</sup> provide an example that can be used to illustrate an application of choiceboxing to dispute resolution. Two companies are contemplating a merger. Open issues include the surviving company's name, the location of corporate headquarters, who will play the chairman and chief executive roles and how necessary lay-offs will be allocated.

Each side is given 100 points to distribute across the issues in proportion to the degree to which it cares about them. They do so as follows.

**Figure 10**

	Name	Headquarters	Chairman	CEO	Layoffs
<b>C1</b>	6	<u>35</u>	19	<u>14</u>	<u>26</u>
<b>C2</b>	<u>21</u>	15	<u>28</u>	12	24

A hypothetical 'initial wins' resolution assigns each party its choice on the issues it rates of highest importance (underlined above). That produces an inequitable result, however, with C1 getting 75 of its points and C2 only 49. The Adjusted Winner method is then used to allocate an issue on which the parties' interests

3 S. Brams & A. Taylor, *The Win-Win Solution*, W.W. Norton, New York, NY, 1999, pp. 124-131.

Figure 11

Company 1		Company 2		Summary		Factor Weight Summary	
Scores:		Rank: 1 100.00	Rank: 4 0.00	Rank: 2 75.00	Rank: 3 61.48		
		C1 takes all	C2 takes all	Initial Wins	Adjusted Winner		
<b>Name</b>							
Weight: 6		100	0	0	0		
<b>Headquarters</b>							
Weight: 3.5		100	0	100	100		
<b>Chairman</b>							
Weight: 1.9		100	0	0	0		
<b>CEO</b>							
Weight: 1.4		100	0	100	100		
<b>Layoffs</b>							
Weight: 2.6		100	0	100	48		

are closest in such a way as to equalize their overall respective points. That issue is lay-offs, which is conveniently divisible (each company loses some employees). By giving each side just enough of that issue to offset the imbalance produced by having won on the other issues on which they have shown most interest, an equitable and envy-free result can be produced. A 48/52 allocation between C1 and C2 accomplished that result, assuming that the companies are entitled to share everything equally. (Brams and Taylor also show how this method can be used when the parties have *unequal* entitlements, such as where one of the merging companies has agreed to less than 50% of the new entity.)

Figure 10 shows how company C1's options look in a choicebox under four possible scenarios – 'C1 takes all', 'C2 takes all', 'Initial Wins' and 'Adjusted Winner'. Preferences among the various 'goods' are expressed by the weights at left. (Weights are expressed on a scale of 0–10, proportionate to the 100 points in the Brams and Taylor example.) The numbers in the cells represent the percentage of 'goodness' a party gets under the scenario. So *e.g.*, for the 'C1 takes all' option, C1 gets 100% for everything, and obviously would find that most attractive.

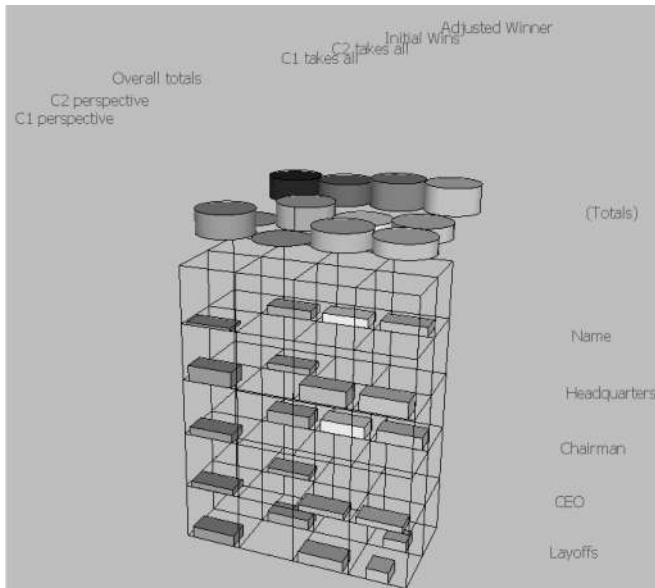
The corresponding sheet for C2 looks like this:

Company 1		Company 2		Summary		Factor Weight Summary	
Scores:		Rank: 4 0.00	Rank: 1 100.00	Rank: 3 49.00	Rank: 2 61.48		
		C1 takes all	C2 takes all	Initial Wins	Adjusted Winner		
<b>Name</b>	Weight: 2.1	0	100	100	100		
<b>Headquarters</b>	Weight: 1.5	0	100	0	0		
<b>Chairman</b>	Weight: 2.8	0	100	100	100		
<b>CEO</b>	Weight: 1.2	0	100	0	0		
<b>Layoffs</b>	Weight: 2.4	0	100	0	52		

The Adjusted Winner scenario (fourth column) is less preferable for both parties to their respective winner-take-all scenarios, but of equal utility to both.

