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**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY
COMMITTEE ON INDUSTRY AND BUSINESS ENVIRONMENT**

Working Party on Small and Medium-Sized Enterprises and Entrepreneurship

**ALTERNATIVE DISPUTE RESOLUTION (ADR) ONLINE MECHANISMS
FOR SME CROSS-BORDER DISPUTES**

THE OECD BOLOGNA PROCESS

**2nd OECD Ministerial Conference on SMEs on "Promoting Entrepreneurship and Innovative SMEs in a
Global Economy -- Towards a more Responsible and Inclusive Globalisation" jointly organised by the
OECD and the Turkish Ministry of Industry and Trade, ISTANBUL, Turkey, 3-5 June 2004**

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FOREWORD

At the first OECD Conference of Ministers responsible for SMEs, hosted by the Italian government in Bologna, Italy, in June 2000, Ministers from nearly 50 member and non-member economies adopted the “Bologna Charter for SME Policies”. They envisaged the Bologna Conference as the start of a policy dialogue among OECD Member countries and non-Member economies and that it would be followed up by a continuous monitoring of progress with the implementation of the Bologna Charter. This dialogue and monitoring have become known as the “OECD Bologna Process”. The second OECD Conference of Ministers Responsible for SMEs, hosted by the Turkish Ministry for Industry and Trade, envisaged by Ministers at Bologna, provides an occasion to assess the impact on SMEs of new developments relating to globalisation.

This report is one of ten background reports prepared for the Istanbul Ministerial Conference, the theme of each of the ten reports being linked to a specific Workshop of the Ministerial Conference. The Working Party on SMEs and Entrepreneurship carried out this study building on the work of both the Working Party on Information Security and Privacy and the Committee on Consumer Policy. Earlier versions of the report were reviewed by the Working Party on SMEs and Entrepreneurship whose comments were subsequently incorporated into the report. Non member economies participating in the OECD Bologna Process have also had an opportunity to provide comments on an earlier version. This final report also sets out some policy messages and recommendations that have emerged from the preparatory work undertaken on this topic in the Working Party. The wide variation in stages of economic development, institutional arrangements and political context across the economies participating in the Bologna Process, now more than 80, means that parts of specific policies and programmes are not appropriate for all participants. The messages and recommendations outlined below provide material from which governments may choose to draw in promoting innovative SMEs in the global economy. In broad terms, these policy messages and recommendations elaborate on the themes developed in the Bologna Charter. Ministers will consider these and other recommendations in their deliberations at the Istanbul Conference.

This report was prepared by Fabien Gélinas, Associate Professor, Faculty of Law, McGill University, Canada, in cooperation with the OECD Secretariat in the Directorate for Science, Technology and Industry. The preparation of the report received financial assistance from the United States Department of Commerce [*e-Business Facilitation Initiative at the OECD*].

This report and its appendices are issued on the responsibility of the Secretary-General of the OECD. Views expressed are those of the authors and do not necessarily reflect those of the Organisation or its member governments.

This and other background documents prepared for the 2nd OECD Conference of Ministers Responsible for SMEs may be downloaded free of charge from the following websites:

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Alternative Dispute Resolution (ADR) Online Mechanisms for SME Cross-Border Disputes

EXECUTIVE SUMMARY

Alternative dispute resolution (ADR) is an issue of growing interest for SMEs. ICT is bringing world markets within the reach of SMEs while legal hurdles and uncertainties related to cross-border commerce prove both resistant to international harmonisation efforts and expensive for businesses to overcome.

Fostering the development of faster and more cost-effective ADR mechanisms should put SMEs in a better position to engage in cross-border business and take advantage of an expanded market. Online dispute resolution (ODR) appears to hold the key to speed and cost-effectiveness in the context of cross-border disputes involving smaller stakes. In this respect, the need for ODR is particularly striking for SMEs.

SME Policy concerns and might be tackled more effectively, at this stage, in other contexts and fora.

Draft recommendations

Information, communication and education appear to lend themselves to more immediate action in support of SMEs and further study is called for to see if the use of PP/P would be appropriate to foster the development of ODR products and services. With a view to submission at the proposed 2nd OECD Ministerial Conference on SMEs which could be held in Istanbul in 2004, **the findings of this report point to the following recommendations:**

- Ensure that SME policy concerns (and, as far as possible, SME input) are taken into account in all ongoing and future ADR work.
- Promote and facilitate the development of an international online ADR market with a view to meeting the dispute resolution needs of SMEs.
- Adopt and disseminate an ADR educational instrument to help guide SMEs in making ADR choices when contemplating the setting-up of a cross-border offering to consumers.
- Adopt and disseminate an ADR educational instrument to help guide SMEs in making ADR choices when contemplating B-to-B cross-border transactions in the context of electronic commerce.
- Develop conduits such as the International Network for SMEs (INSME) for the dissemination of ADR educational instruments and other ADR-related information of use to SMEs.
- Seek partnerships with consumer and other international organizations with a view to creating, maintaining and making accessible to SMEs, on a global scale, further practical information on consumer protection laws and ADR schemes and mechanisms.
- Study the feasibility of using Public-Private Partnerships (PP/Ps) to encourage and foster the development of an international B-to-B online ADR market.

As inventories of existing schemes clearly show, ODR is in its infancy. Although ODR has benefited and continues to benefit from co-regulatory and self-regulatory efforts, clear, sustainable business models that offer safeguards and generate uptake have yet to emerge. Principles and guidelines for ADR and ODR have emerged from a host of self-regulatory and co-regulatory initiatives and are now the object of a broad consensus when considered at a high level. As with many other electronic commerce trust products, however, it remains unclear whether ODR can take off as an industry without increased government participation, at least initially.

Many other issues remain unresolved. Examples of such issues include the implementation of ADR guidelines, oversight of ADR systems, standardisation of forms, interoperability of systems and legal harmonisation. Many of these issues, although they call for further international policy consideration, go beyond.

Introduction

Context

Alternative dispute resolution (ADR) is an issue of growing interest for SMEs. The lack of suitable dispute resolution mechanisms for cross-border disputes, particularly with consumers, is increasingly perceived as an inhibitor to e-commerce adoption by SMEs. The latter are not able to afford the cost of pursuing dispute resolution through foreign court systems, nor are they able to resort to traditional dispute resolution mechanisms such as arbitration because of the time, cost or legal difficulties involved. Fostering the development of faster and more cost-effective ADR mechanisms should put SMEs in a better position to engage in cross-border business and take advantage of an expanded market.

Objectives and Methodology

Ensuring users' redress for cross-border online interactions by providing access to effective ADR is part of the OECD programme to build trust in e-commerce. The focus of the OECD work has been on business-to-consumer (B-to-C) flexible mechanisms offered online, with an emphasis on consumer protection. This report will put the emphasis on SMEs specific needs for dispute resolution in their interactions with consumers (B-to-C).

This report will also briefly examine the area of business-to-business (B-to-B) relations online and make reference to business-to-government (B-to-G) relations online in this context. The report will finally explore ways to strengthen co-operation between governments and the private sector to address these issues effectively at a global level. It will attempt to identify best practices for SMEs' dispute resolution in their interactions with consumers (B-to-C) and propose an ADR educational instrument for SMEs.

Defining ADR

The term ADR refers to a wide range of mechanisms and processes designed to assist parties in resolving disputes out of court. The most common forms of ADR are negotiation, facilitation or conciliation, mediation, and arbitration. ADR mechanisms differ on a sliding scale from the most flexible to the most formal in terms of the rules of procedure, the role of the neutral third party in facilitating or deciding an outcome, the binding character of the outcome – on all parties or on one of them, and, where the outcome is binding, the nature of the agreement that makes it binding.¹

ADR normally involves an external ADR provider, with whom the complaint is typically filed. The provider notifies the other party of the complaint. The parties then participate in a more or less formal exchange in an attempt to settle the dispute, with the possible intervention of a neutral third party. The third party, who is usually a mediator or an arbitrator, could instead be a set of software tools designed to facilitate a settlement.

For the purpose of this discussion, the term ADR will include all of the methods that were mentioned. Online ADR, also referred to as ODR (online dispute resolution), will be taken to include any form of ADR that makes use of ICT, starting from the use of e-mail to the intensive use of specialised software applications, without excluding the variants and hybrids that continue to be developed.

Alternative Dispute Resolution (ADR) Online Mechanisms for SME Cross-Border Disputes

I. ADR AND SMES: IDENTIFYING ISSUES AND SPECIFIC NEEDS

The potential of e-commerce remains largely untapped. And in the race to the full realisation of this potential, SMEs are lagging behind. This is due to a number of barriers to adoption that SMEs are still struggling to overcome: the perceived unsuitability of the medium to the business, the level of ICT knowledge within the firm, the cost of establishing and maintaining online sales and the cost of cross-border trading.

One important element of the overall cost of cross-border trading is generated by legal uncertainties regarding e-commerce operations. Legal uncertainties create a pervasive inhibitor because they are felt not only by SMEs but also by their potential counterparts, be they consumers or other transaction prospects. Legal uncertainties have a direct, negative impact on the perception of potential benefits when analysed against the costs defined by other barriers to e-commerce adoption. They constitute an inhibitor to what could be described as the last stage of adoption: making sales on the Internet. This chapter first describes these uncertainties and their impact on SMEs and moves on to a presentation of ADR as a promising solution.

Legal uncertainties

Businesses transacting across borders on the Internet are known to be negotiating a legal minefield.² The legal uncertainties and resulting legal risks are real and prove very difficult to manage because there is no harmonised legal framework for rules pertaining to the determination of jurisdiction and applicable law on one hand and no global mechanism ensuring the cross-border enforcement of legal rulings on the other.

Jurisdiction and applicable law

As concerns approaches to Internet jurisdiction and applicable law, the main stumbling block to harmonisation has perhaps been the polarisation of a policy debate between the “country of origin” and the “country of destination” approaches.³ This polarisation has crystallised on two axes in multilateral discussions between business associations and consumer associations. The first axis concerns the default legal situation for a cross-border e-commerce operation; the second concerns the validity of choice-of-law and forum selection clauses in the context of Internet transactions.

As concerns the default legal situation for a cross-border e-commerce operation, put at a high level, the country of origin approach gives jurisdiction to the courts of the country from which the transmission originates and generally adopts the law of that same country. The country of destination approach gives jurisdiction to the courts of any country in which the information, goods or services are received and generally adopts the law of that same forum. The country of origin approach is advocated by businesses which, assuming it is impossible to ascertain where a customer is located and denying the effectiveness of blocking technology are concerned about the risk of being sued in multiple jurisdictions under any number of inconsistent legal rules.⁴ The difficulty involved in the multiplicity of legal rules and frameworks is compounded by the current proliferation of Internet-specific legislation and case law in many countries. The country of destination approach, on the other hand, provides greater consumer

protection as it ensures buyers access to their own courts as well as the benefit, in most cases, of their own laws. The main concern of consumers associations is that implementation of the country of origin approach would result in a *de facto*, world-wide adoption of a consumer protection common denominator corresponding to the least protective legal regime. Beyond contracts, this debate extends to jurisdiction and applicable law in such fields, all crucial to the Internet environment, as intellectual property, defamation, libel, obscenity, privacy, racism and freedom of expression.

The second axis of polarisation goes beyond the selection of the default legal position for Internet operations and into the freedom of parties to an Internet transaction to depart from that default legal position. Such departure is normally affected by means of choice-of-law and forum selection clauses. These clauses are very common in agreements between businesses and are widely recognised. But when it comes to consumer transactions, legal systems take different views as to how far the consumer requires protection under public policy. On the Internet, in practical terms, it is no secret that choice-of-law and forum selection clauses usually benefit the party which proposes – and in most cases imposes – the terms and conditions of the transaction. Reflecting a fear of widespread difficulties relating to the actuality of consumer consent, the “strong” version of the country of destination approach makes the default legal position a mandatory position – *i.e.* one that cannot validly be departed from – insofar as B-to-C transactions are concerned.

The strong version of the country of destination approach is reflected, as concerns jurisdiction, in legal regimes that give the consumer the right to sue in their own jurisdiction, normally the country of destination, and sometimes the option to sue in the country of origin, while the other party can only go to the country of destination. Agreements departing from this regime are often only valid insofar as they add to the consumer’s options.⁵ As concerns the law applicable to consumer transactions, the strong version of the country of destination approach is reflected in the legal regimes that allow choice-of-law clauses only insofar as they do not have the result of depriving consumers of the protection afforded to them by the mandatory rules of the law of their country, including consumer protection laws.⁶

The strong version of the country of destination approach was put under global scrutiny in the context of the negotiations toward the Judgement Convention organised by the Hague Conference on Private International Law. The latter had undertaken, in vain, the difficult task of finding a widely acceptable middle ground solution for jurisdiction.⁷ Meanwhile, the legal position remains uncertain in many countries⁸ and jurisdiction tends to be easily assumed by the country of destination in tort cases.⁹ In many countries, there is still debate as to which approach to adopt with respect not only to other countries, but also, in federal systems, between jurisdictions within the same country.¹⁰ Concerning applicable law, the country of destination approach is debated in its public policy, consumer protection aspect, which limits the validity of choice-of-law clauses. Again, many countries are debating which approach to adopt in this respect.¹¹

Enforcement of results

Leaving applicable law and jurisdiction aside, the other main element contributing to the uncertainty of the Internet legal environment is the lack of reliable mechanisms for the cross-border enforcement of judgements. There exist only bilateral and regional instruments that effectively serve this purpose. The only open-ended multilateral instrument that could ensure a broad base for cross-border enforcement is the Judgement Convention the negotiation of which has come to a halt. Meanwhile, the situation remains such that even if the proper forum has been found and the proper law been applied, there is no guarantee that the result will be enforced in a country other than that of the forum.

Box 1. Legal protection insurance

In a highly uncertain international legal context, SMEs and consumers might consider resorting to legal protection insurance to cover increasing legal risks. Legal protection insurance is currently expanding, but remains a partial solution which is by no means widespread.

In the **business-to-business** context, insurers that specialise in legal protection offer generic legal “assistance” products rather than legal cost coverage. Such legal assistance programmes increasingly recommend the use of ADR. Other insurers agree to specific cover on the basis of an ad hoc legal risk evaluation, which may be available only to larger businesses. The typical Comprehensive General Liability policy, which is widespread, works only in cases of negligence and only defensively.

In the **business-to-consumer** context, where risk is perhaps more easily spread, insurers have been increasingly active. Trustedshops.com, for instance, offers “safe and secure” online shopping through a web site that features only shops that comply with their requirements for security, privacy and transparency. Compliance is insured through a set of guarantees, including a money-back guarantee, provided by the Gerling Credit Insurance Group. Fia-net is an insurance protection product for online consumer transactions. The product, created in co-operation with AXA Juridica, protects both consumers and merchants against banking card hijacking.

This lack of mechanisms for the cross-border enforcement of judgements is significant in the B-to-B context because it is the weak link in a chain that could otherwise be strong. Choice-of-law and forum selection clauses are usually recognised in the context of B-to-B transactions, which should mean a judgement can be obtained in a relatively predictable manner. But the ultimate result may be very disappointing if the judgement is not voluntarily complied with. In the B-to-C context, the lack of enforcement mechanisms means that consumers residing in the country with the most protective regime, who take advantage of that regime through legal action in their own neighbourhood against foreign merchants, are likely to obtain valid judicial decisions that cannot be enforced where the merchant is located. But this is perhaps of little practical significance, for, given the stakes of a typical consumer transaction, consumers might be ill-advised to seek or unable to afford cross-border enforcement even if it were available. This last point might force us to look for solutions outside any judicial enforcement framework.

Impact on SMEs

In order to provide an idea of the complexity of the legal context in which an SME planning to go online is expected to operate, it is perhaps helpful to refer to the European Union, which constitutes one of the most harmonised “cross-border” settings. At the legislative level of the Union, there are approximately 150 pieces of “Information Society” legislation, proposed or in force, which a business should ideally be aware of. That does not include national instruments within the Union; nor does it include the legislation and case law of every other country in which a business’ web site may be accessed and used. And this complex, world-wide regulatory landscape is in a permanent state of flux. For any business contemplating an online venture, the establishment of a suitable *modus operandi* therefore implies a substantial initial investment in legal resources as well as a permanent effort to keep abreast of rapid developments. The cost may be too high for a substantial portion of SMEs.

The vast majority of surveys used to identify barriers to e-commerce adoption do not include a reference to legal and regulatory issues beyond security, privacy and confidentiality. The little data that can be found, however, do suggest that legal uncertainty is a significant factor. According to a survey of enterprises in Nordic countries, uncertainty relating to contracts and guarantees is of much significance as a barrier to e-commerce adoption for 18% of enterprises in Denmark, 15% in Finland, 14% in Norway and 20% in Sweden.¹²

Concerning SMEs specifically, legal uncertainty concerning contracts, terms of delivery and guarantees was mentioned by a strong percentage of enterprises in that category as a very important barrier

to e-commerce adoption for purchases last year: 40% of SMEs in Spain, 37% in Italy, 24% in the United Kingdom and 20% in Austria.¹³ This issue also had a significant negative impact on adoption of e-commerce for sales. Eurostat figures clearly show that legal uncertainties constitute, at least in some countries, an important barrier to e-commerce adoption by SMEs.¹⁴ According to the same survey of SMEs, the specific problem of national differences in consumer protection was identified as the single most important reason for not using the Internet only by small enterprises (10 to 49 employees in this survey), presumably because smaller enterprises are much less likely to be involved in cross-border commerce whereas medium-sized enterprises (50 to 249 employees in this survey) are more likely to have the resources needed to tackle the complex legal issues involved in cross-border commerce.

In addition, according to an open consultation process on B-TO-B-related trust issues conducted by the Directorate Enterprise of the European Commission between March and May 2002, more than 50% of companies on both the selling and the buying sides consider the “settlement of disputes” to be among the most important trust barriers for SMEs in the context of e-marketplaces. Although participation in this process mostly involved European Union countries, some respondents were from Bologna countries outside the European Union, such as Romania (9.4% of respondents), Israel (1.6%) and the United States of America (1.6%), and from other countries such as Iran (1.6%) and Lithuania (3.1%).¹⁵

Moving on to the perspective of all Internet users, including consumers, the fear of being left with no satisfactory recourse against a prospective transaction counterpart appears to have been remarkably persistent over the years.

Table 1. Reasons for reluctance to buy online

	Internet Users in 1998 (4415)	Internet Users in 1999 (5951)	Internet Users in 2000 (7408)
Difficulties in gaining satisfactory recourse	58%	59%	60%
Inability to confirm seller's credentials	54%	54%	50%

Source: A.C. Nielsen, *Consumer Behavior on the Internet*, January 2001.