When rendered in a 3D format, this configuration of weights and allocations looks like Figure 12.

Figure 12



Here the rectangular blocks represent the value of goods as allocated to the two parties under the various scenarios, and the cylindrical shapes at the top represent the total goodness in each vertical column. (You can think of them as containers into which the ‘ingots’ of value below have been melted and poured.) Thus, C1 and C2 get everything respectively in the first two scenarios, and the total utility for both (back row of cylinders) is the same. Initial Wins produces a higher joint utility, but it is unevenly distributed between them. Adjusted Winner delivers just slightly less joint utility, but it is evenly divided.

### 5.2 *Benefits of Boxing*

A choicebox-like visualization does not add anything fundamental to Adjusted Winner or related methods. But such a representation, once understood, provides a convenient way to grasp the dynamics of bargaining games, especially for those more visually than numerically inclined.<sup>4</sup> Parties can directly interact with such models to express preferences and explore solutions, perhaps in mutually invisible ways that a neutral (human or machine) accesses to suggest collectively optimizing moves.

Visual depiction can help, for instance, in anticipating ways in which one party might try to ‘game’ the other, such as by exaggerating the degree to which they care about an issue, so as to wring a greater concession in exchange for forgoing it.

Visual depiction can also remind people that other value considerations are almost always in play than those associated with the terms about which one may be bargaining. For example, in the merger example there are costs of negotiation or litigation that might be incurred or avoided under various scenarios, and benefits in terms of public relations and ‘industrial peace’ that may accrue. Also, even if the participants’ decisional frameworks are necessarily entangled, there are often considerations that are peculiar to one side or the other, providing asymmetries that can be exploited for mutually optimizing results.

## 6. **Related Work**

The ideas and plans sketched here of course touch on subjects that have been active fields of research for decades. They likely seem like rediscovery of very basic concepts. For instance, online analytical processing<sup>5</sup> (OLAP), Pugh matrices<sup>6</sup> and three-mode analysis<sup>7</sup> use quite similar constructs.

4 For an early review of visualization opportunities in law, see M. Lauritsen & D. Johnson, ‘Re-envisioning Law Practice With Computers: Visualization and Collaboration’, in *Materials for the Sixth Annual Technology in the Law Practice Conference*, American Bar Association, Chicago, March 1992, <[http://w2.eff.org/Misc/Publications/David\\_Johnson/lauritsen\\_johnson\\_legal\\_comp.article](http://w2.eff.org/Misc/Publications/David_Johnson/lauritsen_johnson_legal_comp.article)>.

5 <[http://en.wikipedia.org/wiki/Online\\_analytical\\_processing](http://en.wikipedia.org/wiki/Online_analytical_processing)>.

6 <<http://lssacademy.com/2007/06/19/the-pugh-matrix/>>

7 <<http://three-mode.leidenuniv.nl/>> provides an excellent gateway to the literature on this topic and related software.



Although enriched by hundreds of books, articles and other materials, most of the work sketched here has been driven by an inventor's drive to build something new and useful, rather than by a scholarly agenda. Any grand effort such as this is certain to treat many ideas superficially and neglect to credit borrowings from elsewhere.

One significant source is the work of Stuart Nagel.<sup>8</sup> He was an early and energetic enthusiast for the power of personal computers to improve decision-making in legal and policy settings.

### 6.1 *Psychology and Game Theory*

Human decision-making has long been a focus of behavioural psychologists and game theorists, and there is an enormously rich literature. Books by Baron,<sup>9</sup> Gilbert,<sup>10</sup> Hammond *et al.*,<sup>11</sup> Iyengar,<sup>12</sup> Lehrer,<sup>13</sup> Luce and Raiffa<sup>14</sup> and Schwartz<sup>15</sup> are excellent starting points.

Psychologists have identified dozens of decisional fallacies that beguile us. For example, there is the 'diagnostic bias': once we label something, we resist contradicting evidence. We give disproportionate weight to aspects of a situation that spring easily to mind ('availability'). We latch onto mentioned quantities, even if irrelevant ('anchoring'). We react differently when exactly the same choice is presented in terms of avoiding a loss rather than realizing a gain ('framing').<sup>16</sup>

### 6.2 *Dispute Resolution Systems*

Mediator, a negotiation support system described by Jarke, Jelassi and Shakun in a classic 1987 article,<sup>17</sup> was designed to support groups of players and a human mediator in decision situations involving multiple criteria as to which participants had differing (and potentially non-linear) utility functions. By mapping utility spaces and providing opportunities for players to adjust their functions, consensus solutions may be found.

- 8 Such as S. Nagel, *Using Personal Computers for Decision-Making in Law Practice*, American Law Institute-American Bar Association Committee on Continuing Professional Education, Philadelphia, 1985.
- 9 J. Baron, *Thinking and Deciding*, 2nd edn, Cambridge University Press, Cambridge, 1994.
- 10 D. Gilbert, *Stumbling on Happiness*, Knopf, New York, 2006.
- 11 J. Hammond, R. Keeney & H. Raiffa, *Smart Choices*, Harvard Business School Press, Boston, MA, 1999.
- 12 S. Iyengar, *The Art of Choosing*, Twelve, New York, 2010.
- 13 J. Lehrer, *How We Decide*, Houghton Mifflin Harcourt, Boston, 2009.
- 14 R. Luce & H. Raiffa, *Games and Decisions*, Wiley, New York, 1967.
- 15 B. Schwartz, *The Paradox of Choice*, HarperCollins, New York, 2004.
- 16 See P. Brest & L. Krieger, *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policymakers*, Oxford University Press, Oxford, 2010.
- 17 M. Jarke, M. Jelassi & M. Shakun, 'Mediator: Towards a Negotiation Support System', *European Journal of Operational Research*, Vol. 31, 1987, pp. 314-334.

The work by John Zeleznikow, Emilia Bellucci and their colleagues<sup>18</sup> has carried ideas like this further. They offer useful insights into trade-off analysis and related disciplines such as the Analytical Hierarchy Process.<sup>19</sup>

### 6.3 Computer Science

A large body of work has accumulated on preference handling techniques.<sup>20</sup>

Branting<sup>21</sup> describes an algorithm for learning customer preferences (in terms of feature weights) from online shopping selections and how it performed in a simulated empirical evaluation. In a 'choice space' environment, such a technique could be a powerful tool for predicting metapreferences (which option-differentiating attributes in a given category are likely to be most salient to a decision-maker), where, as in e-commerce contexts, there are trade-offs between presenting sufficiently large return sets to maximize the likelihood of optimal selections being present and the cognitive load presented by large sets of alternatives.

Liiv<sup>22</sup> has published a fascinating review of seriation and matrix reordering methods across disciplines as disparate as archaeology and bioinformatics, including the possibility of automating pattern discoveries that are now largely accomplished only through visual inspection of brute force rearrangements.

Discussions of choice modelling can also be found in the artificial intelligence and law literature.<sup>23</sup>

- 18 E.g. J. Zeleznikow *et al.*, 'Bargaining in the Shadow of the Law – Using Utility Functions to Support Legal Negotiation', in *Proceedings of the Eleventh International Conference on Artificial Intelligence and Law*, Stanford, June 2007, pp. 237-246.
- 19 <[http://en.wikipedia.org/wiki/Analytic\\_Hierarchy\\_Process](http://en.wikipedia.org/wiki/Analytic_Hierarchy_Process)>.
- 20 See R. Brafman & C. Domshlak, 'Preference Handling – An Introductory Tutorial', *AI Magazine*, Spring 2009, pp. 58-86 and V. Conitzer, 'Making Decisions Based on the Preferences of Multiple Agents', *Communications of the ACM*, Vol. 53, No. 3, 2010, pp. 84-94, available at <<http://cacm.acm.org/magazines/2010/3/7629>>.
- 21 K. Branting, 'Learning Feature Weights From Customer Return-Set Selections', *Knowledge and Information Systems*, Vol. 6, No. 2, 2004, pp. 188-202.
- 22 I. Liiv, 'Seriation and Matrix Reordering Methods: An Historical Overview', *Statistical Analysis and Data Mining*, Vol. 3, 2010, pp. 70-91, <[http://innar.com/Liiv\\_Seriation.pdf](http://innar.com/Liiv_Seriation.pdf)>.
- 23 See, e.g., M. Morge, 'Collective Decision-Making Process to Compose Divergent Interests and Perspectives', *Artificial Intelligence and Law*, Vol. 13, 2006, pp. 79-92, L. Philipps, 'Just Decisions Using Multiple Criteria, or: Who Gets the Porsche? An Application of Ronald R. Yager's Fuzzy Logic Method', in *Proceedings of the Fifth International Conference on Artificial Intelligence and Law*, College Park, May 1995, and J. Sieckmann, 'Why Non-monotonic Logic Is Inadequate to Represent Balancing Arguments', *Artificial Intelligence and Law*, Vol. 11, 2003, pp. 211-219.