This particular fear relating to the availability of a satisfactory recourse is compounded in most cases by the inability of the Internet user to confirm the seller's credentials, which also ranks among the most cited grounds for reluctance to buy online. This last ground, quite obviously, has hardly any effect on larger businesses with highly recognisable brand names: the Internet user who knows a large business through brand recognition does not feel the need to confirm credentials and is much less likely to think about the availability of recourse. It is a question of confidence building, an area in which SMEs are at a clear disadvantage compared to large multinational businesses, especially on a global scale.¹⁶

These are the reasons why finding a way around the legal difficulties outlined above is especially pressing for SMEs. There is a fairly broad consensus among stakeholders that alternatives must be explored while formal efforts toward international legal harmonisation are being pursued. “Complete international harmonisation of applicable laws and international agreements on competent jurisdictions might be the ideal solution in theory, but it is an illusion to believe that this can be achieved in practice”,¹⁷ at least in the foreseeable future. In fact, these two avenues are not entirely independent, for some of the legislative policy deliberations at national and other levels are at least partly contingent upon the growth of alternatives to regulation.¹⁸ There is also consensus that ADR, especially if provided online, holds the key to many of the legal riddles that act as inhibitors to e-commerce adoption.

Alternative dispute resolution

The most direct benefit of ADR in the context of cross-border e-commerce lies in keeping as many disputes as possible out of court and thereby reducing the overall legal costs of cross-border litigation. At a macro level, the benefit lies in cutting down the economic cost of the chilling effect which uncertainty relating to jurisdiction and applicable law appears to have. There is a widely held belief that ADR can provide fair and effective redress and help foster the sense of trust between Internet businesses and other users, including consumers, and thus contribute to the growth of e-commerce.¹⁹

ADR in the business-to-business context

When SMEs slowly began reaching out to markets beyond their national borders in the wake of globalisation and e-commerce, it was natural that they should turn to the prevailing model followed by international business. The reasons why traditional international business normally turns to ADR are well known. They pertain to such advantages as speed, economy, flexibility, neutrality and confidentiality. ADR is generally perceived as faster and more economical than court proceedings; it is seen as more flexible because it can be shaped to suit the specific needs and expectations of parties from different countries and cultures; it is more neutral because rules of procedure can be detached from any particular legal tradition and mediators or decision makers can be recruited from countries with which the parties have no links; it can be confidential depending on the situation.

For traditional international business, the most formal ADR mechanism, arbitration, has the added advantage of binding choice of law, final decisions that are not subject to appeals and, last but not least, facilitated international enforcement in some 135 countries under a proven multilateral framework, i.e. the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention was ratified by all Bologna Charter countries without exception and applies in all APEC economies except for Papua New Guinea. Because of this direct recognition and enforceability, arbitration is the only ADR mechanism that can replace court proceedings when it comes to deciding the merits of a dispute between parties that are unable to come to a settlement. That is the reason why arbitration has become the form of private justice privileged by traditional international business. Even where provisions are made to enjoin parties to a contract to have recourse to other forms of ADR such as mediation, the need for an arbitration clause is still there if one wishes to ensure out-of-court resolution.

When considering the advantages of ADR, it is fairly easy to grasp that they are even more compelling in the context of the smaller cross-border transactions brought forth by e-commerce. It was therefore natural that SMEs should embrace the model. But the realisation that the model in question had been developed by large multinational businesses for large multinational businesses soon followed. Traditional arbitration systems were conceived for cross-border disputes but not for disputes involving modest amounts, and certainly not for consumers. This is reflected in the cost of using such systems, as well as in the time needed to reach results, which in the case of arbitration is hardly ever less than nine months.

Traditional dispute resolution providers have recently started developing small-claims and fast-track procedures. However, each institution has its own conception of small-claims and handles them differently. Differences are important and depend on the purpose and context of each institution, including the kinds of cases they usually handle. For example, the ICC International Court of Arbitration considers as small claims cases where the stakes do not exceed USD 200 000 but has no special procedure for such cases. The American Arbitration Association designed a fast track procedure for cases involving less than USD 75 000. The CCAC, a dispute resolution centre established in Canada, and the CEPANI, a centre established in Belgium, have special procedures for claims of less than, respectively, USD 35 000 and USD 11 000. If the goal of institutions is to lighten the procedures and to accelerate the process, they do

not all seriously minimise the costs. For instance, the Stockholm Chamber of Commerce system puts forward rules for expedited arbitration that simplify the process but barely modify the fee schedule.

Table 2. Costs of traditional arbitration systems for “small” disputes

Institutional and Arbitrator Fees	Claim of USD 7 500	Claim of USD 15 000	Claim of USD 75 000
American Arbitration Association (AAA)	3 695	4 688	7 163
International Chamber of Commerce (ICC)	5 000	5 025	10 500
London Court of International Arbitration (LCIA)	5 978	6 721	9 196

Based on a procedure with a sole arbitrator spending a total of 22.5 hours on the case.

AAA: Arbitrator's fees based on same brackets as LCIA for purposes of calculation.

LCIA: Administrative expenses: USD 2 142 for registration fee, USD 213/hr for Registrar and USD 107x4 hrs for Secretariat. The arbitrator's fees were fixed at USD 142/hr, USD 175/hr and USD 285/hr.

ICC: Average fee used for arbitrator's fees published brackets.

Box 2. Example of Arbitration Fees

A dispute has arisen between a Canadian company and an Australian company. There is a clause in their contract specifying that any dispute will be decided by one arbitrator under the ICC Rules of Arbitration. The total amount of claims is USD 15 000. The advance on costs, which will likely cover the whole procedure, is fixed as follows:

- Administrative expenses (Fee of the ICC) USD 2 500
- Arbitrator's fees USD 2 550
- Total USD 5 550

The minimum arbitration costs represent 33% of the amount in dispute. It would be 66% for an amount of USD 7 500 and 12% for an amount of USD 75 000.

When making these calculations, none of the expenses are taken into account. These usually include fees for legal representation and expenses for hearing rooms, meals and travel. When these are taken into account, the total costs would probably exceed the amount in dispute in our example.

Traditional institutions also provide other ADR services in addition to arbitration. Mediation is the most widespread of the less formal ADR mechanisms and is offered as a service by most dispute resolution organisations. Mediation involves a neutral third party who is usually pro-active in identifying possible solutions. There is also conciliation, a kind of “assisted negotiation” where a neutral third party helps the parties in a more passive way. The efficiency and costs of these and other ADR services are extremely difficult to assess. What can be said in the B-to-B context is that the fees of the professionals involved are not significantly lower than those charged by institutions for arbitrators, which roughly correspond to those of junior partners in international law firms.

Although the dispute resolution model that SMEs naturally turned to when looking across borders was made for disputes between large businesses, it can be made suitable to SMEs with the right precautions and adaptations. ADR being contract-based, the procedure can be designed to be more economical. Providing that one arbitrator, not three, will deal with the dispute, for instance, is a good start. Depending on the kinds of disputes one is looking at, providing for a procedure with no physical hearings can also save a very large proportion of arbitration costs. The need to travel is one of the most costly and burdensome aspects of international procedures. That is the main reason why SMEs should take online dispute resolution (ODR) very seriously. The reproduction of the model in an online environment is an obvious adaptation which traditional and other institutions have begun to implement to various degrees and which looks extremely promising in terms of bringing the costs down to a reasonable proportion of the amounts in dispute. With SMEs increasingly trading across borders and initial transaction costs getting lower, the average amount of a typical e-commerce dispute will be significantly lower than the average previously known in international commerce.

Box 3. ADR and Governments

The use of ADR mechanisms to resolve international business-to-government disputes has been growing world-wide since the 1960's. Investor-to-state arbitration found its way into hundreds of bilateral investment treaties before (and after) being institutionalised by the World Bank through ICSID, the International Centre for the Settlement of Investment Disputes. It is also found in such integration and investment contexts as NAFTA, MERCOSUR and the ECT. Meanwhile, international commercial transactions between states or parastatal entities and private enterprises have increasingly been referred to arbitration, where legal hurdles to state participation are no longer of significance.

Developments have not been as swift in the case of domestic disputes between government agencies and private enterprises, although an increased willingness can be noted on the part of many governments to resort to out-of-court mechanisms. Australian administrative law (through the Commonwealth Administrative Appeals Tribunal Act 1975), for instance, has long made use of conciliation conferences and mediation with respect to administrative decisions that involve businesses.

ADR in the business-to-consumer context

International B-to-C e-commerce will only realise its full potential when consumers are satisfied that they have a satisfactory redress mechanism in case of disputes. The complexity and uncertainty of the current international legal position is such that SMEs are likely to find international consumer transactions unmanageable. Again, it is widely believed that online dispute resolution (ODR) can provide inexpensive, fair and effective redress and thus ensure the growth of e-commerce with the full participation of SMEs.

ADR and consumer protection

If the traditional ADR model for international business needs adaptation and caution when used by SMEs, it is obviously even more so when SMEs transact with consumers. The following assumptions are usually made in the traditional, B-to-B ADR model:

- Parties are free at any time to limit or waive their right to go to court in favour of arbitration or other processes.
- Parties to a dispute share equally in the costs of ADR unless and until the parties agree otherwise or a legal ruling such as an arbitral award orders otherwise.
- Parties are equal in the eyes of the law and their contract binds them.

- Parties to a settlement agreement can count on it being “binding”.

Each of these assumptions points to constraints that need to be borne in mind in developing ADR mechanisms for cross-border consumer transactions.

The assumption that parties are free at any time to limit or waive their right to go to court has two aspects in the context of consumer transactions. The first aspect concerns the possibility for a consumer validly to enter into an arbitration agreement, which amounts to a waiver of the right to go to court. There is no universal answer to that question. There are regimes where consumers are free to enter into pre-dispute arbitration agreements provided the nature or cost of the process is not such as to make the agreement fundamentally unfair or unconscionable;²⁰ there are regimes where consumer arbitration or conciliation is organised under legislative instruments by administrative or joint agencies;²¹ and then there are regimes where consumer arbitration provisions are invalid or of no effect unless the consumer agrees to arbitrate after the dispute has arisen.²² The second aspect of this assumption concerns the validity and desirability of agreements whereby participation in an ADR process is made a pre-condition to any other legal action. This, again, has no clear and uniform legal answer. As a matter of policy, there is no agreement among stakeholders as to the desirability of such provisions.²³ This issue should be a matter of concern to SMEs for a simple reason: the overall legal costs eventually assumed by SMEs in e-commerce will grow in inverse proportion to the number of disputes that are settled out of court.

The assumption that parties to a dispute share equally in the costs of ADR unless and until the parties agree otherwise (or a legal ruling such as an arbitral award orders otherwise) is understood to be out of place in the context of consumer ADR. Policy statements that have been made in this connection take the position that ADR should be available to the consumer either at no cost or for a modest contribution. The “other side” of the transaction might somehow be expected to bear the inevitable cost differential. From the point of view of large businesses, this may be easy to agree to and there are precedents. Often with a view to avoiding regulation, large industry associations have made ADR systems available to consumers at no cost. The Canadian Motor Vehicle Arbitration Plan affords a good example of such system.²⁴ But SMEs are in a very different position in terms of both means and organisational power, especially on a global scale. Even if it is assumed that the cost of such systems must somehow be borne by SMEs (and eventually be worked into the price charged for goods and services), there appears to remain a serious organisational vacuum. No organisational or ADR business model has yet attracted widespread adoption among SMEs.

The assumption that parties are equal in the eyes of the law and bound by their contracts, taken from the B-to-B context, holds only partially in the context of B-to-C interactions. As already indicated, a number of legal provisions in a contract between a consumer and a business, including a choice-of-law clause, may quite simply be unenforceable against the consumer based on public policy considerations. Such considerations derive from an assumption of power disparity between the consumer and the business which e-commerce might perhaps make somewhat less persuasive. SMEs are held to the same standards as large businesses in this respect. This reality should encourage the use of ADR techniques that allow interests-based results, not only conclusions strictly based on legal rights. To give a simple example, there is no reason why an ADR mechanism should not result in a consumer who has a legal right to financial compensation obtaining instead some in-kind redress that is worth to the consumer more than what the financial compensation would be, while it is worth less to the business. Legal rights should always be a factor in mediation as they have always been in negotiation. But they should not constitute a limiting factor in the search for solutions that leave both parties better off, in their own evaluation of this notion.

The assumption that settlement agreements are binding should also be handled with care in the context of B-to-C ADR. One should firstly keep in mind that, like any other agreement, a settlement agreement is liable to being avoided on consumer-protection grounds. This goes to the effectiveness not of

the original contract but of the very result of the ADR mechanism. It was mentioned that even an arbitration result might not be final where a consumer is a party; the same can be said of settlement agreements. Secondly, one should also remember that, unlike arbitral awards, settlement agreements – even if binding – have little or no claim to cross-border enforceability. Arbitration results in awards that may be directly enforceable under an international instrument. But there is no international instrument that has this effect with respect to settlement agreements. In some jurisdictions, in some cases, settlement agreements may be registered with the local courts and become locally enforceable. But generally speaking, settlement agreements are nothing but contracts, the breach of which must be put before a court of law – or an arbitrator – before redress can be ordered and enforced. This is perhaps of particular significance to SMEs, since the very possibility of settlement breaches opens up a window of international legal risk which, under an economy-of-scale logic applied to legal services, is necessarily heavier to bear for SMEs than it is for larger businesses

Box 4. B-to-C Transaction Case Study

A consumer located in Paris purchases an electronic organiser through a website operated by a Texas SME. Soon after delivery, the product is found defective.

Terms and conditions

- Price: USD 400
- Governing Law: State of New York (USA)
- Choice of Court: Texas

Following an attempt to deal with customer service using the contact information provided on the website, the consumer has at least the following options against the SME:

- Court action in France under the laws of the State of New York, possibly followed by an attempt to enforce a French judgement in Texas;
- Court action in France under French Law, possibly followed by an attempt to enforce a French judgement in Texas;
- Court action in Texas under, at least, the laws of the State of New York.

The situation is unsatisfactory for all involved because the SME is not in a position effectively to control its liability and court action is far too expensive for the consumer when compared to the amount at stake.

Autonomy of ADR mechanisms and schemes

Taking stock of the various assumptions and constraints that were outlined for B-to-C ADR, some conclusions may be drawn with respect to the directions that would seem most likely to function globally in the short term. These conclusions go directly to policy differences that might remain among stakeholders concerning the deployment of ADR mechanisms. “Three areas requiring further debate among stakeholders are particularly clear. First, stakeholders disagree as to whether there are situations where it should be mandatory for consumers to engage in an ADR process before going to litigation. Second, stakeholders disagree as to whether online ADR resolutions should, or even could, be binding on parties. Third, stakeholders need to further explore what are the most effective means to ensure compliance with, and enforcement of, ADR processes and outcomes.”²⁵ As different situations and contexts may call for different approaches, the conclusions drawn here are to be taken as general.

Firstly, although there is scope for binding arbitration in the B-to-C, cross-border context, public policy constraints (and the uncertainty of their effect in each case) significantly curtail the interest of this mechanism unless it is set up to be binding only on the business. Schemes that affect the right of the consumer to seek redress in court when the dispute arises appear to have limited room to grow in the prevailing international legal environment. Secondly, issues of applicable law are fraught with similar difficulties and choice-of-law provisions have uncertain and limited effect depending on each private

international law scenario. Mechanisms such as mediation or assisted negotiation, which do not rely exclusively on legal, rights-based considerations, therefore appear more promising. Thirdly, the quest for an ADR result that is both binding and enforceable in the traditional legal sense will remain futile in practice in most cases involving a consumer. Either the ADR result is a settlement agreement for which there is no cross-border enforcement framework or it is an arbitral award, which could be enforced internationally if only the amount of the award could justify the expense. The value of the average B-to-C Internet transaction is not sufficient to cover the average cost of enforcing an award – or a judgement – across borders. One should therefore encourage the search for ADR schemes that do not rely on courts for implementation. It might be worth noting in this respect that negotiated or mediated solutions, because both parties agree to them, are probably more likely to be implemented voluntarily. Business incentives to comply can also be built into the balancing of an ADR scheme, which amounts to a “self-enforcement” mechanism.

The above conclusions do not exclude any form of ADR in the context of B-to-C, cross border disputes; they simply identify as the most promising forms of ADR those that can be deployed on a global scale immediately, without encountering the legal difficulties that were referred to. Such forms of ADR leave most or all consumer rights intact before, during and even after the process but are so attractive to consumers that the business risk involved in consumers going to court virtually disappears. The first step in achieving this would appear naturally to lie in the establishment of a good internal complaint handling system the aim of which should be to prevent all disputes. This is a task for which SMEs might require help. Recourse to an ADR mechanism would then be had to solve only those differences that could not be solved through the complaint handling system. The selection or setting up of external ADR systems is another area where SMEs might require assistance.

SMEs and models for online ADR

An important element of an ADR system, an element that goes to make such system attractive to the consumer, is the assurance that compliance will follow the ADR result. Such assurance may of course take many forms, from organised peer sanctions, through the removal of some form of certification, to insurance schemes. The possibilities would be numerous in a traditional environment; they are multiplied in the online environment. Not only can the ADR process be conducted online, where the transaction took place, but a whole trust scheme or network can be organised in the same environment and comprise an ADR system. It is quite clear that online ADR, or ODR, can bring solutions to SMEs that they could not afford offline. The central promise of ODR is to make the cost of cross-border dispute resolution proportionate to the amounts at stake.

Despite the many possibilities, promises and projects that the past few years have seen, clear business or other models have yet to emerge for the provision of ODR. The challenge of establishing such models lies in finding ways and means to finance ODR while maintaining independence and impartiality safeguards that may be uncontroversial and universal in theory but not necessarily easy to tackle in practice. It should be noted that developing ODR software applications takes a great deal of resources and that ADR cost-cutting through ICT may require a substantial initial investment.²⁶ Private ADR providers, which may themselves be SMEs, may find it hard to build a path to sustainability without some form of corporate sponsorship that might raise issues of independence and impartiality. A related point is that things do not appear to be moving more swiftly on the demand side, as significant uptake would depend heavily on confidence in the models.

Box 5. Online dispute resolution pros and cons

Pros

- Easy access from where the transaction took place.
- Low cost.
- User-friendliness.
- Speed of communication.
- Efficiency of communication (no “telephone tagging” or call waiting).
- Convenience for parties.
- Less emotional than face to face meetings.
- Record of proceedings and tracking.
- Equality of the parties in their online presence.
- Technology leverage to improve process (e.g. inexpensive web-conferencing, instant gist-translations, automatic transcripts, real-time keyboard-conferencing, computer-assisted negotiation; database support for decisions, etc.)

Cons

- Compatibility of equipment and operative software.
- Loss of visual or verbal communications cues.
- Lower pressure to settle.
- Difficulty in handling consumers with low literacy skills.
- Need to ensure the security of confidential communications and documents.
- Need for authenticating systems identifying the parties.
- Risk of high volumes of frivolous complaints.
- Difficulty in balancing the “business model” between affordability, quality and integrity.

There is a consensus that efforts to devise ADR mechanisms must take into consideration the voice of all stakeholders. The OECD guidelines for consumer protection in the context of electronic commerce provide that “businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms to address consumer complaints and to resolve consumer disputes arising from B-to-C electronic commerce, with special attention to cross-border transactions.”²⁷

The industry initiatives that were observed – and put to the test of consumer association criticism tanks to governmental self-regulation facilitation initiatives – since the publication of the guidelines, however, are very often somewhat lacking in terms of SME representation²⁸. In this ongoing process, SMEs have somehow not sufficiently organised to be heard as stakeholders. And their interests in building

confidence are objectively not the same as those of the large businesses that have often led self-regulatory initiatives in the context of ADR. One might legitimately ask, for instance, whether larger businesses with internationally recognisable brand names are not actually benefiting from the prevailing lack of trust. This “confidence deficit” objectively gives them a competitive advantage over SMEs in that consumers who are unable to verify the credibility of a small web merchant will naturally turn to the large multinational merchant they already know. As the guidelines already indicate, governments need to be involved in the development of ADR models; in doing so, they have a role to play in ensuring that SMEs’ interests are reflected in the frameworks and systems that ultimately emerge to govern consumer redress in e-commerce.

II. IDENTIFYING ADR SCHEMES AND MECHANISMS

Based on a broad international consensus that “businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from B-to-C electronic commerce, with special attention to cross-border transactions,”²⁹ ADR schemes and mechanisms have been growing in numbers over the past few years. This Chapter will briefly take stock of what has been achieved in terms of the creation of ADR options that SMEs might resort to.

Several inventories of ADR schemes and mechanisms have been published since ADR was put on the international e-commerce agenda. The Global Business Dialogue on Electronic Commerce released the first one in early 2000. It focused on ODR and reviewed nine initiatives.³⁰ The next inventory, which was first published by Consumers International toward the end of 2000, surveyed and analysed 32 ODR initiatives.³¹ The International Chamber of Commerce had also released in September 2000 an inventory of ODR initiatives containing some 40 initiatives,³² which was updated in December, in co-operation with the OECD.³³

An update of the Consumers International inventory was released at the end of 2001 which included 29 initiatives, 13 of which were deemed “useful to consumers” by the organisation.³⁴ A more recent inventory was released by the International Chamber of Commerce, which worked on the basis of a questionnaire to ADR providers developed in partnership with the OECD.³⁵ The latter two inventories, upon which this analysis is based, are partly reproduced in ANNEX I and ANNEX II of this Report for ease of reference. A comprehensive, general chart of ODR initiatives, including B-to-B initiatives, based on data from a review conducted in March 2003 for the Department of Justice of Victoria, Australia, can also be found in ANNEX III of this Report.^{35a}

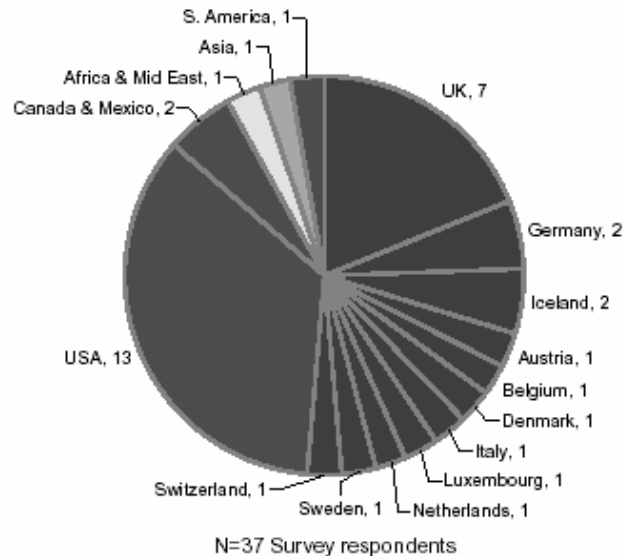
Methodology and Overview

In terms of methodology the ICC survey and the Consumers International survey are both based on a preliminary at-large, international inquiry into existing dispute resolution organisations followed by the submission of a questionnaire to the respondents thus identified. The Victoria review was limited to site visits. In the case of Consumers International, a further in-depth analysis of the relevant websites was conducted and an assessment made on the basis of the organisation’s guiding principles for ODR. The surveys resulted in inventories meant to assist potential users in finding and selecting the most appropriate service provider in view of their particular needs.

The most significant difference between the surveys lies in their respective scope. The ICC and the Consumers International surveys target ADR services for disputes arising out of online transactions involving a consumer (B-to-C and C-to-C).³⁶ But, whereas the ICC survey includes ADR services provided offline, the Consumers International survey is limited to ODR (ADR provided online). This difference in scope explains at least in part the significant disparity in the geographical distribution of the respondents identified by the two inquiries. Of the 29 service providers identified in the Consumers International survey, 24 are based in North America (22 in the United States of America; 2 in Canada); the other 5 are based in Europe. The ICC survey, in contrast, identified 37 organizations located in 16 countries from

across the Americas, Europe, Asia, the Middle East, and Africa. Still, even where offline ADR providers are accounted for, as in the ICC survey, more than four-fifths of the organisations handling B-to-C and C-to-C online transactions are situated in the United States of America and Europe. As for the Victoria review, it includes past, current and planned initiatives ranging from B-to-B through B-to-C to C-to-C, and from email complaint handling services through online filing technology to online arbitration. A total of 76 sites were singled out for analysis. Forty-three were from the United States of America, 20 from Europe, four from Canada, four from Australia and four from the rest of the world.

Figure 1. Geographic Distribution of ICC Survey Respondents



In terms of services offered, the statistical results of the Consumers International survey were as follows:

- 12 of the 29 service providers offer automated negotiation services. Of these, a few limit their service to insurance or personal injury cases. Six offer only automated services, and four offer automated negotiation as part of a suite of services.
- Five provide complaints assistance services, of which one provides only such services.
- Seven offer facilitated negotiation services, usually in conjunction with mediation and/or arbitration.
- 17 offer mediation services. Of these, three offer only mediation.
- 11 offer arbitration services. Of these, two offer arbitration services only. Eight offer both binding and non-binding arbitration, while three offer non-binding arbitration only (one in the form of mock trials).

The ICC survey established four categories of ADR services (arbitration, mediation, assisted negotiation and automated negotiation), doubled by a distinction between services provided online and offline. Within the ICC group of respondents, offline services were more prevalent than online services. In the category of online services, assisted negotiation was the most widely offered service: 54% of the respondents offered that service. Automated negotiation was available from only 27% of the respondents. In the offline category, mediation was the most widely available service, with 70% of the respondents offering it.

Table 3. Breakdown of Services by Percentage of Providers (ICC survey; N=37)

	Offered ONLINE	Offered OFFLINE
Arbitration	35%	57%
Mediation	41%	70%
Assisted Negotiation	54%	68%
Automated Negotiation	27%	16%

Of the 29 service providers reviewed by Consumers International, 21 offered services in English only. Three offered services in English and one other language, one in English and two other languages, and four in a number of languages other than English. The ICC survey also concluded that English was the most popular language of services. A few respondents, primarily government consumer bodies offering dispute resolution services, did this only in the language of their country. European providers tended to offer services in a number of languages, usually including English, French and German. Services in Chinese and Japanese were offered by some providers outside Asia. Many providers from the United States of America offered services only in English. Only a handful of providers offered services in more than 5 languages. Of the 76 initiatives analysed by the Victoria review, 49 appeared to offer services in English only.

In terms of funding, the vast majority (23) of the 29 service providers reviewed by Consumers International were private, for-profit initiatives depending primarily on user fees. Six were funded by business subscriber or membership fees, sometimes in addition to user fees. Two were funded by consumer organisations and government grants and three by public institutions/private foundations. The ICC survey found that government-related (public or quasi-public) dispute settlement bodies received public funding and that many private ventures reported receiving government grants. The providers financed by external private investments which did not report receiving government grants were all in the United States of America.

Assessment

Although SMEs were not specifically contemplated in the methodology, the results summarized here provide a good general picture of existing ADR schemes and mechanisms that SMEs might use in the context of cross-border consumer transactions. One point that bears mention at the outset is the relative scarcity of service providers, even where offline government consumer-protection ADR schemes are counted in (as they were in the ICC survey), and time-bound pilot projects are included (as is the case of ECODIR, which was surveyed by Consumers International and reviewed in the Victoria Report). These numbers go to the business model conundrum, which also explains many of the other salient points of the state of affairs in the “market” of ADR schemes for consumer. Beyond this preliminary comment, four points will be highlighted which qualify and augment the surveys’ findings.

The first point is the high concentration of providers in North America and Europe and the ensuing scarcity of services available in languages other than English. This is of particular importance in the context of ADR because the latter is often legally grounded in contractual provisions which in many countries would be considered invalid if not couched in the language of the consumer. Also, SMEs can be said to be in an entirely different position in this respect than large multi-national companies that maintain a website in each country where they do business. SMEs would appear to need mechanisms and services that help them go the extra step towards consumers in other countries through ADR schemes that bridge the language gap for them beyond the transaction itself, which consumers are often happy to go through in any language they “roughly” understand.

The high concentration of providers in North America and Europe, beyond the language issue, might also signify a service supply range which is somewhat distorted in view of the demand as analysed more internationally. The “blind-bidding” services found in the United States of America, for instance, might be thought to exist in response to needs of the insurance industry specific to that market.

The second point was not mentioned in the Methodology and Overview section. It is the question of costs and fee structures. The Consumers International survey was not particularly helpful from the perspective of SMEs because it focussed on the question of the cost to consumers. The report does address the issue of funding, however, and mentions the concepts of business subscription schemes, business membership fees, funding by consumer organisations and government and private venture or foundation capital. We have not seen market stabilisation in this area and pricing discrepancies are accordingly vast. The ICC survey, which did not take the particular perspective of one protagonist in looking at costs, reports that reliable information on pricing could not be obtained from a large portion of the respondents. This is also apparent from the Victoria review, which reports, under the heading Fee Structure, “unknown” or “no information provided” for a large number of initiatives.

The third point concerns internal complaint management systems, which are left out of the surveys and may impact significantly on the ways in which ADR schemes ultimately play out in the broader picture. There is a very broad consensus that a consumer should always first try to solve any problem directly with the merchant. Traditionally and generally, this means contacting the seller using the email address or the phone number provided on the website. More recently, large businesses, particularly in the financial services sector, have been experimenting with partially automated, multi-media complaint management systems that are integrated in their customer relationship management (CRM) strategy (and which make use of “intelligent agents”). This is giving a boost to the CRM software industry which, according to an estimate, should see a growth of 27% per year from USD 9.4 B in 2000 to USD 72.6 B in 2005.³⁷ The result of this growth could be a “takeover” of a significant part of the ADR and ODR market by CRM services and software providers, and the availability, in time, of cheap, multilingual, advanced CRM tools that SMEs might use to solve all but a marginal portion of their consumer problems.

The fourth and last point is largely left out of the surveys and goes to the complex interplay between ADR providers and the other protagonists of the trust-enhancement market. A full understanding of how ADR services are, should or might be provided in the context of e-commerce in general and consumer transactions in particular requires a broader view of trust-enhancement schemes. This brings us to the “business model conundrum”.

Chapter I of this report indicated that clear business or other models have yet to emerge for the provision of ODR, explaining that the challenge of establishing such models lay partly in finding ways and means to finance ODR while maintaining independence and impartiality safeguards. It was noted that developing ODR software applications required a great deal of resources and that ADR cost-cutting through ICT may require a substantial initial investment.³⁸ Private ADR providers, which it was noted may themselves be SMEs, find it difficult to build a path to sustainability without some form of corporate sponsorship. The latter is neither ideal, because it might raise issues of independence and impartiality, nor easy to secure. Uptake is at any rate very slow as it would depend on a fairly high degree of pre-established confidence.

Going back to the surveys for a brief moment might be illustrative of the situation. The Consumers International results, which are now two years old, show the extreme instability of the market when checked against today’s situation. The online dispute resolution providers listed in that survey report were paid a virtual visit on 1 November 2003, for the purpose of this report. Of 29 providers, 9 had completely disappeared from the Internet, 2 had merged and become one operation, one had a “for sale” sign on its home page and a further 3 were known to the author of this report as maintaining a front and

having no full-time staff. Of the 87 initiatives mentioned in the Victoria review, 27 are no longer operating and many others are little more than a web site.

Noting that the number of ODR providers had contracted in 2002, the Final Report of the American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution makes the following observations, which bear reproduction:³⁹

- The ODR community is, in most respects, still in its infancy, without a meaningful database of experience, information or analysis.
- No strong or significant business or “trade” association has emerged, around which the ODR community can coalesce, particularly on a worldwide basis.
- To date, consumers worldwide do not have great awareness of the existence of ODR as a means of resolving disputes generated online or offline. They are not, therefore, making decisions whether or where to transact online based on the availability of ODR.
- Existing ODR providers range from the old, respected and financially stable to the new, unproven and less capitalized. The ODR industry is currently in a state of flux and some providers will ultimately fail, as is natural in any new marketplace.
- Whether styled as a for-profit or as a non-profit entity, each member of the ODR community is subject to all forms of market pressures and business and financial realities and can be expected to respond to those pressures and realities as any other business entity might respond.
- ODR for B2C transactions is intrinsically multi-jurisdictional and exceedingly complex, yet subject to severe financial limitations. Since many B2C disputes involve dollar values that are relatively low, it has been challenging for ODR providers to provide such services and to generate a profit.
- No guidelines or standards for ODR have emerged as a dominant code of practice within the ODR community.

The question of sustainability and stability for the ODR market, however, goes beyond the direct delivery of services by providers to users and into the larger problem of what might be termed the “economics of trust”. The uptake of trust marks – the market-driven scheme most cited as the natural home for ADR – has thus far remained below expectations. The insurance model is just beginning to emerge on what could be termed a trial basis and ADR providers are still struggling to create models that balance the need for corporate funding with the requirements of impartiality and independence. In the context of ADR for transactions involving consumers, it is not clear that market mechanisms and self-regulation alone will suffice to meet the needs of all involved and establish trust beyond laws and courts.

The question therefore arises whether ADR for cross-border transactions involving consumers might not fall squarely within that sphere where market failures, due to a particular configuration of forces and complex parameters, inhibit the development of a market where private interests otherwise broadly overlap with public interests. This hypothesis is currently under discussion within the OECD Working Party on Information Security and Privacy in the broader context of trust products for B-to-C interactions and transactions.⁴⁰ Market failures in that broader context were also recognized by the American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution, which felt compelled to conclude, beyond the issue of ADR, “that other tools necessary to assist the online consumer are still not in place” and “that there are in fact existing structural failures in addressing the reasonable concerns of consumers on a worldwide basis”.⁴¹ A proposal was put forward for an OECD feasibility study toward the establishment of Public-Private Partnerships in the deployment of trust-enhancing policies. ODR was singled out in this proposal, together with privacy-enhancing tools.⁴²

1. “Building Trust in the Online Environment”, OECD, HCOPIL and ICC Joint Conference Report, paragraphs 162-165, available at:
http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.
2. Landwell/Pricewaterhouse Coopers, *Time for Law and Order*, 2001, at www.ebcenter.org.
3. These terms represent useful generalisations for an otherwise highly complex legal and political reality.
4. Cf.: International Chamber of Commerce, “Jurisdiction and applicable law in electronic commerce” (6 June 2001), policy statement available at <http://www.iccwbo.org/>.
5. This is the overall European position, which is taken by other jurisdictions such as Switzerland and Quebec. For the EU, see: Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, O.J. L 12/1, Art. 5, 16 (December 22, 2000, effective 1 March 2002) (Brussels Regulation). 319/9, articles 16 and 17. For Switzerland, see: Federal private international law statute, article 114. For Quebec, see: Civil Code, article 3149.
6. The same jurisdictions may be given as examples. For the EU, see: Convention on the law applicable to contractual obligations (1980) O.J. L 266, 9. 10. 1980, p.1, article 5(2). The 1997 Directive on distant contracts confirmed the applicability of this regime to Internet transactions regardless of the location of the other party (Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts O.J. L 144, 04/06/1997 p. 0019). The European policy choice in favour of the strong version of the country of destination approach is to a certain extent offset by the more recent Directive on Electronic Commerce (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market) which adopts a country of origin approach with respect to “the protection of public interest objectives” (Recital 22: “Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established”. But the Directive apparently leaves the existing level of protection for consumer interests untouched (Article 1(3): “This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services”). For Switzerland, see: Federal private international law statute, article 120. For Quebec, see: Civil Code, article 3117.
7. See Bureau of the Hague Conference on Private International Law, “The Impact of the Internet on the Judgements Project: Thoughts for the Future” by April D. Haines, Preliminary Document 17 February 2002 for the Special Commission of April 2002 on General Affairs and Policy of the Conference, available at <http://www.cptech.org/ecom/hague/hague17feb2002-ah-internet.rtf>.
8. Japan is one example among many others. See: Yoshihisa Hayakawa & Dai Yokomizo, “E-commerce and Private International Law in Japan”, Paper delivered at the IST 2000 Event, November 2000, available at <http://2000.istevent.cec.eu.int/en/index.htm>.
9. On jurisdiction over copyright infringement in China, see: Supreme People’s Court Interpretation on the Law Application in the Trial of Internet Copyright Disputes, available at <http://www.lawinfochina.com/LegalForum/ChineseLawInterpreted>; on jurisdiction in cases of defamation in Australia (Victoria), see: *Gutnick v. Dow Jones*, [2001] VSC 305 (special leave to appeal to the High Court granted 14 December 2001).
10. In the United States, for example, Internet jurisdictional principles vary from state to state and trends are evolving rapidly. In the early stages, the question of Internet jurisdiction was highly unpredictable (see for instance *Inset Systems Inc. v. Instruction Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996), assuming jurisdiction

on the basis of posted information that could be accessed in the forum, and *Bensusan Restaurant Corporation v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd.*, deciding that “the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.” The following year, the Pennsylvania District Court in *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) established a new test for Internet jurisdiction referred to as the “Zippo continuum”: the more “active” the web site in a particular forum, the more likely the court is to exercise personal jurisdiction over the defendant. The Zippo case remained the reference for about two years. Then a shift could be seen towards a broader approach focusing on actual effects rather than characteristics of the web site and its potential impact (See for instance *Mattel Inc. v. Adventure Apparel*, 2001 WL 286728 (S.D.N.Y. 2001), and *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (2000). The evolution has been similar in the common law jurisdictions of Canada. See, generally, Michael Geist, “Is There a There There?: Towards Greater Certainty for Internet Jurisdiction” 16 (2001) *Berkeley Tech Law Journal*, available at: http://www.law.berkeley.edu/journals/btlj/articles/16_3/geist/geist.pdf.