## 7. Questions and Principles

Choice-making is one of those intellectual activities, like argumentation and document drafting<sup>24</sup>, in which the underlying issues and opportunities largely transcend the particular context. They seem quite basic and domain-independent.

Choices of the sort discussed in this article are critical to many of life's processes. Balancing 'tests' are ubiquitous. They are often used as parts of broader decisional frameworks. Many judgments involve more balancing than rule-following. Even when composed of many sub-decisions, at bottom there are often discrete options that respond to goal accomplishment differentia or other desiderata. Sometimes the rules 'run out', or you need to make a choice to determine what rules to apply. Often the competing factors are fuzzily quantitative, not Boolean.

Choice-making is a characteristic kind of reasoning that does not so much involve chains of implications as compositions of value assertions. It is often subconscious and metaphorical, sometimes sloppy. Choosers can hide behind approximate and misleading metaphors. Because words are inadequate to express our thinking, it is hard to hold people to account.

We may relegate these kinds of decisions to subjectivity, deontology, open texture or vagueness. We may think of true choice as unautomateable, as not responsibly machine-assisted, as ineffably human, as off limits. But there are constraints on what can and can't legitimately be taken into account in given situations, and neutral notions of coherence that can be applied.

Here are some of the interesting questions: What kinds of visualizations are possible and desirable in this context? How do we best support choice *processes*? What kinds of knowledge and intelligence characterize excellent human decision-making, as rare as they may be? How can we best model the options, circumstances, goals and preferences at play?

Choiceboxing so far is a complex of ideas, not a realized implementation, let alone one that has been carefully evaluated, like ValueCharts.<sup>25</sup> The following are some of the principles behind its development:

- It emphasizes rich visualizations of choices in progress, beginning with 3D metaphors that seem to capture the fundamental dynamics of most situations, but with a commitment to ongoing interface improvement driven by actual participant experience.
- Such representations must deliver high transparency of rationale and support collaborative deliberation.

24 See M. Lauritsen, 'Intelligent Tools for Managing Factual Arguments', in *Proceedings of the Tenth International Conference on Artificial Intelligence and Law*, Bologna, June 2005, and M. Lauritsen, 'Knowing Documents', in *Proceedings of the Fourth International Conference on Artificial Intelligence and Law*, ACM Press, Amsterdam, June 1993.

25 See J. Bautista & G. Carenini, 'An Empirical Evaluation of Interactive Visualizations for Preferential Choice', in *Proceedings of the Working Conference on Advanced Visual Interfaces*, ACM Press, Napoli, Italy, 2008, pp. 207-214.

- It builds on social production of choice support content, Wikipedia-like, yet goes well beyond textual forms of meaning communication, and is turbo-charged by intelligent content refinement.
- It celebrates and empowers chooser autonomy through portability and relentless neutrality and privacy.
- It supports rich conversations among choosers and those with stakes in particular choices, rather than just being an apparatus to help one party make a decision.
- It builds on a deep and comprehensive model of choice-making.
- It encompasses a full system of tools, content, communities and social/economic players, rather than just being an 'application'.

## 8. Conclusion

The current president of the United States likes to note that people are entitled to their own opinions, but not to their own facts. We might similarly say that decision-makers are entitled to their own values, but not to their surreptitious or inconsistent application. Trade-offs should not be exempt from analysis and critique.

Having choices is the essence of freedom. Choosing well is a hallmark of responsibility. Intelligent tools with rich visual interfaces can help people choose both more freely *and* more responsibly. We need more such tools.