11. The traditional basis for the strong consumer protection approach is an assumption of power disparity between consumer and business which, it might be argued, could be revisited in the context of e-commerce, where the average business is probably smaller (See Henry H. Perritt, Jr., “Economic and Other Barriers to Electronic Commerce”, (2000) 21 *U. Pa. J. Int'l Econ. L.* 563) and the average consumer better informed. The ability of consumers to make informed and valid choices of law and forum is central to the debate.
12. Statistics Norway, *Use of ICT in Nordic Enterprises 1999/2000*, 2001, p.20.
13. European Commission, “Benchmarking National and Regional E Business Policies (Stage 1 – Synthesis Report)”, February 2001 (Figures from Eurostat Survey).
14. *Idem.*
15. European Commission (2002), *Commission Staff Working Paper on B2B Internet Trading Platform: Opportunities and Barriers for SMEs –A First Assessment*, SEC(2002) 1227.
16. OECD (2001) “The Internet and Business Performance”, *Business and Industry Policy Forum, Report on Proceedings*, p. 25. <http://www.oecd.org/pdf/M00023000/M00023758.pdf>.
17. *Global Business Dialogue on Electronic Commerce*, “Consumer Confidence: Alternative Dispute Resolution”, September 2001, at www.gbde.com.
18. OECD, *First Report: Government and Private Sector Initiatives to Promote and Implement the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* 9 (Feb. 2001) available at [http://www.oecd.org/olis/2000doc.nsf/LinkTo/DSTI-CP\(2000\)7-FINAL](http://www.oecd.org/olis/2000doc.nsf/LinkTo/DSTI-CP(2000)7-FINAL).
19. “Building Trust in the Online Environment”, OECD, HCOPIL and ICC Joint Conference Report, at http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.
20. E.g. people’s Republic of China and United States of America. For China, see: *Consumer Rights and Interests Protection Law*, 4th Session of the Standing Committee of the 8th National People’s Congress, 1993, articles 24 and 34(4), available at: <http://www.ciroap.org/apcl>. For the USA, see Supreme Court decision in *Green Tree Financial Corp. Alabama et al. v. Randolph*, 178 F. 3d 1149 (2000) and National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol: Statement of Principles*, 1998, available at: <http://www.adr.org>.
21. E.g. Indonesia and Japan. For Indonesia, see: *Law No 8 of 1999 concerning Consumer Protection*, article 52. For Japan, see generally Norihiko Maeda, *ADR in Japan*, Japan Commercial Arbitration Association, available at <http://www.jcaa.or.jp>.
22. E.g. Sweden. See: *Arbitration Act (SFS 1999: 116)*, article 6. This is probably the case throughout the European Union. See: *Council Directive of 5 April 1993 on unfair terms in consumer contracts*, 93/13/EEC, article 3(1): “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer”; article 3(3): “The Annex shall

- contain an indicative and non-exhaustive list of the terms which may be regarded as unfair”; annex, (q): “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.” Available at: http://europa.eu.int/comm/consumers/policy/developments/dist_sell/dist01_en.pdf.
23. “Building Trust in the Online Environment”, OECD, HCOPIIL and ICC Joint Conference Report, at http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.
 24. See <http://www.camvap.ca/index.html>. Under this scheme, the consumer makes a choice between courts and arbitration after the dispute has arisen.
 25. “Building Trust in the Online Environment”, OECD, HCOPIIL and ICC Joint Conference Report, at http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.
 26. European Commission (2001), “Business Process Models and Technical Requirements for Online Dispute Resolution”, Workshop Report, Joint Research Centre, Ispra, Italy.
 27. OECD, Guidelines for Consumer Protection in the Context of Electronic Commerce.
 28. Cf. the list of initiatives mentioned in OECD (2001) First Report: Government and Private Sector Initiatives to Promote and Implement the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, pp. 9-10 (Feb. 2001) available at: [http://www.oecd.org/olis/2000doc.nsf/LinkTo/DSTI-CP\(2000\)7-FINAL](http://www.oecd.org/olis/2000doc.nsf/LinkTo/DSTI-CP(2000)7-FINAL).
 29. OECD, Guidelines for Consumer Protection in the Context of Electronic Commerce.
 30. The document is available at: <http://consumerconfidence.gbde.org/adrinventory.pdf>.
 31. “Disputes in Cyberspace – online dispute resolution for consumers in crossborder disputes: Executive Summary, Conclusions, Recommendations and Summaries of Online Alternative Dispute Resolution Services”. Available at: <http://www.consumersinternational.org/campaigns/index.html#electronic>.
 32. “Out-of-court Settlement of Disputes Concerning E-commerce Consumer Transactions: An Inventory of Current Approaches”, September 2000.
 33. OECD, “Inventory of Online ADR Mechanisms”, DSTI/ICCP/REG/CP(2001)2, available at http://www1.oecd.org/dsti/sti/it/secur/act/online_trust/documents.htm.
 34. “Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-border Disputes”.
 35. International Chamber of Commerce, Business-to-Consumer and Consumer-to-Consumer Alternative Dispute Resolution (ADR) Inventory Project: Summary Report, Paris, July 2002.
 - 35a. Conley Tyler, Melissa & D. Bretherton, “Research into Online Alternative Dispute Resolution”, report prepared for the Department of Justice, Victoria (March 21, 2003).
 36. Other differences are less significant. Firstly, the Consumers International survey targets dispute resolution for cross-border disputes whereas the ICC survey includes providers with no cross-border services. In reality, only three of the ICC survey respondents had no cross-border services. Secondly, the Consumers International survey targets dispute resolution arising out of B2C transactions but reviews the services of SquareTrade for C2C transactions.
 37. Gartner Group, “CRM Spending to reach \$76.3 Billion in 2005”, Press Release, March 7th 2001, available at <http://www3.gartner.com>.
 38. European Commission (2001), “Business Process Models and Technical Requirements for Online Dispute Resolution”, Workshop Report, Joint Research Centre, Ispra, Italy. The now defunct ODR provider eResolution, in which the author of this report was involved, had invested well in excess of USD 1M to build the first generation of ODR software. When venture capital had dried up, revenues were insufficient to make the venture viable.

39. American Bar Association (Task Force on Ecommerce and ADR) (2002), Addressing Disputes in Electronic Commerce: Final Recommendations and Report, August 2002, p. 18.
40. OECD (2002e), Trust-Enhancing Policies: Public-Private Partnerships – Proposal for a Feasibility Study, DSTI/ICCP/REG/RD(2002)5, October 2002.
41. American Bar Association (Task Force on Ecommerce and ADR) (2002), Addressing Disputes in Electronic Commerce: Final Recommendations and Report, August 2002, p. 19.
42. OECD (2002e), Trust-Enhancing Policies: Public-Private Partnerships – Proposal for a Feasibility Study, DSTI/ICCP/REG/RD(2002)5, October 2002.

III. FOSTERING ONLINE ADR BEST PRACTICES FOR SMES

Starting from existing practices, recommendations and guidelines relating to B-to-C ADR, this Chapter will bring out the main points of agreement as well as the areas where more policy or consensus-building work is needed. The analysis will first focus on guidelines for ADR mechanisms and schemes before turning to other areas where particular policy attention appears necessary in view of the specific needs of SMEs. One of the most pressing concerns in this area being information and education, an educational instrument meant to assist SMEs in making decisions and choices about ADR in the B-to-C context is presented for adoption (see Annex III). It was also recommended at the Geneva meeting of June 2002 that a similar ADR educational instrument be prepared for SMEs in the B-to-B context.

Guidelines for ADR

The OECD was among the earliest and most effective actors in the development of international standards for electronic commerce transactions. In 1997, the organisation stressed the necessity of international cooperation not only among governments but also among all stakeholders.⁴³ Shortly after, the Joint EU – US Statement on Electronic Commerce encouraged an open international dialogue between governments and the private sector with a view to building a predictable legal and commercial environment on the Internet. The Statement recognised the role of governments in the protection of consumer and other public interests and the role of self-regulation in devising such mechanisms as codes of conduct and guidelines.⁴⁴

The OECD Committee on Consumer Policy started to work on guidelines in cooperation with business and consumer representatives in 1998. The OECD guidelines for consumer protection in the context of electronic commerce were adopted by the Council in December 1999. They provide that consumers should be given “meaningful access to fair and timely dispute resolution and redress without undue cost or burden” and that “effective and transparent self-regulatory and other procedures” should emerge from businesses, consumer representatives and governments working together.

The OECD guidelines were endorsed by the G-8 in the Okinawa Charter on Global Information Society of 2000, which mentions the use of ADR as an option to alleviate the difficulties faced by consumers in cross-border disputes and states that, “although the private sector plays a leading role in the development of information and communications network, it is up to governments to create a predictable, transparent and non-discriminatory policy and regulatory environment”.⁴⁵

The European Union and the United States of America renewed their commitment to the OECD guidelines at their summit of December 2000. The joint statement issued on that occasion explicitly recognises the benefits of fair and effective ADR, especially if provided online, and the importance of promoting it. Fair and effective ADR is also tied to principles of impartiality, accessibility, low or no cost to consumer, transparency and timeliness of redress.⁴⁶

Apart from the multilateral efforts mentioned above, governments and private organisations contributed significant initiatives toward standardization. Examples of early initiatives include:

- The Australian Best Practice Model for Business.⁴⁷
- Consumer Protection for Electronic Commerce, A Canadian Framework.⁴⁸

- Consumers International’s “Disputes in Cyberspace”.⁴⁹
- The Dutch Model Code of Conduct.⁵⁰
- The Global Business Dialogue on Electronic Commerce Recommendations on ADR.⁵¹
- The New Zealand Model Code of Consumer Protection in Electronic Commerce.⁵²
- The European Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.⁵³
- The Transatlantic Consumer Dialogue’s “Alternative Dispute Resolution in the Context of Electronic Commerce”.⁵⁴

Table 4. Examples of B-to-C ADR Principles found in various “soft” normative instruments

Principle Source	Independence	Impartiality	Accessibility	Transparency	Low or no cost	Speed
“OECD Consensus”	X	X	X	X	X	X
Australia	X		X			
Canada			X	X	X	X
New Zealand	X		X			
Consumers International.	X	X	X	X	X	X
GBDe		X	X	X	X	X
TACD	X		X	X	X	X
ABA		X	X	X	X	X

Meanwhile, the OECD, the Hague Conference on Private International Law (HCOFIL) and the International Chamber of Commerce (ICC) held their joint conference in December 2000, bringing together an impressive array of stakeholders. That conference helped crystallise a broad consensus on the need to safeguard the following principles in the deployment of ADR mechanisms and schemes for consumer transactions: independence and impartiality,^{54a} accessibility, transparency, low or no cost to the consumer and speed. However, questions that concern the interface between ADR and law (*e.g.* obligation to attempt ADR as a pre-condition to other recourse, binding character of results and avenues to enforcement) have thus far partly resisted international consensus.⁵⁵

Since the December 2000 joint OECD, HCOFIL and ICC Conference, a major rationalization effort worthy of notice was conducted by the American Bar Association (ABA), which released in August 2002 a set of Recommended Best Practices by Online Dispute Resolution Service Providers.⁵⁶ They are intended to assist not only ODR service providers but also users of those services, be they individual consumers or businesses. The Recommended Best Practices recognise that the ODR market is in its infancy and steers clear of the difficult issues of implementation and oversight. Rather, the Recommended Best Practices focus on disclosure requirements, which in effect constitute “soft” guidelines for ADR providers and, for users, a guide of what to look for in a provider. This has the indirect, though deliberate, effect of injecting some substance into the principles on which there is global consensus while suggesting that the right questions be asked about the areas (issues of interface between ADR and law) that have resisted consensus.

With a certain degree of realism that takes account of the early stage of development of the ODR market and the discrepancies in focus and resources between providers, the Recommended Best Practices lay out a set of Minimum Basic Disclosures which should be listed here:

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

The above is given as an example of the issues that more detailed guidelines or principles for ODR providers might go into. The disclosure requirements proposed by the ABA Task Force address the same questions that need to be asked by users, including SMEs, contemplating the use of ODR and are as such helpful. Leaving implementation and oversight aside (as somewhat premature), they boil down largely to telling users what information to look for while exerting a certain amount of pressure on ODR providers to work on the substantive issues about which they may be expected to be fully transparent.

This report concludes that it is indeed too early for implementation and oversight mechanisms to be put in place for ODR guidelines and principles beyond an approach focussed on transparency and information. Clearly, information is needed much more urgently in the field of ODR than formal mechanisms for implementation and oversight. As concerns the areas that have thus far resisted consensus (issues of interface between ADR and law), some of the legal issues addressed in Chapter 1 might have to be sorted out multilaterally between governments. Meanwhile, experiments can be as varied as the number of possible legal configurations alluded to in Chapter 1. The legal uncertainties currently prevailing will favour mechanisms that focus on areas of consensus (and therefore leave most or all consumer rights intact before, during and in some cases even after the ADR process).

Issues for Policy Consideration

Most of the issues that call for further policy consideration in the realm of ADR go well beyond SME policy and might be tackled more effectively in other contexts or fora (such as, within the OECD, the Committee on Consumer Policy and the Working Party on Information Security and Privacy). These might eventually include, for instance, issues that pertain to the implementation of ADR guidelines and oversight of ADR systems once the market has somewhat matured.

Issues requiring policy consideration would also include the question of the standardisation of consumer complaint forms. The European Commission has developed a standard consumer complaint form, which is available in all EU languages⁵⁷ and served as a basis for the web-based form currently used

by the European Extra-Judicial Network⁵⁸. The US Federal Trade Commission has also designed a web-based complaint form that allows consumers from all over the world to file complaints.⁵⁹ On the technical side, the interoperability of ODR systems and languages was taken up by the European Commission's Joint Research Centre, which is working on ODR XML, a variant of XML meant to ensure that different ODR providers can refer cases and share case information irrespective of the system they have developed.⁶⁰ More co-ordination will be required in this area.

As regards the public policy considerations attendant to consumer protection law and the pervasive legal uncertainties relating to applicable law and jurisdiction in cross-border electronic commerce, it is not controversial that international efforts toward harmonisation should be pursued along with co-regulatory and self-regulatory ADR efforts.

Finally, questions relating to the sustainability of ODR business models, which are perhaps closer to SME policy concerns (if only because the ODR industry has thus far been driven by SMEs), also call for policy consideration. As this report points out, the success of trust marks – the market-driven scheme most cited as the natural home for ADR – has up to now remained below expectations, the insurance model is just beginning to emerge and ADR providers are struggling to create models that balance the need for corporate funding with the requirements of impartiality and independence. Before a solid ODR industry can emerge and take shape, it is possible that governments will need to explore new avenues, including “public-private partnerships” to create the incentives apparently needed for the “trust market”, including the ODR market, to take off.

Communication, information and education appear to lend themselves to more immediate action in support of SMEs. Accordingly, this is the area where this Working Party is in a position to consider immediate action.

Firstly, in terms of communication, it is clear that governments must at some level be involved in the development of ADR models. In doing so, they have a clear role to play in ensuring that SMEs' interests are reflected in the frameworks and systems that ultimately emerge to govern consumer redress in e-commerce. This concern is already addressed within the OECD but more work and better communication is needed to ensure that SME policy concerns (and, as far as possible, SME input), are taken into account in ongoing and future ADR work.

Secondly, in terms of access to information and legal resources, SMEs are often placed in a situation that is only marginally better than that of consumers. One of the most pressing needs is therefore to provide tools that will help guide SMEs in making ADR choices when contemplating the setting-up of a cross-border offering to consumers. Building on a similar effort undertaken by the OECD for the benefit of consumers contemplating a purchase online or experiencing a problem resulting from such purchase, this report presents an ADR Educational Instrument for SMEs in the B-to-C context for adoption (see APPENDIX IV).

Following the same rationale, *i.e.* SMEs are often placed in a situation that is only marginally better than that of consumers in terms of access to information and legal resources, the same pressing need was identified to provide tools that will help guide SMEs in making ADR choices when contemplating B-to-B cross-border transactions in the context of electronic commerce. As recommended at the Geneva meeting of June 2002, a similar ADR educational instrument has been prepared for SMEs in the B-to-B context (see APPENDIX V).

Thirdly, it is uncontroversial that SMEs could benefit from a better access to practical information on consumer protection laws and ADR schemes and mechanisms. Governments do and should continue to ensure that such information is made accessible to SMEs. But in order to maximise the potential for such information to be helpful in facilitating business decisions for SMEs in the context of cross-border electronic commerce, global reach and centralised access would seem desirable. This is not a

new difficulty. It is notoriously difficult to reach out and disseminate information to SMEs even at a national level. The challenge is all the more daunting when it comes to reaching out on a multi-national or a global level. Apart from the obvious language difficulties and the cost of producing, updating, hosting and disseminating information, the challenge will always remain of reaching the least connected SMEs (a challenge very much akin to that known in the traditional telecoms industry as “the last mile” (or last kilometre)).

Although this is not the place to discuss the issue at length, the proposal of the ABA Task Force on Electronic Commerce and Alternative Dispute Resolution for an international ADR centre should perhaps be mentioned in this context. The proposed “iADR Center” would, in its most modest form, update governmental recommendations, codes and reports relating to best practices for ODR Service Providers and Internet merchants, recommend and publish Best Practices by ODR Providers and related commentary and produce and disseminate ADR/ODR information. The Centre, according to the proposal, should have diversified funding sources and represent all constituencies.⁶¹ This idea would have to be taken up by a more representative body if it were to have the remotest chance of being realised. It is mentioned here merely to show that a need has been identified.

Another initiative which should be mentioned is the proposal within APEC for an SME Portal Hub which was approved in principle at the APEC SME Ministerial Meeting in 2002. The proposal envisages the establishment of a hub to provide growth-oriented SMEs with enhanced access to relevant information, advice and services. Although it remains unclear what information will be provided through such portal, it is obvious that the vehicle would be adapted to the task discussed above. Mention of this initiative is made here to highlight that a need has been identified.

One example of an initiative making consumer protection laws information available to a wide audience is the Asia Pacific Consumer Law (APCL) website.⁶² It is hosted and managed by the Regional Office for Asia and the Pacific of Consumers International (CIROAP) and covers some 15 countries of the region. The objective of the initiative is to provide readily accessible information on:

- Statutes and subsidiary legislation pertaining to consumer protection.
- Commentaries on such laws, and highlights of innovative approaches.
- Updates on developments in consumer law including amendments and case law.
- Updates on alternative redress mechanisms.

Sharing experience with the enforcement of consumer laws across borders is also part of the information which APCL wishes to provide. Mention of this initiative is made here to demonstrate not the need for but the feasibility of centralising and disseminating such information. On a broader scale, such information could be provided and updated through governments, building upon existing initiatives and channels in many cases. The OECD itself has released the result of a survey on legal provisions related to business-to-consumer alternative dispute resolution in relation to privacy and consumer protection in OECD countries as well as an inventory of consumer protection laws, policies and practices applied to electronic commerce, which are available on its web site.^{62a} The “econsumer.gov” web site also contains information about ADR and consumer protection laws. This report concludes that SMEs need that kind of practical information and should be able to get it at a centralised location. Cooperative efforts should be envisaged here since the needs of SMEs for this information are very similar to those of consumers.

In the OECD context, leaving aside questions of coordination, which should be discussed, one obvious means of reaching out to SMEs, of communicating information and educating about ADR is through the International Network for SMEs (INSME). It is not a question of providing dispute resolution services through INSME but of taking advantage of the channel to SMEs which the INSME website has created to get information and educational materials across.

43. OECD (1997) Business-to-Consumer Electronic Commerce – Survey of Status and Issues, DSTI/GD(1997)219.
44. Joint E.U.-U.S. Statement on electronic commerce, 5 December 1997.
45. Okinawa Charter on Global Information Society, Kyushu-Okinawa G-8 Summit Meeting 2000.
46. Statement of the European Union and the United States on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution, EU - US Summit, Washington, 18 December 2000, http://europa.eu.int/comm/external_relations/us/summit12_00/e_commerce.htm.
47. <http://www.e-commerce.treasury.gov.au/html/e-commerce.htm>.
48. <http://strategis.ic.gc.ca/SSG/ca01182e.html>.
49. <http://www.consumersinternational.org>.
50. <http://www.ecp.nl/ENGLISH/index.html>.
51. <http://consumerconfidence.gbde.org>.
52. http://www.consumer-ministry.govt.nz/dp_e-commerce_statusreport.htm.
53. Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (1998/257/CE). See also: Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).
54. <http://www.tacd.org>.
55. “Building Trust in the Online Environment”, OECD, HCOPI and ICC Joint Conference Report, at http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.
56. Although the Task Force was composed exclusively of practitioners and academics from the United States of America, a well-organized, very broad international consultation was conducted. <http://www.aba.net>.
57. See <http://europa.eu.int/comm/dg24>.
58. See <http://www.eej-net.org.uk>. In addition to EU countries, Norway and Iceland are part of this pilot project. For a backgrounder and overview of EEJ-NET and related projects, see Julia Hörnle, “The European Extra-Judicial Network – Overcoming the Obstacles”, ADR Online Monthly, available at <http://www.ombuds.org/center/adr2002-11-hornle.html>.
59. See <http://www.econsumer.gov>.
60. See <http://econfidence.jrc.it>.
61. American Bar Association (Task Force on Ecommerce and ADR) (2002), Addressing Disputes in Electronic Commerce: Final Recommendations and Report, August 2002, pp. 33-34.
62. http://www.ciroap.org/apcl/about_us.html. The countries covered by the initiative are: Australia, Cambodia, China, Fiji, Hong Kong, India, Indonesia, Japan, Macau, Malaysia, Mongolia, Nepal, New Zealand, Pakistan, Philippines, South Korea, Sri Lanka and Thailand.

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*Appendix I***B2B AND C2C ADR INVENTORY BY ICC**

© ICC – Reproduced with permission. Summary Results extracted from “Business-to Consumer and Consumer-to-Consumer Alternative Dispute Resolution (ADR) Inventory Project: Summary Report”; Website materials from www.iccwbo.org, copied on 1st November 2002.

Summary results

This section provides highlights from preliminary analysis of the collected surveys from ADR service providers around the world. Results are presented concisely and are intended to provide an overview of general trends and notable results that have been identified.

It should be noted that the trends and results presented here may not reflect the characteristics of all global ADR service providers. There was no effort to create a statistically significant survey sample, though every attempt was made to distribute the survey to as large a population as possible. The responses we received represent a self-selected group that is not necessarily representative of the larger survey recipient sample or of the entire universe of ADR service providers around the world. As a result, these results should be taken more as indicative of the range and scope of services currently offered throughout the world, rather than as a definitive analysis of the state of the ADR industry for disputes that arise out of B-TO-C and C2C online transactions.

More than half of the survey respondents offered online assisted negotiation, and online mediation is offered by 2 in 5 of the service providers surveyed. As such online services become more widely available, there may be an important need to help establish guidelines and standards for the provision of such

*Forms of dispute resolution services offered**Forms of services offered online and offline*

Survey respondents were asked to check off which of four broad types of dispute resolution services they offered online and offline: arbitration, mediation, assisted negotiation, and automated negotiation. Notably, the majority of survey respondents offer a mix of both online and offline services. This suggests that a growing number of traditional ADR providers have begun to offer online ADR services to complement existing offline ADR mechanisms. Consumers Association of Iceland, for example, offers arbitration and assisted negotiation offline, and now has begun providing online assisted negotiation. The Chamber of National and International Arbitration of Milan has added online mediation to their traditional offline arbitration and mediation services. Only 6 of the 37 respondents offered only online services while 9 offered no online services.

The table below shows the frequency with which the various dispute resolution services were offered. Within our respondent pool, providers tended to offer more services offline than online. In the online arena, assisted negotiation was the most widely offered service, provided by 54% of respondents. Automated negotiation, which does not require a human intermediary and relies only on a computerized

process was the least popular online service, available from only 27% of providers. In the offline world, mediation was the most popular service and was offered by 70% of respondents. Respondents also had the option of listing other offered services that did not fit in the four suggested categories. Examples of such listed services include conciliation, early neutral evaluation, and non-binding expert opinions.

Table 1. Proportion of providers offering ADR service (N=37)

	Offered ONLINE	Offered OFFLINE
Arbitration	35%	57%
Mediation	41%	70%
Assisted Negotiation	54%	68%
Automated Negotiation	27%	16%

Cross-border disputes

The vast majority of survey respondents indicated that their services were available for cross-border disputes. For example, only 2 of the 13 American survey respondents do not offer services for cross-border disputes. It is not clear how frequently such cross-border disputes are presented for resolution.

Scope of Services Offered

Most frequent types of disputes handled

Survey respondents list a wide range of disputes that are frequently handled, including delay of delivery, false product specifications, unexpected additional costs, and non-delivery of goods.

Language of service

English is the most popular language of service and is offered by all but a few survey respondents. A few respondents, primarily government consumer bodies, offer service in only the official language of their country. Many European providers offer services in more than one language, usually including English, French, German, Spanish or Italian. Many American providers offer services in English only or English and French or Spanish. Japanese and Chinese services were offered by several providers outside of Asia. Several providers indicated that they were capable of providing services in several languages, but in practice have never had to use certain languages. Eurochambres (Europe-wide), NovaForum (Canada), WIPO Arbitration and Mediation Center (Switzerland), and SquareTrade (USA) were the only providers offering services in more than 5 languages. Specific language capabilities have been tabulated and can be found in the accompanying online resource.

Geographic scope of service

Many governmental and quasi-governmental consumer agencies offer dispute resolution services that tend to focus on consumers and businesses within their respective countries. Among private initiatives, few limits seem to exist on the potential geographic scope of services offered. In practical terms, many providers tend to focus on their home regions, with international dispute resolution limited by language and other practical considerations. NovaForum (Canada) offers services internationally, though their focus is the United States, Canada, and Western Europe. Cibertribunal (Peru) offers offline services primarily in Peru, but can provide online services worldwide. ADR Group (UK) focuses on the United Kingdom and Europe but also promises service in most of the world.

Filing a dispute resolution request***Typical Value of Disputed Transactions***

The typical value of disputed transactions handled by ADR providers varies widely but can be quite high. For Mediation Arbitration Resolution Services (USA), transaction values of online disputes typically range from USD 100 to USD 5 000. For traditional ADR disputes, the transaction values typically range from USD 5 000 to USD 1 000 000 or more. At Consensus Mediation (UK), nearly all consumer disputes handled are for transactions under GBP 5 000. Squaretrade (USA) has handled disputes for transactions up to USD 1 000 000 with average dispute size being under USD 1 000.

Case results

The outcomes of ADR decisions vary widely from provider to provider. ADR decisions made by Internet Ombudsmann of Austria or the National Consumer Agency of Denmark, for example, are not legally binding to any party. Meanwhile, agreements facilitated by ADR Group in the UK are considered legally binding to both parties. Variations in legal environments can also affect the enforceability of ADR decisions. In Italy, for example, courts can enforce arbitral awards made by the Chamber of National and International Arbitration of Milan. Off the continent, neither Iceland's Appeals Committee on the Sale of Goods and Services nor the Consumers Association of Iceland offer any provision for the enforcement of ADR decisions.

Requirements for mediators, arbitrators, or neutrals

Nearly all respondents reported that they had specific requirements for their mediators, arbitrators, or neutrals. Most respondents provided detailed information on these training and experience requirements.

Security, technical details, and privacy policy

Among those providers of online services, E-mail and web forms were the most frequently mentioned mode of online communication tool. In regards to security, nearly all providers of online services generally took the time to provide detailed responses about the use of encryption and other data and privacy protection measures.

Cost of services

Pricing information was not reliably offered by a large portion of survey respondents. In general, respondents indicated that filing and service fees varied according to the size of the dispute. Fees ranged from zero in the case of several community and government organizations to several thousand US dollars. For respondents who did provide such information, summary pricing data has been entered into the accompanying Excel file ADR_Survey.xls.

Company information

Certifications of ADR service providers vary enormously around the world. Many providers have some form of certification by a national agency. No single international body has emerged as a central certification agency or governing body over the industry.

Primary sources of funding also vary widely by organization. Aside from internal business-related revenue streams, many public and quasi-public organizations received public funding, like the Danish National Consumer Agency, the Swedish National Board for Consumer Complaints, and

Eurochambres. Some private firms like NovaForum in Canada and ACB Conflict Management for Commerce and Industry in the Netherlands also reported receiving government funds. Among firms that received outside private investment were several Internet-based dispute resolution providers like Cybersettle, SquareTrade, and Online Resolution, all in the United States.

[List and Web-based Inventory]

Austria

Internet Ombudsman				
Address: ÖIAT (Austrian Institute for Applied Telecommunication) Margaretenstrasse 70 A-1050 Vienna Austria				
Telephone: 01/595 21 12 - 95				
Fax: 01/595 21 12 - 99				
Email: kontakt@ombudsmann.at				
Web: http://www.ombudsmann.at/				
Languages of Service: German, English				
Cross-Border Services: Yes				
Industries Served: All online retail and services				
ADR Services Offered:				
	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	
Offline	X	X	X	

Belgium

Eurochambres				
Address: Rue Archimède 5 Box 4 , B-1000 Brussels Belgium				
Telephone: +32.2.2820867				
Fax: +32.2.2300038				
Email: eurochambres@eurochambres.be				
Web: http://www.eurochambres.be/				
Languages of Service: English, German, French, Italian, Spanish, Swedish, Dutch				
Cross-Border Services: Yes				
Industries Served: All online retail and services				
ADR Services Offered:				
	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline				

Canada**NovaForum**

Address: 1670 Bayview Avenue
Suite 310
Toronto , Ontario M4G 3C2
Canada
Telephone: 416.481.6682
Fax: 416.486.9069
Email: info@novaforum.com
Web: www.novaforum.com

Languages of Service: English, French, Italian, Spanish, German, Chinese

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	X
Offline	X	X	X	X

China**Hong Kong International Arbitration Centre**

Address: 38th Floor Two Exchange Square
8 Connaught Place
Hong Kong S.A.R.
China
Telephone: 011-852 2525-2381
Fax: 011-852 2524-2171
Email: adr@hkiac.org
Web: <http://www.hkiac.org/>

Languages of Service: English, Chinese

Cross-Border Services: Yes

Industries Served: Online retail and financial services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X			
Offline	X	X		

Denmark

National Consumer Agency of Denmark - Forbrugerstyrelsen

Address: Amager Faelledvej 56 - DK- 2300
Kobenhavn S
Denmark

Telephone: 00 45 3266 9000

Fax:

Email: fs@fs.dk

Web: <http://www.fs.dk/>

Languages of Service: Danish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline	X			

Egypt

Cairo Regional Centre for International Commercial Arbitration

Address: Al-Saleh Ayoub St .
Zamalek, Cairo
Egypt

Telephone: (20) 2-340-1333

Fax: (20) 2-340-1336

Email: crcica@idscl.gov.eg

Web: www.crcica.org.eg

Languages of Service: English French Arabic

Cross-Border Services: Yes

Industries Served: All aspects of consumer protection

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline	X	X	X	

Germany

gwmk (Gesellschaft fuer Wirtschaftsmediation und Konfliktmanagement e.V.)

Address: Briener Strasse 9
D-80333 Muenchen
Germany

Telephone: 49 89 290970
Fax: 49 89 29097200
Email: mediation@gwmk.org
Web: <http://www.gwmk.org/>

Languages of Service: German, English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online		X	X	
Offline		X	X	

Trusted Shops GmbH

Address: Im MediaPark 8 / KölnTurm
50670 Cologne
Germany
Telephone: 49 221 77 53 66
Fax: ++40 221 77 53 689
Email: service@trustedshops.com
Web: <http://www.trustedshops.org/>

Languages of Service: German English French

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	X
Offline	X	X	X	X

Iceland

Appeals Committee on the Sale of Goods and Services

Address: Arnarhvoli
Reykjavík
Iceland
Telephone: (354) 5609070
Fax: (354) 5621289
Email: postur@ivr.stjr.is
Web: <http://www.raduneyti.is/>

Languages of Service: Icelandic

Cross-Border Services: No

Industries Served: Online retail

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline				

Neytendasamtökin (Consumers Association of Iceland)

Address: Síðumúla 13
108 Reykjavík
Iceland
Telephone: (354) 545 1200
Fax: (354) 545 1212
Email: ns@ns.is
Web: <http://www.ns.is/>

Languages of Service: Icelandic English

Cross-Border Services: No

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline	X		X	

Israel**Israeli Institute of Commercial Arbitration**

Address: Haihashruouaim St. 84-
Tel Aviv 67132
Israel
Telephone: (972) 3 5631052
Fax: (972) 3 5619027
Email: michall@the-chamber.org.il
Web:

Languages of Service: Hebrew, English

Cross-Border Services: Yes

Industries Served:

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline	X	X		

Italy**Camera Arbitrale di Milano**

Address: Piazza Affari 6
Milano
Italia
Telephone: 39285154536
Fax: 39285154531
Email: camera.arbitrale@mi.camcom.it
Web: www.camera-arbitrale.com

Languages of Service: Italian, English, French

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online		X		
Offline	X	X		

Luxembourg**Centre Européen des Consommateurs – Luxembourg**

Address: 55, rue des bruyères
L-1274 Howald
Luxembourg
Telephone: (352) 496022-1, 496022-403, 496022-404
Fax: 494957
Email: info@euroguichet.lu
Web: <http://www.euroguichet.lu/>

Languages of Service: French, German

Cross-Border Services: No

Industries Served:

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline		X	X	

The Netherlands**ACB Conflict Management for Business and Industry**

Address: Beznidenhouteseweg 12
Postbus 93002, 2509 AA
Den Haag
The Netherlands
Telephone: (31) 70-3490 493
Fax: (31) 70-3490 295
Email: acb@vno-ncw.nl
Web:

Languages of Service: Dutch, English, German, French

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline		X	X	

Peru

Cibertribunal Peruano

Address: Av. Santa Cruz 937
Lima 18
Peru

Telephone:

Fax:

Email: ajacy-w@amauta.rcp.net.pe

Web: <http://www.cibertribunalperuano.org/>

Languages of Service: English, Spanish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X			
Offline	X	X	X	

Sweden

National Board for Consumer Complaints

Address: PO Box 174
101 23 Stockholm
Sweden

Telephone: 46 8 783 17 00

Fax: 46 8 783 17 01

Email: arn@arn.se

Web: www.arn.se

Languages of Service: Swedish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline	X			

Switzerland

WIPO Arbitration and Mediation Center				
Address: 34, chemin des Colombettes P.O. Box 18 1211 Geneva 20 Switzerland				
Telephone: (41-22) 338 9111				
Fax: (41-22) 740 3700				
Email: arbiter.mail@wipo.int				
Web: arbiter.wipo.int/center/index.html				
Languages of Service: English, French, German, Japanese, Korean, Portuguese, Spanish				
Cross-Border Services: Yes				
Industries Served: All online retail and services				
ADR Services Offered:				
	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	
Offline				

United Kingdom

A Commercial Initiative for Dispute Resolution				
Address: 3 Verulam Buildings Gray's Inn London WC1R 5NT UK				
Telephone: 44 (0)20 7269 1169				
Fax: 44 (0)20 7269 1186				
Email: admin@aci-adr.com				
Web: http://www.aci-adr.com/				
Languages of Service: English, Spanish, French, Portuguese				
Cross-Border Services: Yes				
Industries Served: All online retail and services				
ADR Services Offered:				
	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X			
Offline	X	X	X	

ADR Group

Address: Grove House
 Grove Road
 Bristol BS6 6UN
 UK

Telephone: 0117 946 7180
Fax: 0117 946 7181
Email: info@adrgroup.co.uk
Web: <http://www.adrgroup.co.uk/>

Languages of Service: English, Spanish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline		X	X	

Association of British Travel Agents

Address: 68-71 Newman Street ,
 London , W1T 3AH
 United Kingdom

Telephone: 44 (0)20 7637 2444
Fax: 44 (0)20 7637 0713
Email: abta@abta.co.uk
Web: <http://www.abta.com/>