## BOOK REVIEW

S. Ossowski (Ed.), *Agreement Technologies, Law Governance and Technology Series, Volume 8, Springer, Dordrecht, 2013*

Reaching an agreement on the definition of Online Dispute Resolution (ODR) is not an easy task – indeed there is no readily acceptable definition of Alternative Dispute Resolution (ADR). As Lodder and Zeleznikow<sup>1</sup> point out, examples of negotiation reach back to antiquity,<sup>2</sup> well before the development of state-organized litigation originated. Modern alternatives to litigation were heavily influenced by the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, which took place in Minneapolis, Minnesota, from 7 to 9 April 1976. At this conference, then US Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes. Lodder and Zeleznikow cite this conference as the commencement of the modern ADR movement.

Hence, it is not surprising that there is no readily acceptable definition of ODR. Some researchers, such as Larson,<sup>3</sup> discuss technology-mediated dispute resolution. Such a definition does not necessarily require the disputants to be online. For example, the software developed in the Adjusted Winner,<sup>4</sup> Family\_Winner<sup>5</sup> and Smartsettle<sup>6</sup> systems, which use game theory developed by Nash<sup>7</sup> to provide negotiation, can be used on stand-alone computers. Such software does not require the connectivity of the Internet.

It is important to hold a liberal view of the definition of ODR when deciding whether the new monumental book<sup>8</sup> on Agreement Technologies is indeed a book in the ODR discipline. The book is a series of 37 contributions about the semantic web, norms, argumentation and trust. It is not a treatise that would be readily understandable to traditional ODR developers and consumers.

- 1 A. Lodder & J. Zeleznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Systems in a Three Step Model', *The Harvard Negotiation Law Review*, 2005, Vol. 10, pp. 287-338 and A. Lodder & J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge University Press, Cambridge, 2010.
- 2 For example, as stated in the Torah, negotiations between Abraham and God regarding criteria for the destruction of Sodom and Gomorrah.
- 3 D.A. Larson, 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR', *Ohio State Journal on Dispute Resolution*, Vol. 21, No. 3, 2006, p. 629, pp. 668-677.
- 4 S.J. Brams & A.D. Taylor, *Fair Division, From Cake Cutting to Dispute Resolution*, Cambridge University Press, Cambridge, 1996.
- 5 E. Bellucci & J. Zeleznikow, 'Developing Negotiation Decision Support Systems That Support Mediators: A Case Study of the Family\_Winner System', *Journal of Artificial Intelligence and Law*, Vol. 13, No. 2, 2005, pp. 233-271.
- 6 E.M. Thiessen & J.P. McMahon, 'Beyond Win-Win in Cyberspace', *Ohio State Journal on Dispute Resolution*, Vol. 15, 2000, p. 643.
- 7 J. Nash, 'Two Person Cooperative Games', *Econometrica*, Vol. 21, 1953, pp. 128-140.
- 8 648 pages.

*Agreement Technologies* is the result of a European Union research project conducted within the framework of COST Action IC0801.<sup>9</sup> Thus the book is Eurocentric, and most (but not all) of the authors of the chapters are from countries in the European Union.

ODR researchers and practitioners constitute a wide community including:

- (a) The Group Decision and Negotiation community – who see negotiation as a form of economic bargaining, where Pareto optimal solutions can be obtained.<sup>10</sup> The community has as its main disciplines Group Decision and Negotiation Support Systems, Artificial Intelligence and Management Science, Applied Game Theory, Experiment and Social Choice and Social/Behavioural Sciences.
- (b) The ODR Legal community – who are concerned with legal norms for regulating online disputes.<sup>11</sup>
- (c) The ODR provider community – such as Modria<sup>12</sup> and ECODIR.<sup>13</sup>
- (d) The Automated Negotiation community – this community conducts research in the disciplines of Artificial Intelligence and Software Engineering. Rather than providing advice or support for negotiations, it develops automated software<sup>14</sup> to support agents in a software engineering environment to col-

9 See <[www.agreement-technologies.eu/](http://www.agreement-technologies.eu/)>, last accessed 9 December 2013. Here *Agreement Technologies* refer to computer systems in which autonomous software agents negotiate with one another, typically on behalf of humans, in order to come to mutually acceptable agreements. This Action aims at coordinating national efforts on a new paradigm for next-generation distributed systems, based on the concept of agreement between computational agents. An entity may choose whether to fulfil an agreement or not, and it should fulfil it when there is an obligation to do so derived from the standing agreements. Autonomy, interaction, mobility and openness are the characteristics that the paradigm will cover from a theoretical and practical perspective. Semantic alignment, negotiation, argumentation, virtual organizations, learning, real time and several other technologies will be in the sandbox to define, specify and verify such systems. Both functional and non-functional properties are to be studied. Security on execution will be based on trust and reputation measures. These measures will help agents to determine with whom to interact and what terms and conditions to accept.

10 See for example the Journal *Group Decision and Negotiation*, <[www.springer.com/business+%26+management/operations+research/journal/10726](http://www.springer.com/business+%26+management/operations+research/journal/10726)>, last accessed 9 December 2013.

11 See, e.g., L.E. Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution', *Fordham Law Review*, Vol. 70, 2001, p. 985 and O. Rabinovich-Einy & E. Katsh, 'Technology and the Future of Dispute Systems Design', *Harvard Negotiation Law Review*, Vol. 17, 2012, pp. 151-289.

12 See <[www.modria.com/](http://www.modria.com/)>, last accessed 9 December 2013.

13 See <[www.arbitration-adr.org/resources/?p=serviceproviders&a=show&id=40](http://www.arbitration-adr.org/resources/?p=serviceproviders&a=show&id=40)>, last accessed 9 December 2013 and B. Hutchinson, 'Online Resolution of Consumer Disputes – An Introduction to ECODIR: Electronic Consumer Dispute Resolution', in *UNECE Forum on Online Dispute Resolution*, Geneva, 2002, pp. 6-7.

14 No need for the intervention of a human.

laborate.<sup>15</sup> While automated negotiation is not one of the thirteen issues that the Journal has noted should be addressed,<sup>16</sup> it is worthy of being considered.

In its 37 chapters, the book on Agreement Technologies focuses upon many distinct topics. However, with regard to ODR, its major contribution is to the automated negotiation community.

Ossowski views *Agreement Technologies* as next-generation open distributed systems where interactions between computational agents are based on the concept of agreement. To reach such agreements we require a normative context that defines the rules of the game and an interaction mechanism by means of which agreements are first established.

It is impossible to read the book from cover to cover. It is too long and dense with important information to be read as a textbook. Rather the reader should use it as an encyclopedia, going to the index to retrieve relevant information.

The first three chapters provide the foundation for the book: Ossowski, Sierra and Botti define and describe the computing foundations of Agreement Technologies, while Casanovas illustrates how relational law is required for a deeper understanding of Agreement Technologies. Chapters 4 to 9 examine semantics. While the issues discussed in these chapters are fundamental to understanding the operation of the semantic web, they carry little direct relevance to dispute resolution practitioners and theorists.

Chapters 10 to 16 focus upon the issue of norms. An understanding of norms and law is vital to the efficient and just operation of both ODR and ADR. The chapters on social norms, normative agents, trust and argumentation are important and useful. But those dealing with norms and logic will no doubt be peripheral to the reader. For instance, no justification is given as to why abstract issues of Deontic Logic and Artificial Intelligence and Law have any relevance to those interested in ODR.

The latter sections, on Organizations, Argumentation and Negotiation and Trust and Reputation, are very useful. The theoretical component of the book finishes with an excellent chapter by Carles Sierra and the late and very highly valued and distinguished John Debenham, on the issue of building relationships with trust.

Perhaps the crux of the book, which makes it valuable to read, is the last section: seven chapters on applications. These chapters, dealing with Agreement

15 See J.S. Rosenschein, *Rules of Encounter: Designing Conventions for Automated Negotiation Among Computers*, MIT Press, Cambridge, MA, 1994 and N.R. Jennings *et al.*, 'Automated Negotiation: Prospects, Methods and Challenges', *Group Decision and Negotiation*, Vol. 10, No. 2, 2001, pp. 199-215.

16 These issues are technological applications in dispute resolution; new approaches to the use of technology to prevent disputes; the resolution of technology- and telecommunications-related disputes; legal and technical aspects of innovative technological applications; cross-cultural and legal comparisons in dispute resolution and technology; use of technology in dispute systems design; digital divide implications and applications; e-commerce, m-commerce and dispute resolution; resolution of e-governance/government disputes; electronic funds/data transfer for dispute resolution; cyber ethics/e-privacy/e-security for dispute resolution; legal aspects of social engineering and technology/telecommunications dispute resolution and policy.



Technology applications related to call centres, transport planning, water, medical applications, business collaborations and e-commerce, finally convinced me that the issue of *Agreement Technologies* is worth investigating.

To summarize, *Agreement Technologies* is a very demanding book to read. However, the book has many valuable insights and should thus be on the shelf of any ODR enthusiast.