Languages of Service: English

Cross-Border Services: Yes

Industries Served: Travel

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X		X	
Offline	X		X	

Centre for Dispute Resolution (CEDR)

Address: Princes House
95 Gresham Street
London EC2V 7NA
England

Telephone: 011-44-20 7600-0500
Fax: 011-44-20 7600-0501
Email: mediate@cedr.co.uk
Web: www.cedr.co.uk

Languages of Service: English

Cross-Border Services: Yes

Industries Served:

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline		X	X	

Consensus Mediation

Address: York House
89 York Street
Norwich NR2 2AP
United Kingdom

Telephone: 01603 665845
Fax: 01603 633996
Email: mediate@consensusmediation.com
Web: <http://www.consensus.uk.com/>

Languages of Service: English, Swedish, Spanish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online		X	X	
Offline	X	X	X	

USA

Council of Better Business Bureaus Dispute Resolution Division

Address: 4200 Wilson Blvd.
Suite 800
Arlington , VA 22203-1838
USA

Telephone: 703.276.0100
Fax: 703.525.8277
Email:
Web: www.bbb.org/complaints/aboutResolution.asp

Languages of Service: English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				
Offline	X	X	X	

Cybersettle

Address: 105 South Bedford Rd.
Mount Kisco , NY 10549
USA

Telephone: 914-244-7000
Fax: 914-244-1010
Email: info@cybersettle.com
Web: www.cybersettle.com

Languages of Service: English

Cross-Border Services: No

Industries Served: Insurance, legal

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				X
Offline				

Internet Neutral Mediation Services

Address: 33626 Rising Tide Court
Dana Point , CA 92629
USA

Telephone:
Fax:
Email: mediator@internetneutral.com
Web: <http://www.internetneutral.com/>

Languages of Service: English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online		X	X	
Offline				

Mediation Arbitration Resolution Services (MARS)

Address: 22817 Ventura Blvd. Suite 488
Woodland Hills , CA 91364
USA

Telephone: 1-888-769-6277
Fax:
Email: info@resolvemydispute.com
Web: <http://www.resolvemydispute.com/>

Languages of Service: English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	X
Offline	X	X	X	X

National Arbitration Forum

Address: P.O. Box 50191
 Minneapolis , MN 55405-0191
 USA
Telephone: (800) 474 2371 in North America , (651) 631 1105
Fax: (651) 631 0802
Email: Infor@arb-forum.com
Web: www.arbitration-forum.com/

Languages of Service: English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X		X	X
Offline	X	X	X	

Online Resolution

Address: One Broadway, Suite 600
 Cambridge , MA 02142
 USA
Telephone: (617) 475-1515, (866) 324-7111
Fax: (413) 215-0002
Email: sales@onlineresolution.com
Web: <http://www.onlineresolution.com/>

Languages of Service: English, French, Spanish

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	X
Offline				

SquareTrade

Address: 50 First Street, Suite 600
San Francisco , California 94105
USA

Telephone:
Fax:
Email:
Web: www.squaretrade.com

Languages of Service: English, French, German, Italian, Russian,
Spanish, Portuguese, Japanese

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online	X	X	X	
Offline				

TRUSTe

Address: 1180 Coleman Avenue, Suite 202
San Jose , CA 95110
USA

Telephone: (408) 494-4950
Fax: (408) 494-4960
Email:
Web: www.truste.org/users/users_watchdog_intro.html

Languages of Service: English Japanese

Cross-Border Services: Yes

Industries Served: Privacy-related issues

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online			X	
Offline			X	

USsettle.com

Address: U.S. Settlement Corporation
 21 Tenby Court
 Baltimore , MD 21093-1872
 USA

Telephone: 410.321.4700
Fax: 410.321.4780
Email: info@ussettle.com
Web: www.ussettle.com/

Languages of Service: English

Cross-Border Services: Yes

Industries Served: All online retail and services

ADR Services Offered:

	Arbitration	Mediation	Assisted Negotiation	Automated Negotiation
Online				X
Offline	X	X	X	X

Appendix II

B2C ODR INVENTORY BY CONSUMERS INTERNATIONAL

© Consumers International – Critical inventory excerpted and reproduced with permission from: “Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-border Disputes”

1-2-3 Settle.com (<http://www.123settle.com>)

Automated negotiation, mediation, arbitration, claims evaluation; user fees

123Settle.com is a US-based online ADR service owned and operated by attorneys. It began operation in late 1999. It is a private business venture that relies upon user fees for its revenues. Automated negotiation, mediation, evaluation, and arbitration services are offered for both online and offline disputes. It is up to the parties to decide whether to make the results of automated settlement, mediation, or arbitration binding. 123Settle.com does not enforce and is not party to any such agreement. Parties can opt out of the ADR process at any time. Currently, 123Settle.com’s services are available only in English. 123Settle.com’s website is easy to access and use. A variety of communication tools are used in the resolution process, including web-based communications, confidential emails, fax and telephone. The automated negotiation service is available 24 hours a day, 7 days a week. Parties agree in advance to participate, and must pay in advance a fee of USD 200 (total, not per participant), regardless of whether settlement is reached. Each party submits confidential settlement bids, in rounds of bidding. Under the default parameters, if the offer is within 80% of the demand, the dispute settles for the amount of the offer. If the offer is greater than the demand in any round, the dispute settles for the demand. Parties can set their own parameters. Parties are notified of any settlement (or lack thereof) within 24 hours of the commencement of negotiations. Mediations are conducted by email and/or via 123Settle.com’s website, and involve unlimited email correspondence for three consecutive business days. Email correspondence can be confidential or not, as requested. Arbitration and Evaluation services involve the submission of briefs (documents, evidence, arguments, etc.) via email by the parties to an arbitrator, who then provides a determination of liability and an evaluation of damages, if appropriate. Reasons are provided. The fee for mediations, arbitrations, and evaluations begins at USD 600 (total fee, not per party). Parties are informed in advance if the cost will exceed USD 600. 123Settle.com uses professional mediators and arbitrators (mainly retired judges and judicial officers), via a third-party provider of such services. ADR officers are randomly assigned to each dispute. Case results are not published

ASSESSMENT

123Settle.com’s automated negotiation service is potentially useful only for high value consumer disputes where money is the only issue and where the vendor is willing to negotiate in this manner. 123Settle.com’s mediation/arbitration service is also too expensive to be practical for consumers, unless the vendor pays for the service. While the services meet the criteria of independence, convenience, timeliness, and due process, transparency could be improved by the publication of arbitration decisions.

AllSettle.com (<http://www.allsettle.com>)

Automated negotiation for: insurance claims only; free to insurance claimants; fees to insurance Co.

AllSettle.com is a US-based online insurance claims settlement service which has been operating since early 1999. It deals only with insurance claims – largely personal injury claims. This private business venture was developed by a number of internet specialists, insurance claimants and adjusters. It relies on private investor funding and user fees. In order to maintain independence, it does not accept investment from the insurance industry. AllSettle.com's service is free for claimants and attorneys. When a settlement is reached, AllSettle.com charges the insurance company a flat fee of US \$200. There is no time limit imposed to settle claims unless agreed to by the parties. To facilitate the resolution process, it uses a number of communication tools including web-based communications, email, and phone (for those who do not have computers). All bids remain confidential and are not revealed to the opposing party. Once offers and demands are within 1/3 of each other, the claim will be settled for the median amount. Once a demand is entered, the Claimant will be notified of the lowest possible settlement amount before finalizing their demand. Once an offer is entered, Claims Adjusters will be notified of the highest possible settlement amount before finalizing their offer. If the offer and demand differ by more than 1/3, the claim will not settle. If the settlement offer is the same or greater than the Claimant's demand, the claim is settled for the demand amount. Parties can opt out of the process at any time until a settlement is reached. Users of the service agree to be legally bound by any settlement reached in their case, but they do not give up any right to legal recourse. AllSettle.com's website is easy to find and the service is easy to use. The service is currently available only in English, although AllSettle.com has reserved several foreign language URL's with a view to offering its service in French, German and Spanish in the future. Case results are not published or made accessible to the public, though AllSettle.com reserves the right to publish case outcomes in the future.

ASSESSMENT

AllSettle.com is of very limited application in the B2C context, as it deals only with insurance claims. However, it ranks high in terms of transparency, convenience, affordability, timeliness, and due process. Unlike other automated settlement services, it is designed to be free to claimants (consumers). The fact that insurance companies pay for this service may, however, affect the independence of the service – if not in a real sense, than at least its perceived independence.

BBB and BBBOnline Complaint System (<http://www.bbbonline.org>)

Complaints assistance/consumer information service; free to consumers; business member fees

Close to 150 non-profit Better Business Bureaus (BBBs) in North America make up the BBB system, which is supported by more than 270,000 local business members and over 300 large corporate members who must meet and maintain BBB standards. The BBB's mission is "to promote the highest ethical relationship between businesses and the public through voluntary self-regulation, consumer and business education, and service excellence." BBBs are well-known sources of consumer information on local businesses, issuing reports on members and non-members alike that are based largely on how a company handles complaints. The vast majority of BBB reports, with complaint information, are available online through the Bureau Information System (go to www.bbb.org) and click on "Check out a Company"). Since its establishment many decades ago, the BBB system has provided offline ADR services, including in-person mediation and various types of arbitration, for consumer disputes with its business members. BBBOnline is in the process of developing an online ADR system which will offer automated negotiation, mediation, and arbitration, but this service is not yet available. BBBOnline currently operates three trustmark programs: Reliability, Privacy, and Children's Privacy; each with its

own seal. The online privacy seal program include it own ADR process, under which complaints regarding privacy practices of any business, whether or not it subscribes to the seal, will be investigated. All other complaints, regarding members of BBBOnline's Reliability program or others, can be made online via the BBBOnline website. BBB will not handle complaints from anonymous consumers, nor cases already involved in litigation. Non-privacy-related online complaints are forwarded to the appropriate local BBB, based on the zip code of the company in question (must be provided with the complaint). The local BBB will then forward the complaint to the company for its response. Because most businesses will not want to risk tarnishing their reputation, such intervention by the BBB is usually successful in achieving dispute resolution. Where the company does not cooperate, this fact will be noted by the BBB and reported to consumers who inquire about the company. Where appropriate, BBB may refer its file on the company to law enforcement agencies. In the calendar year 2000, the entire BBB system provided complaint counselling or referral in 2 285 000 cases. Approximately 60% of these complaints were filed online. In the seven month period from October 2000 to April 2001, BBBOnline received approximately 600 online complaints from consumers in 10 countries outside the US and Canada, relating to US or Canadian businesses. Of these, 245 were from Europe and 355 from other countries (The top ten origin countries were UK (70), Australia (50), Russia (35), Germany (31), Japan (29), Israel (26), Mexico (25), Switzerland (21), New Zealand (16), and Hungary (14).)

ASSESSMENT

BBBOnline's non-privacy ODR services are currently limited to the filing of complaints, and are therefore of limited usefulness in the e-commerce context. As well, the integral role of local BBBs in BBBOnline's ADR process limits the geographic applicability of this ombuds-type service. Important positive attributes of the BBB system's service include its costlessness and accessibility to consumers (plain language, easy to use), the availability to consumers of information on businesses, and the existence of an oversight body (BBB) to encourage compliance. It is also helpful that the vast majority of reports are provided online. However, that fact that BBBOnline is an industry association, reliant on and accountable to the very bodies it oversees, raises concerns about its ability to be truly independent. The fact that it is offered only in English clearly limits the availability of this service.

ClaimChoice.com (<http://www.claimchoice.com>)

Facilitated negotiation; claimant assistance

ClaimChoice.com is a privately owned and operated ODR service founded in 1999 by eLegius Inc. The founders are comprised primarily of lawyers and technology professionals. The site is set up to assist claimants and to facilitate negotiations regarding insurance claims. It does not provide mediation, arbitration, or any other ODR services. Claimchoice.com does not receive any funding from external sources. Claimchoice.com provides an electronic forum for claimants to prepare documents related to their case, giving step by step instructions on what information to include, and how to present it. The claimant is also provided with guidelines to help determine the monetary value being requested. The claimant then files the claim electronically on the site. The insurance company can log on and view all the files, and then make a counter claim. The claimant can either accept or reject, and the process continues. ClaimChoice.com estimates the process can take up to 90 days. Essentially, it allows a claimant in one location to present a case to an insurance company in another location. The claimant and insurer still do the negotiations themselves. If the claimant believes at any point they need legal representation, ClaimChoice.com provides assistance in locating a lawyer. They provide the details of the claim (without identifying the claimant), and allow lawyers to submit proposals for how to handle the case, and at what cost. The claimant can choose from any of these lawyers, or can use one of their own. There is no filing fee on ClaimChoice.com, and no fee at all for the claimant if the case does not settle. If the case is settled,

ClaimChoice.com receives 5% of the agreed upon amount, up to a maximum of USD 5 000. Insurance companies and lawyers who use the site are charged a fee.

ASSESSMENT

ClaimChoice.com is not applicable to typical B2C disputes, given its limitation to insurance claim disputes and specifically, to personal injury cases. However, it is an interesting model in that there are no initial fees for a complainant to file a case, and no fees at all if the case does not settle.

ClaimResolver/ClaimNegotiator (<http://www.claimresolver.com>)

Automated negotiation, facilitated negotiation

ClaimResolver.com is a US based online insurance claims settlement site. It is a private venture that receives funding from Ernst and Young and user fees. It provides three options to participating parties for ODR in addition to the standard automated negotiation: a Negotiation Parameters Option, a Minimum/Maximum Settlement option, and the Quick Settlement option. Each is described in detail in the comprehensive Terms and Conditions section of the website. ClaimResolver.com requires a minimum amount of USD 1 000 in dispute for parties to access the ODR programs. There is a standard fee of USD 35 for each claim enrolled by the originating party. If the claim is resolved for USD 10 000 or less, there is a fee of USD 250. If it resolves for more than USD 10 000, the fee is USD 350. The defendant in the case is fully responsible for the success fee, but it can be split between the two parties if they so desire. The standard practice is for a party to make a confidential offer, and the opposing party to make a confidential demand. If they are within 10% of each other, the claim is resolved, and the decision is binding. Negotiation parameters can be set in place by either party, allowing the participants to mutually agree to modify the percentage requirements for claim settlement. If this option is enabled, leading to a settlement, a USD 175 fee is charged. The Minimum/Maximum program is similar, but uses actual dollar values instead of percentages. There is no fee if settlement is reached. The Quick Settlement program requires each party to submit 3 bids. The program will compare the complainants lowest bid with the defendant's bid, the two middle bids, and then the complainants highest to the defendants lowest. If at any point there is a 10% or less difference, the claim settles. Parties are free at any point to terminate the process. ClaimResolver.com does not disclose any information about any of the settlements. ClaimResolver.com has recently launched ClaimNegotiator.com as an internet based mediation tool. It provides parties with access to teleconferencing, sharing of exhibits, editing documents etc. Special forms are provided for summarizing agreements reached at different conferences. The program also provides a real-time confidential offer demand program which can be used while parties are in direct negotiations. Fees to initiate a conference are USD 18. For the data section, the fee is USD 0.25 per minute, per participant. Teleconferencing fees vary with the level of service required. Both services are offered only in English.

ASSESSMENT

Given its focus on insurance claims, and minimum \$1,000 claim value requirement, this service is not applicable to typical B2C disputes. As well, its fee structure makes this service impractical for typical B2C disputes.

ClickNsettle.com (<http://www.ClickNsettle.com>)

Automated negotiation

ClickNsettle.com is an international Alternative Dispute Resolution (ADR) provider that has been in operation since June, 1999. ClickNsettle.com's automated negotiation service, while available for

all sorts of monetary disputes, is geared toward business clients; only 10% of its cases to date have involved consumers, and these tend to be personal injury claims. ClickNsettle.com uses a real-time fully interactive blind-bid process involving email communications. Parties submit confidential offers/demands (“bids”) during a 60-day negotiating period. Once the bids are within 30% of each other, the case settles for the midpoint amount. If the demand is less than the offer in any round of bidding, the dispute settles for the demand. The submitting party pays an initial submission fee of USD 15. Each bid made during the first 20 days costs UDS 10; each made during the next 20 days costs \$15 per party; and each made during the last 20 days of the resolution process costs \$USD 20 per party. If a settlement is reached, each party pays a settlement fee of USD 100 (USD 200 for settlements over USD 10 000). All fees are due upon settlement or expiration of the case. US corporations may establish a credit account; otherwise, parties must provide credit card information at the time they submit or respond to a case. Before the negotiation begins, the parties sign an agreement to be bound by any settlement reached. However, parties can opt out of the process at any time before a settlement is reached. Case results are not published. The clickNsettle.com website is easy to locate via all major internet search engines, and the site is informative and easy to navigate. While there have been 2 000 B2B cases filed with clickNsettle.com to date (50% of which have been resolved favourably), clickNsettle.com has handled no B2C cases over the past year.

ASSESSMENT

Like other automated negotiation services, ClickNsettle.com’s service is potentially useful for higher value consumer disputes where money is the only issue and where the vendor is willing to negotiate in this manner. It is, however, of limited use for small value consumer disputes given its fee structure (as reflected in the lack of B2C cases handled by this service).

Cybersettle.com (<http://www.Cybersettle.com>)

Automated negotiation

Cybersettle.com is a North American-based online automated claims settlement service which has been in operation since June 1998. It is an independent private business venture, reliant upon user fees. Cybersettle.com advertises its services for “insurance, personal injury, property damage, and other disputes”, and the vast bulk of their cases involve personal injury. Once a party submits settlement numbers on the system, the opponent is supplied with a Cybersettle.com case number, password and information package by fax or mail. Each side submits three double blind, confidential bids. If the offer and demand are within an acceptable range, the case immediately settles for the mean amount. Offers and demands are only compared within a given round. For example, the round one offer is compared only to the round one demand. Negotiations continue for a preset number of days specified by the initiator of the claim. The confidentiality of all communications during the settlement process is protected by the Cybersettle.com system, which includes state-of-the-art Secure Socket Layer (SSL) encryption and individualized passwords. Cybersettle.com never sees the settlement offers and demands. When a claim settles successfully, only the amount of the settlement is disclosed. Unsuccessful offers and demands expire without further action by either party, but parties may resubmit a case. Parties can opt out of the process at any time before a settlement is reached. Parties agree in advance, however, that any settlement achieved is binding. Insurance carriers pay a flat fee, per claim uploaded, which is based on volume and length of commitment. Attorneys only pay if and when a claim settles; this fee ranges from USD 100 to USD 200 for settlements up to USD 20 000. Fees increase in USD 50 increments up to USD 1000 for settlements over USD 250 000. Cybersettle.com is available 24 hours a day, seven days a week. It uses website, email and fax in order to resolve disputes. Cybersettle.com’s website is easy to navigate and is accessible from all major internet search engines. Case results are not made accessible to the public.

ASSESSMENT

Like other automated negotiation services, Cybersettle.com's service is of limited use for consumer ecommerce disputes given its focus on insurance claims, the user fee structure, and the need for vendor cooperation. Transparency needs to be improved: the website does not provide full information on the process.

ECODIR (<http://www.ecodir.org>)

Facilitated negotiation; mediation; non-binding arbitration; free to consumers; online disputes only

ECODIR is a new pilot project devoted to the electronic resolution of Internet disputes between consumers and merchants. It was initiated by a university and funded by the European Commission. Unveiled in October 2001, ECODIR will provide online consumer conflict resolution services until June 2002, at which time the project will be evaluated with a view to encouraging continuation of the services. ECODIR has constituted a consortium of European and North American "partners" from the academic and dispute resolution worlds. ECODIR offers a three-step process for dispute resolution: 1. Facilitated Negotiation: ECODIR provides a confidential, secure online platform from which the parties can negotiate. From the creation of the first party's user account, the parties have 18 days to negotiate and exchange as many proposals and as much information as they wish (the second party has 7 days to respond to the initial invitation to negotiate). 2. Mediation: If parties are unable to resolve the dispute themselves, they may request mediation. In this case, a Mediator is appointed by the ECODIR secretariat, and is given access to the secure site to review information exchanged during the negotiation phase. The Mediator invites parties to communicate further, and may propose solutions. If the parties agree to a solution, the Mediator formalizes the settlement. 3. Recommendation: If the parties did not select a common solution within 15 days of the commencement of Mediation, the "Recommendation Phase" is initiated. Within 4 days of the beginning of this phase, the Mediator makes a recommendation and gives reasons therefore. Unless the parties have entered into a valid prior agreement to be bound by the final recommendation of the Mediator, this recommendation is not legally binding. If parties do not approve the recommendation within 7 days, the case is terminated.

e-Mediator.co.uk (<http://www.e-Mediator.co.uk>)

Mediation

e-Mediator.co.uk, (originally known as "CyberSolve"), is a UK-based online mediation service that began operations in February 2000. It is an online offshoot of an offline mediation service provider ("Consensus Mediation") operating throughout the UK. It has dealt with only a handful of B2C cases e-Mediator.co.uk uses professional mediators with a variety of qualifications and experience levels, from student mediators to senior professionals. Individual mediators are selected based on the complexity of the case and the amount of money at stake. Fees vary according to the mediator, but are generally half the amount charged for face-to-face mediation: e.g., GBP 75 for a junior mediator or GBP 150 (+VAT) for a consultant on a claim of valued at up to GBP 5 000. Fees are payable in advance by each party (equally). e-Mediator.co.uk is offered only in English. Its website is easily reached through all major internet search engines. The site itself is user friendly and has been recently updated to provide a wealth of information about mediation and other dispute resolution techniques. A variety of communication tools, including email, telephone, and video conferencing are available to facilitate the mediation process. e-Mediator.co.uk uses secure encrypted email, to ensure identity, security and the enforceability of any settlement reached. Everything discussed within the mediation is kept private amongst the parties. If the parties decide to seek legal recourse after undertaking mediation, the mediators cannot be called upon to give evidence regarding the mediation. Cases filed with e-Mediator.co.uk are usually concluded within a week. Parties can opt out

of the process at any time. The outcome of each dispute is confidential; results are not published. While representation by a lawyer is not necessary, Consensus Mediation does recommend that parties seek legal advice before entering the negotiation process. For this purpose it provides links to directories of solicitors and other legal resources on its website. e-Mediator.co.uk has a success rate of approximately 60 to 70%.

ASSESSMENT

e-Mediator.co.uk's service is strong in terms of independence, convenience, transparency of process, and especially, due process. Affordability is enhanced with the tiered service structure. Because of the fees involved, however, this service is not practical for typically low value B2C disputes. As with mediation generally, the confidentiality of case results prevents this service from providing useful marketplace information.

eResolution.ca (<http://www.eResolution.ca>)

Mediation/arbitration

eResolution.ca is a soon-to-be-launched Canadian-based online ADR service. It has been offering online dispute resolution services for domain name disputes since January 2000. In the Fall of 2001, it will begin offering online mediation and arbitration services for B2B and B2C commercial disputes. eResolution.ca is a private business venture that receives no public funding. eResolution.ca offers its services in both English and French. It will use an array of communication tools in order to resolve disputes including web-based communications, real time chat, email and phone. eResolution.ca will not publish the outcome of any of its cases, save in an anonymous statistical format. There will be a procedural time limit imposed within which a dispute must be settled. The fee schedule will be based on a flat rate scheme and a percentage of the amount in dispute for higher value conflicts. eResolution.ca's ODR process will involve three distinct processes: negotiation, mediation, and arbitration, which can be used jointly or separately, as appropriate for the case in question. Once a party files an online request for ODR services, the normal first step is to attempt resolution via an online forum through which the parties can confidentially share views, documents, and make settlement offers. If negotiations fail, parties can engage the online services of a professional mediator specializing in the field of their conflict. Again, this process is confidential and voluntary; parties can withdraw at any time. Finally, if the parties so desire, they may engage the services of a professional arbitrator in order to obtain a binding decision. A number of eResolution.ca's current practices for domain name dispute resolution will be applied to its general mediation and arbitration services. For example, qualified Arbitrators and Mediators will continue to be selected by eResolution.ca's "Arbitrators Council", and will then be assigned to disputes on the basis of their experience with the issues in question, the geographic location of the parties, and the language(s) in which the parties are conversant. eResolution.ca's mediators and arbitrators are required to sign a declaration of independence and impartiality before they take on a dispute. Fees have yet to be determined.

ASSESSMENT

Because eResolution.ca's B2C services are not yet fully developed, we cannot provide an assessment on its usefulness for consumers.

i-Courthouse.com (<http://i-courthouse.com>)

Non-binding arbitration in form of mock jury trial

i-Courthouse.com is a U.S.-based online ADR provider that has been in operation since November, 1999. This private business venture was established in order to create a virtual courthouse that delivers juried verdicts on civil disputes in a fraction of the time that the traditional legal system would

require. i-Courthouse.com receives no external funding. The service functions as a mock-trial forum that is analogous to nonbinding arbitration (although parties can agree to make the results of the mock trial binding). i-Courthouse.com is currently available only in English, however there are future plans to offer the service additionally in French and Spanish. Cases are presented over the internet and are decided by juries. In public cases, the jury is comprised of an unlimited number of volunteer jury members. In private, JurySmart cases, a limited number of jurors are summoned to hear and decide the case confidentially, and are available to the parties afterwards for additional questions and debriefing. Public cases at i-Courthouse.com are free. JurySmart cases, which included a detailed written report breaking down juror responses demographically, cost USD 329. All communications take place via the i-Courthouse.com website. Personally identifying information (*e.g.*, both first and last name, addresses) is not to be used, and no racial, ethnic, or religious identifying information is to be offered. The service uses passwords and registration numbers to enhance security, but does not guarantee the security of any information transmitted over its website. For public cases, case results are available to the public, and those who register to be i-Courthouse.com members can view the evidence and arguments posted by the parties and participate as jurors. Joining i-Courthouse.com is free and takes less than two minutes to complete. JurySmart cases can only be viewed by the parties; the participating jurors have limited access to see the case materials presented, but cannot view the verdicts and comments provided by the other jurors. While the parties to a public case dispute must file their electronic “trial books” within 72 hours of registering, there is no time limit placed on verdicts. Cases continue until dismissed by the plaintiff, either because the parties agree that there has been a final verdict, or because the parties have settled the case. Plaintiffs can obtain verdicts without the cooperation of the defendant. If the defendant does not respond to an email summons with ten days, a verdict is rendered solely on the basis of the plaintiff’s evidence. The i-Courthouse.com website is easy to access via all major search engines, and is easy to use either as a plaintiff or a jury member. Over 600 public and JurySmart cases have been filed with i-Courthouse.com.

ASSESSMENT

i-Courthouse.com is an interesting, and, to the best of our knowledge, unique, online service. While it does not necessarily resolve disputes, i-Courthouse.com does provide a useful tool for disputing parties who wish to evaluate the merits of their case, and possibly to put pressure on the other party to settle. It is therefore one of the few ODR services that offers assistance to consumers even where the vendor is uncooperative. However, the USD 329 user fee for “JurySmart” cases limits its affordability.

InternetNeutral.com (<http://InternetNeutral.com>)

Mediation

InternetNeutral.com is an independent U.S. based online mediation service provider. This private business venture has been in operation since 1997, and will handle any type of online commercial dispute. A variety of communication tools are offered, including email, instant messaging, chat rooms and video conferencing. Despite being available since 1997, InternetNeutral.com has not yet resolved any disputes. It ascribes this to the fact that most disputants are not yet able to use, or are sufficiently comfortable with, existing online technologies for mediation, especially video-conferencing. It is expected that this will change over time. Where mediation is conducted solely through email (possible where the parties need not be present at the same time, and where no significant documentation needs to be reviewed), InternetNeutral.com charges a per-minute fee (for time spent reviewing and preparing email) ranging from USD to USD 6, depending on the magnitude of the claim. (USD 1/minute for claims larger than USD 100; USD 2/minute for claims between USD 100 and USD 1,000). Where other communication tools than email are used, a minimum half-day fee of USD 250 per party applies. This covers two hours of mediation time as well as two hours of reading and preparation time. Additional services cost USD 125 an hour. Charges will be 50% higher if the service is used outside of the hours of 7am and 7pm (local time).

InternetNeutral.com's services are easy to locate via any major search engine. Its website is informative. Parties must agree to abide by the certain rules prior to using the service. No set time limits apply. Instead, the process continues until an agreement is reached or until one of the parties decides to end the mediation. All communications during the mediation process strictly confidential and cannot be used in a court proceeding. Case results are not published. Mediators used by InternetNeutral.com are required to have internet skills, training and experience in mediation, and knowledge of business and commercial law. They are also required to abide by the ABA approved Model Standards of Conduct for Mediators. InternetNeutral.com has developed a standard mandatory mediation clause that can be inserted into commercial contracts. This clause requires a party who disputes an Internet transaction to engage in mediation with the vendor via InternetNeutral.com, where the matter cannot be resolved internally.

ASSESSMENT

InternetNeutral.com ranks high in independence, transparency, and due process. As with mediation generally, the confidentiality of case results prevents this service from providing useful marketplace information. Despite the fact that it has scaled its services and fees in an attempt to accommodate smaller claims, InternetNeutral.com's usefulness for consumer disputes is limited because of the cost to consumers and the technology required.

InternetOmbudsmann (<http://InternetOmbudsmann.at>)

Complaints assistance/mediation/arbitration

InternetOmbudsmann.at is an Austrian-based online ADR provider that has been in operation since December, 1999. This non-profit venture was jointly established by the Austrian Institute for Applied Telecommunications (Das Osterreichische Institut fur angewandte Telekommunikation: OIAT), and the Austrian Consumer Information Organization (Der Verein fur Konsumenteninformation: VKI), with financial assistance from the European Community. OIAT received corporate funding to develop the technological platform for the service (although funds from businesses engaged in consumer ecommerce were not accepted), while VKI supports the consumer information and complaints handling aspect of the service itself. InternetOmbudsmann.at currently provides online complaints assistance (consumer information) and mediation services, online arbitration, and since Spring 2001 legal protection for consumers when ODR attempts don't lead to a result. It handles B2B, B2C, and C2C disputes. A number of communication tools are used to settle disputes, including email, fax, and phone. The service is free for all parties. The legal protection is offered in the frame of a membership programme. It is provided in German and English. InternetOmbudsmann.at's website is easy to locate via all major search engines, and is easy to use and navigate. InternetOmbudsmann.at does not impose a time limit on the resolution of disputes, which are usually resolved within one week. Either party can opt out of the process at any time except during binding arbitration. The parties can agree beforehand to binding arbitration. At no time, though, do consumers give up the right to take their case to court. Arbitration decisions are guided by local consumer protection law and relevant international guidelines. Reasons for arbitration decisions are provided to parties. Case results are publicised in Austrian newspapers and online media. More than 300 online media refer to the report of The InternetOmbudsmann.at. Mediators and arbitrators working for InternetOmbudsmann.at are required to hold a variety of qualifications. They must have knowledge of consumer protection, ecommerce and trade law, as well as be familiar with international agreements. They must also have mediation and conflict resolution experience, and journalistic and research experience. Mediators and arbitrators are assigned to individual cases on the basis of their expertise. To date, 1400 cases have been filed with InternetOmbudsmann.at; 92.6% have been resolved in the year 2000.

ASSESSMENT

InternetOmbudsmann.at ranks high in terms of independence, transparency, effectiveness, due process and legality/liberty. Its rapid growth over the past year attests to its usefulness for consumers. This service is limited, however, insofar as it is marketed to Austrian complainants (*e.g.*, reliance on Austrian media for publicity) and is offered in German and English only.

MARS (<http://www.resolvemydispute.com>)

Automated negotiation/mediation/arbitration

Mediation Arbitration Resolution Services (MARS) is a U.S.-based online ADR provider that has been in operation since October, 1999. This private business venture relies upon user fees, but is also seeking external sources of funding. It has recently started offering a MARS Merchant Seal Program, targeted at the consumer ecommerce market. MARS handles all kinds of disputes. MARS offers four separate dispute resolution services, described below. Each requires an advance filing fee of USD 25 per party, which will be applied towards overall fees or refunded if the claim is not accepted. Most relevant for online consumer disputes is “Fair & Square”, an online mediation service for online ecommerce disputes only. This process usually takes no more than a week, and as with all mediation, parties retain the right to take their case to court. Fees for this service are split equally between the parties, and occasionally with the merchant paying 75%. The fees are scaled to the size of the claim: USD 50 for claims of USD 100 to USD 250; USD 75 for claims from USD 251 to USD 500, USD 100 for claims between USD 501 and USD 1 000; and 15% of the settlement amount (min. USD 150) for amounts over USD 1 000. The minimum amount in dispute must be USD 100, with the transaction occurring within the last 60 days. The MARS Merchant Seal program requires merchants to agree to provide business information and references in order to qualify to participate in the program, and to abide by the business practices recommended by the eCommerce and Consumer Protection Group. The merchant must agree to take place in third party ODR process if their own internal Customer Service process fails to resolve a problem or dispute, and must agree to pay all, or part of the cost of the ODR process. Finally, while the merchant agrees to be bound by the outcome of the negotiation or binding mediation, the consumer is not and may seek redress in other legal venues. MARS also offers a blind-bidding automated negotiation service called “SuperSettle”. Parties agree in advance that any settlement reached is final and binding. A series of confidential demands and offers are exchanged over the telephone or the Internet until the Respondent’s last offer is within 10% of the Claimant’s last demand, at which time the matter is settled. Parties have 30 days to resolve their dispute using SuperSettle. Fees payable by each party are scaled according to the amount in dispute, and involve a registration fee, a settlement fee, and for larger claims, a fee per round of bidding (USD 50, USD 75, and USD 0 respectively for claims of USD 1 000 to USD 5 000). MARS’s general mediation and arbitration services are also available for any kinds of dispute. Tools used include teleconferencing, the Internet, and video-conferencing (for an extra fee). MARS uses only professional, experienced mediators and arbitrators, and matches them to individual disputes on the basis of their expertise in the subject area. The resolution period is 30 days. Fees for this service are incurred equally by both parties; per party, they include an initial consultation/party contact fee of USD 150; a 2 hour mediation or arbitration fee of USD 225; and a one hour arbitration (at time of mediation) fee of USD 125. Typical mediation or arbitration fees thus amount to USD 500 for “fast-tracked” services, and \$600 for “full” services. MARS does not publish case results. Indeed, MARS requires participants to agree beforehand not to disclose the award or any case specific information to third parties. In order to assist in the enforcement of monetary awards, MARS offers a collection service. The MARS website is easy to locate, navigate, and provides adequate information about the service. Currently, MARS’ services are available only in English but there are plans to offer the service in Spanish, French and possibly Chinese.

ASSESSMENT

MARS's automated negotiation and regular mediation/arbitration services are unlikely to be useful for consumers because of the applicable fees. While MARS has developed a service specifically geared to small consumer disputes ("Fair&Square"), with fees scaled to the amount in dispute, the fact that such fees begin at USD 50 and can amount to up to 50% of the disputed figure still limits its affordability to consumers in small value disputes. Otherwise, MARS's services appear to meet most key criteria, including independence, transparency re: process, timeliness, and convenience. The MARS Merchant Seal program adds further value to this service. However, MARS's prohibition on the publication of case results seriously undermines its transparency, and means that the service fails to provide any useful marketplace information.

MediationAmerica.com (<http://www.mediationamerica.com>)

Online mediation, negotiation

MediationAmerica.com is a U.S. based online dispute resolution site focusing primarily on insurance claims and B2B, but available for B2C disputes as well. In addition to mediation services, parties using this site have access to a wide range of tools permitting interactive, multiparty videoconferencing and document sharing. This private business venture was launched in 2000. It relies on user fees, and does not accept investment funds from insurance companies. It operates in partnership with a web-design company and a law firm in Boston. MediationAmerica.com provides neutral mediators and sets up online portals through which parties can access such tools as mediation via videoconferencing, multi-party negotiations, or simultaneous document display (and eventual electronic transmission of) documents. The site also features private caucusing, which allows the mediator to conduct group discussions or exclude certain parties for private discussions with other parties (by 'clicking' them off the conference). Parties can also use standard e-mail. For video-conferencing, participants require a High Speed DSL connection, and computer with 450MHz to 700MHz Pentium Processor, 256 MB RAM, 24bit video card, camera and microphone. All video is broadcast quality and all audio/video conferences are data encrypted. Fees are \$200/hour, to be split equally among the parties. Settlements reached through MediationAmerica.com can be binding or non-binding, depending on the parties' agreement and/or jurisdictional rules. There is no minimum disputed value required to access the site.

ASSESSMENT

MediationAmerica.com's video-conferencing mediation service (like that of Internet Neutral) is unlikely to be of practical use for most B2C disputes, at least for the time being, given the cost to consumers and the requirement for sophisticated computer technology. As well, its fees will constitute a deterrent to its use in lower value B2C disputes.