### **Disclaimer**

John Zeleznikow is a close friend and collaborator of Pompeu Casanovas, the series editor of the Springer *Law, Governance and Technology Series* and the author of one of the chapters in the book under review.

John Zeleznikow

## ODR NEWS APRIL 2014

### UK Forms ODR Advisory Group

The Civil Justice Council (a public body with responsibility for overseeing and coordinating the modernization of the civil justice system of England and Wales) has formed an ODR Advisory Group tasked to produce a Report in nine months on the introduction of ODR into the civil justice system for civil claims up to £20,000 in value.

Richard Susskind, the Head of this new Advisory Group (as well as IT adviser to the Lord Chief Justice, and president of the Society for Computers and Law) wrote an article in *The Times* which covers ODR, and which concludes:

ODR offers the promise of robust and yet radically less costly dispute resolution. While today's lawyers and policymakers may find it alien or outlandish, few of them belong to the internet generation. Tomorrow's citizens, for whom working and socialising online is second nature, are likely to regard ODR as a wholly natural facility, much more so perhaps than conventional courts.

<[www.thetimes.co.uk/tto/law/columnists/article4070943.ece](http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece)>

### AAA Chooses ODR for Its Largest Volume Case Load

The American Arbitration Association (AAA) has decided to partner with Modria.com to build a new ODR platform to manage AAA's New York No Fault (NYNF) case load. This system will support more than 100,000 cases annually, providing new online tools to appellants and insurance carriers, and new case management tools to AAA staff and neutrals.

The AAA New York Insurance ADR Center will go live in the second quarter of this year, and will allow appellants and their attorneys to file disputes online with just a browser and an Internet connection. All parties will be able to get on-demand status updates on pending cases anytime, keeping all participants aware of progress. The new platform will provide AAA staff with rich case and document management, and new hearing scheduling tools, supporting their ongoing commitment to process optimization and continuous process improvement. New secure online communication tools will allow parties to communicate directly with AAA staff, and with each other, adding additional efficiency to the overall resolution process.

This new platform will accelerate case processing, ensure secure and transparent communication between parties, and increase convenience for AAA and its customers. It will support conciliation (mediation), arbitration and master appeal processes. Insurance carriers, applicants and general counsel will save valuable time, while increasing transparency and access for all parties.

<[www.prnewswire.com/news-releases/american-arbitration-association-selects-modria-to-power-new-york-no-fault-caseload-248543191.html](http://www.prnewswire.com/news-releases/american-arbitration-association-selects-modria-to-power-new-york-no-fault-caseload-248543191.html)>

## **New European Online Mediation Resource**

A coalition of several groups in Europe have teamed up to launch <<http://gotomediation.eu>>, a website to promote the awareness and use of Mediation in cross border B2B disputes – both for preventing and resolving disputes. The site also aspires to offer affordable cross-border mediation services precisely tailored to the specific requirements of cross border-business Mediation.

The site will assist individual disputants in deciding whether Mediation is the right resolution path. If Mediation is appropriate, the site will organize the Mediation process. Gotomediation.eu offers an independent and trusted service for dealing with B2B disputes. Through the network of several European Chambers of Commerce and Mediation Centres the site is able to refer disputants to the appropriate contact, provide necessary legal information, and help to find a suitable, highly qualified and experienced business mediator.

As the site explains, the requirements for mediators who deal with cross-border Mediation are high. The mediator needs to have an understanding of the legal situation in the countries of the parties as well as the cultural differences. Eliminating language barriers and misunderstandings caused by cultural patterns of behavior is as important as to endorse the request to make the content of a written agreement resulting from Mediation enforceable. Gotomediation.eu organizes a regular exchange of knowledge and experiences between our mediators and institutions, so as to ensure compliance with training standards and legal developments at European level to ensure a high quality of service.

To learn more, visit <<http://gotomediation.eu>>.

## **UNCITRAL ODR Working Group Hears from Private Sector Experts**

Working Group III of UNCITRAL met at the United Nations in New York City from 24-28 March 2014. This meeting was preceded by a meeting of ODR experts (both commercial and academic) from the private sector who offered perspective on the deliberations to date. Recently the Working Group has been hampered by disagreements among the participating State members around whether the rules being designed should provide for binding or non-binding consumer outcomes. In light of these continuing disagreements, the Expert Group released a consensus statement prior to the Working Group meeting that made several observations, including:

- The expert group believes that both consumer and business groups around the world are unanimous in seeking fair, proportionate, effective, online, cross-border redress for low value cross-border disputes. As a result, ODR is already happening, and it will continue to grow regardless of the actions of the Working Group. That said, the experts are unanimous in hoping that the

Working Group will be able to issue rules urging expanded global access to quality ODR.

- It is vital for consumers and small to medium size business alike to address the problem of cross-border consumer redress and the private sector is stepping in to provide manifold solutions to this problem. Market-based approaches will provide the best solutions for this problem. These market-based approaches will require a lot of experimentation and evolution to get it right. As such, the rules issued by the Working Group should not be too prescriptive, because they may hinder innovation required to solve this problem over the longer term.
- ODR administrators, marketplaces, and payment providers want the flexibility to design, build, and deploy both non-binding and binding ODR systems. Each ODR system designer can later decide which design is a better fit with their specific needs and relevant legal environment. The Working Group should not spend any more time debating which design is better or preferred.

The ODR Working Group from UNCITRAL will next meet in Vienna near the end of 2014. For more information on the Working Group, and a draft copy of its proposed ODR guidelines, visit [www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)

### **New ODR Providers: Rezoud, Arbitration Resolution Services (ARS), and Youstice**

Three new ODR service providers have launched, two in Florida and one in Prague.

Rezoud ([www.rezoud.com](http://www.rezoud.com)) is an industry leading Technology, Dispute Resolution and Education company focused on the international Dispute Resolution Industry. Based on more than three years and 10,000 hours of research, Rezoud has announced a series of new products and services to the Dispute Resolution marketplace: Technology-enhanced Dispute Resolution TeDR™, a new conflict resolution process methodology built around having the parties communicate more directly via Facilitated Negotiation leveraging fixed processes enhanced by technology; Settle-Now™, offering a Unified Communications Eco System, Enhanced Case-Management with video-conferencing plug-ins and proprietary settlement algorithms centered on Dynamic database processing, Big Data, settlement calculators and integration with court e-filing systems; Rezoud Academy announces a new three course online certificate in Corporate Dispute Resolution in partnership with the University of South Florida – St. Petersburg; and Family-Settle™, a new system to simplify divorce into a user friendly, next generation collaborative divorce process bundled into a single cutting edge system.

Rezoud is located in Tampa Bay, Florida – but has also opened a European Headquarters, located in Paris. A video interview with the CEO is available here: [www.youtube.com/watch?v=L8ofE14X1O8](http://www.youtube.com/watch?v=L8ofE14X1O8).

Founded by experts in dispute resolution and technology, Arbitration Resolution Services, Inc. (ARS, located at <[www.arbresolutions.com](http://www.arbresolutions.com)>) has launched a service called Complete system for Online Dispute Resolution, or C-ODR. Combining its unique proprietary technology with a roster of industry professionals, ARS offers services in the Alternative Dispute Resolution (ADR) and legal areas that allow for accurate, efficient and affordable dispute resolution services for all, according to its leadership.

At the core of ARS services is its proprietary Arb-IT system, which guides parties through the mediation or binding arbitration process. The system also enables users to submit their claims and supporting evidence electronically. The case is then assigned to a highly experienced, impartial litigation attorney, who serves as the parties' personal judge in a secure and private forum. The company's programs include disputes involving businesses and individuals, disputes involving businesses and disputes involving physical damage to real or personal property.

ARS is based in Coral Gables, Florida. For more information, visit <[www.arbresolutions.com](http://www.arbresolutions.com)>.

Youstice (<[www.youstice.com](http://www.youstice.com)>) is an open, globally available service in the area of low value customer claims. Youstice aims to interconnect ODR stakeholders all over the world – buyers and sellers, ODR providers, consumer centers, trustmarks, and online marketplaces. Every stakeholder will be able to communicate in their own language via the Youstice platform.

Youstice is holding media days in UK, France and Germany to introduce the project and partners in May 2014, with an official launch of following on 11 June 2014 in London.

The company is inviting ODR experts to become Youstice accredited ODR providers and/or ODR trainers for neutrals. Youstice considers ODR providers to be partners, and so provides services to providers at a very low cost. In addition, Youstice guarantees that ADR professionals get paid fees from the parties to each case. Youstice also makes participation very easy for neutrals, making online case-loads easy to maintain alongside other projects.

Youstice is based out of Prague, in the Czech Republic. Trials of the beta version are available on the Youstice web site (<[www.youstice.com](http://www.youstice.com)>).

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