NovaForum.com (<http://NovaForum.com>)

Mediation/arbitration/facilitated negotiation

NovaForum.com is a Canadian-based online ADR service which launched in June 2000. It is a private business venture, reliant on subscriber fees (business only). NovaForum.com offers the full range of dispute resolution services to its business subscribers, including facilitated negotiation, mediation and binding arbitration. It markets its DR services to businesses, who for an annual subscription fee, are entitled to display the NovaForum.com seal and have access to all of NovaForum's dispute avoidance resources (e.g., advice on contractual clauses). NovaForum.com also markets its services to corporate and government ombudsmen, complaints management, and adjudicative bodies. It is up to subscribing organizations whether or not to charge consumers a fee for use. Otherwise, each party to the dispute pays

an equal up-front fee to use “The Electronic Courthouse”. A successful party may recover its fees in the settlement or arbitration order. NovaForum.com offers its services for both B2B and B2C disputes, but it has dealt with only “about 20” B2C cases in the past 21 months. A wide variety of communication tools (e.g., email, fax, online conferencing, and video conferencing) are available. The multilingual service is available internationally, and simultaneous translation is expected to be available as of Fall 2001. NovaForum.com’s dispute resolution professionals have the ability to operate in English, French, Portuguese, German, Mandarin, Cantonese, Polish, Russian and Ukrainian. The service is available 24 hours/day. It is not clear, however, how many B2C cases this service has actually handled. NovaForum.com accepts disputes for resolution only once all avenues of redress internal to the company in question have been exhausted. High value cases are assigned to a neutral legal professional with subject matter expertise, who is either professionally licensed and/or sufficiently trained in ADR methods, and who agrees to abide by a strict Code of Ethics. Less expensive, but qualified, professionals are used to resolve smaller value consumer disputes. Decisions or settlements reached through NovaForum.com may be made binding by agreement of the parties. NovaForum.com assists its subscribers in drafting dispute resolution clauses for customer contracts, which require the customer to engage NovaForum.com’s ADR service before or instead of taking legal action. NovaForum.com’s arbitrators use common sense and the most appropriate applicable law to guide their decision-making. While parties are free to publicize the results of any dispute resolution via NovaForum.com, all communications in NovaForum.com cases are considered private and confidential, and will not be disclosed to third parties by NovaForum.com. Case summaries are made available to subscribers as part of the service package. Aggregate statistical data on such matters as the frequency of awards for complainants and defendants will be collected, and monitored to ensure impartiality. NovaForum.com’s service is expected to be well-advertised by its subscribers. Its website and service are user-friendly.

ASSESSMENT

NovaForum.com’s subscriber-fee approach has the benefit of potentially being free to consumers. However, NovaForum.com’s subscriber-fee approach raises questions of independence, which NovaForum.com should address through a clearly impartial governing body, as well as through the monitoring and publication of aggregate statistics. NovaForum.com gets high marks, however, for ensuring the independence of its dispute resolution professionals, for its multi-lingual service, and for delivering an effective dispute resolution service where offered. Transparency could be improved by publishing the results of arbitration decisions, at least. As with mediation generally, the confidentiality of case results prevents this service from providing useful marketplace information. To the extent that NovaForum.com encourages the use of mandatory arbitration clauses in consumer contracts, thereby interfering with consumers’ right to legal recourse, it violates a central principle of consumer protection.

OnlineResolution.com (<http://OnlineResolution.com>)

Mediation, user fees

OnlineResolution.com is a U.S. based online ODR provider that began offering services in January 2000. It is a spin-off from Mediate.com, which offers dispute resolution information and referrals to face-to-face mediators. OnlineResolution.com handles all kinds of disputes. Arbitration, mediation, automated negotiation, and expert evaluation services are offered on the site, and each mechanism has a series of pages explaining in detail how it works. Complainants submit their disputes in an intake form available on the homepage of the site. There are no time limits for dispute resolution processes offered. Parties can agree to make the results of any process binding. Services are advertised in English only, but several of its panelists are also fluent in other languages. The dispute resolution process is conducted in secure online environments called ‘Resolution Rooms.’ These Rooms enable parties to discuss their issues, share files, schedule meetings, and jointly draft documents. Disputes of under USD 500 cost the initiating

party a one-time fee of USD 15-25. This provides electronic conversation and file-sharing, and the good faith efforts of a qualified mediator, but no guaranteed amount of time. Disputes over USD 500 cost each party USD 100 for up to two hours of mediation services. Beyond this two hour minimum, fees are USD 50/hour per party. The fees tier upward from this rate based on the value under dispute. All panelists used by this service are trained and experienced, and must abide by the Model Standards of Practice for Mediators of the ABA, SPIDR, and AAA. Information on each mediator is available online. All information revealed throughout the mediation process is kept confidential, and case results are not published. Parties retain the right at all times to take their dispute to court, in which case the mediator cannot be asked to testify or provide materials from the mediation. A full privacy policy is posted on the OnlineResolution.com website. As of the date of this survey, OnlineResolution.com has handled app.25 B2C disputes, of which 5 were cross-border.

ASSESSMENT

OnlineResolution.com's regular mediation services are clearly too expensive for the typical B2C dispute. However, its discount service for small value disputes is geared toward the B2C market. OnlineResolution.com's service appears to meet the criterion of independence, as well as competence and convenience. Transparency is enhanced by the detailed information provided on staff and mediators, but information on the organization itself is lacking.

Online Ombuds Office (<http://Ombuds.org>)

Ombuds service/mediation; free

The Online Ombuds Office is based in the United States and has been providing complaints assistance services and online mediation since June 1996. It was developed as a non-profit research project by the University of Massachusetts at Amherst, with funding from the National Center for Automated Information Research (NCAIR) and the Hewlett Foundation (a private foundation in California). It is run by the Centre for Information Technology and Dispute Resolution at the University of Massachusetts, with an Advisory Panel of experts. The Online Ombuds Office handles any kind of dispute arising from online activity. The service is free for both parties. The Online Ombuds Office offers first, an online informational resource that can help consumers help themselves. Second, it offers complainants assistance on appropriate strategies for dispute resolution in the circumstances. Finally, the Online Ombuds Office provides mediation services, upon request of both parties. The Online Ombuds Office's mediation service is currently offered only in English. All of its mediators have completed a training program and are assigned to individual disputes on a random basis. There are no time limits placed on reaching a resolution to a dispute. Online Ombuds Office uses a variety of communication tools including email, and web-based communications, and experiments with other tools to enhance online mediation. Parties can opt out of mediation at any time, and the results are only binding upon agreement of the parties. Online Ombuds Office does not publish any of its case results and so the outcomes are not accessible to the public. Online Ombuds Office's website is easy to locate through any major search engine, and the site itself is easy to navigate. There have been just over 200 cases filed with Online Ombuds Office and approximately 50% of them have been resolved favourably. Most recently, particular efforts have been devoted to resolving disputes over Internet domain names.

ASSESSMENT

The Online Ombuds Office service is particularly attractive to consumers because it is free, and because it provides assistance regarding recalcitrant vendors. The mediation service takes advantage of online technologies, thus improving its potential effectiveness. The independence of this service is guaranteed by its roots in academia, and its non-allied funding base. However, the ongoing viability of this

business model remains to be proven. The service is adequately transparent, although the lack of information on case results (as with all mediation services) means that this service provides no marketplace information for consumers generally.

ResolutionForum.org (<http://ResolutionForum.org>)

Assisted negotiation/mediation; user fees

ResolutionForum.org is a U.S.-based non-profit ADR provider that has been in operation since 1997. It was created by “leaders in the business, legal, and medical communities in close association with the Center for Legal Responsibility at South Texas College of Law. Its mission is to improve the quality and efficiency of dispute resolution services and to increase public awareness of Alternative Dispute Resolution (ADR).” In particular, it seeks to make ADR services more accessible and affordable to the general public. ResolutionForum.org receives external funding from the State Bar of Texas. ResolutionForum.org will accept all kinds of disputes. ResolutionForum.org uses its own online conferencing system (“CAN-WIN”) designed specifically for online negotiation and mediation. The CAN-WIN system allows for public and private communication among parties around the world, using standard browser software. Through CAN-WIN, ResolutionForum.org also offers a pre-ODR conferencing service that allows parties to obtain an objective evaluation of the issues, risks and costs of their case before commencing settlement negotiations. ResolutionForum.org’s services are currently available in both English and Spanish. The cost of using this service is USD 250/hour per party. If a party is of limited means, this fee may be lowered, at the discretion of ResolutionForum.org. No set time limits apply. All information is kept confidential and case results are not published. Confidentiality is assured by password-protected access to the conferencing system. All mediators and negotiators, as members of ResolutionForum.org, are screened for legal and ADR experience. The Code of Ethics of the Institute for Responsible Dispute Resolution (see the web site) has been adopted, and all RF members who conduct ODR will have committed to this Code. Mediators and negotiators are assigned to individual disputes on a random basis. The ResolutionForum.org website is easy to locate using any major internet search engine. 75% of the cases filed with ResolutionForum.org, Inc’s CAN-WIN conferencing system have been resolved favourably.

ASSESSMENT

This service appears to meet the criteria of independence, convenience, and transparency re: process, and is particularly noteworthy for its easily accessible online conferencing system. However, it remains too costly for consumers involved in small value disputes. As with mediation generally, the confidentiality of case results prevents this service from providing useful marketplace information.

Resolveitnow.com (<http://Resolveitnow.com>)

Automated negotiation

Resolveitnow.com is a privately owned U.S. based ODR site providing automated negotiation. It was developed by a small group of lawyers and professional mediators. It does not receive any external funding, relying only on user fees. All settlements reached are considered binding. This site uses a blind bidding process. Detailed instructions are provided for the claimant. The claimant enters their information, and their minimum and maximum settlement values. The site notifies the other party that a claim has been filed, without revealing any information about the values submitted by the claimant. The opposing party enters the values they are willing to accept, and if there is an overlap, the program settles on the mid-point. If there are two identical values, the program will accept those instead of determining a range. If there is no settlement on the first try, the initiating party may expand their range by up to 50% for a second round. If

there is still no settlement, the party can either select new ranges, or submit a new claim. There is no fee for submitting claims. The fees associated with this site exist when a settlement is reached. If the settlement is more than USD 3 000, each party pays USD 150. If it is less than USD 3000, Resolvetitnow.com receives 5% of the settlement value from each party.

ASSESSMENT

While receiving high marks for transparency, ease of use, and affordable (scaled) fees, this ODR service is, like other automated negotiation services, of limited applicability to B2C disputes where matters other than monetary settlement amounts are at issue.

SettleOnline.com (<http://SettleOnline.com>)

Automated negotiation

SettleOnline.com is a U.S. based automated negotiation service that began operations in June 1999. This private business venture was developed by Resolute Systems Inc., a provider of offline mediation, arbitration, mock trials, and other forms of ADR. SettleOnline.com handles any kind of financial disputes; its clientele is comprised primarily of insurance companies, law firms and corporations. SettleOnline.com's blind-bidding automated negotiation service is available 24 hours per day. It uses email and web-based communications. There is no fee for filing a case with SettleOnline.com, but a USD 50 "Agreement Fee" is charged to the filing party when the opposing party agrees to participate. If a dispute settles for USD 10 000 or less during negotiations with SettleOnline.com, each Party pays a Settlement Fee of USD 75 (USD 200 for settlements of over USD 10 000). Parties agree in advance to be bound by any settlement reached. For a period of up to 90 days, parties make confidential bids during consecutive rounds of bidding. If a demand is less than or equal to an offer, the case settles for the demand. Otherwise, settlements occur when demands and offers come within a pre-determined range of each other. SettleOnline.com currently offers its services in both English and Spanish, but it has plans to soon offer the service in other major languages. SettleOnline.com's website is accessible via all major search engines and is easy to use. All entries made to its website are protected with the Net Sure Protection Plan, and all data is encrypted. There have been over 2 600 cases filed with SettleOnline.com, and just over 50% of them have been resolved favourably.

ASSESSMENT

Like other automated negotiation services, SettleOnline.com's service is useful only for higher value financial disputes where both parties agree to use the service. It is of limited use to consumers in small value disputes with merchants, especially where issues other than monetary settlement are involved. The service is transparent, convenient, and easy to use.

SettlementOnline.com (<http://SettlementOnline.com>)

Automated negotiation

SettlementOnline.com is a U.S. based privately-run automated negotiation service, which has been in operation since 1999 and began as a pilot project with the Safeco Insurance Company's Spokane office. Like other automated negotiation services, it is focused on insurance claim disputes; of the 21 B2C disputes handled in the past year, all involved personal injury claims. It is available for consumers to access directly, but is most often used by companies when claims have been filed against them. Fees are charged only upon settlement of the case: USD 150 for each party. SettlementOnline.com receives no external funding from the companies that use the software. The process is a blind bidding, three step offer. The party originating the complaint enters three dollar values they are will to accept, and the opposing

party replies with three counter claims. The bids are compared round by round, and if they fall within a settlement range agreed upon by both parties, the claim is settled. The decision is binding. There is no set timeline for a case to be resolved. Although focused primarily on the local/ regional market in Seattle, SettlementOnline.com does accept participants from any location. They do not publish the results of settlements. The service is available only in English.

ASSESSMENT

As with other automated negotiation services, SettlementOnline.com has limited applicability to typical B2C disputes.

SquareTrade (<http://transecure.com>)

Facilitated negotiation, mediation, arbitration

SquareTrade is a U.S.-based online ODR provider that began operation in 1999 and went live in February 2000. It handles a range of ecommerce disputes and has also expanded into real estate mediation. Square Trade offers a trustmark in conjunction with its services to business subscribers who agree to abide by its rules. SquareTrade's services are presented in English, although its mediators have provided services in five additional languages. To date, Square Trade has conducted dispute resolutions involving more than 100 countries and currently handles approximately 10 000 cases per month. This private business venture is supported by subscription fees from its seal-holders, as well as by user fees for its dispute resolution services. SquareTrade has contracted with a number of online auctions and B2B marketplaces as well as bill payment and certificate services, to provide its Seal and ODR services for disputes. SquareTrade is also working with the California Association of Realtors to provide online mediation for real estate disputes. SquareTrade's dispute resolution process involves five steps: 1. Filing the case on the SquareTrade website. (The filing party is linked to Square Trade's website from the online marketplace.) 2. SquareTrade then automatically generates an e-mail notifying the respondent of the case file and provides instruction on responding to the case. The case and related responses appear on a password-protected Case Page on the SquareTrade website. 3. Direct Negotiation: Using SquareTrade's secure "Case Page", an automated webbased communications tool, the parties try to reach an agreement by communicating directly with each other. App.60% of cases are resolved at this stage. 4. If the parties cannot resolve the case through Direct Negotiation, they can request the assistance of the mediator in developing a fair, mutually agreeable solution. 5. If the parties cannot reach a mutually agreeable settlement with the assistance of a mediator, they can ask the mediator to recommend a solution. In such a case, the reasoning behind his or her suggested resolution will be communicated to both parties. SquareTrade's Direct Negotiation service is currently free to consumers. Mediation services are priced as follows: USD 20 each to the filer and the respondent, plus 0.5% of the transaction value if >USD 1 000. Ebay covers the cost of mediation for its users, so it is free for consumers in that context. Pricing for the Square Trade Seal program is tiered, according to company's annual revenues: from \$100/yr where revenues are <USD 50 000 to USD 6 400/yr where revenues are >USD 1b. See Square Trade for pricing on real estate mediation. Disputes brought to SquareTrade are usually resolved within 10 to 14 days, although there is no time limit. The parties can opt out of the process at any time. SquareTrade's mediators are trained and experienced; information on some of them is provided on the website. SquareTrade does not publish the results of its cases, given the strict confidentiality of the process.

ASSESSMENT

SquareTrade is by far the most active of existing B2C ODR services, largely as a result of its successful partnership with the burgeoning online auction site, eBay. SquareTrade's service ranks high in terms of transparency re: process, convenience, affordability, due process, and liberty. Transparency could

be improved by publishing more information on who runs the service, and by providing background information on all mediators. As well, the publication of case results on the SquareTrade website would provide consumer information regarding online business practices. The service appears to be independent of vested interests where it is offered in partnership with online marketplaces, but this may not be the case where it is offered via individual business subscribers.

The Virtual Magistrate (<http://vmag.org>)

Non-binding arbitration

The Virtual Magistrate is a U.S.-based online ADR provider that began as an experimental pilot project in May, 1996. It was revitalized and relaunched in the summer of 2000. This non-profit service was developed by a group of interested individuals at a meeting sponsored by the National Center for Automated Information Research (NCAIR) and the Cyberspace Law Institute (CLI). The Virtual Magistrate receives external funding from the Chicago-Kent College of Law. It handles consumer disputes arising from online transactions in the areas of communications, property, tort and contract. The Virtual Magistrate conducts only non-binding arbitration, and does so via email. Its service is free for both parties. The Virtual Magistrate attempts to resolve all disputes within 72 hours of both parties agreeing to participate. Parties file their complaint and response, with supporting information, via online forms. Once a complaint has been accepted, the VMAG administrator selects a Magistrate and forwards the documentation to that person. A listserv/newsgroup (“grist”) is then set up for that case, and participants are directed to post messages to the grist, which automatically sends all messages to all participants. Parties can send private email messages to the Magistrate as well. All information is kept confidential during the arbitration process. Parties can opt out of the process at any time, and always retain their right to legal recourse. The Virtual Magistrate’s arbitrators (“magistrates”) do not automatically apply the law of any specific legal jurisdiction when making a decision. Instead, they look at the circumstances of each complaint, the views of the parties as to applicable legal principles, and the likely outcome in any ultimate litigation or dispute resolution. Magistrates provide reasons for their decisions. They are selected from a pool of qualified and trained arbitrators, who are familiar with both the law and online systems, and who must abide by the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes. Once decisions are rendered, they are made public, along with complaints and other submissions, via a website maintained by the Villanova Law School. The Virtual Magistrate’s website is easy to locate via all major search engines and is informative and easy to navigate. The Virtual Magistrate offers its services in English, although it will provide translation in some other languages upon request. A link is provided to the Online Ombuds Service, which provides online complaints assistance and online mediation. It appears, however, that this service is not very active.

ASSESSMENT

The Virtual Magistrate scores high in terms of all key criteria: independence, transparency, affordability, convenience, speed, due process and liberty. The service is especially appealing because it is free to consumers, and because case results are published. However, reliance on external sources of funding may not be viable in the longer term, especially if the service proves to be popular.

U.S. Settle (<http://ussettle.com>)

Assisted negotiation

U.S. Settle is an online negotiation service which has been in operation since April, 1999. Established by a retired U.S. judge and professional mediator/arbitrator, this private business venture “is designed to resolve financial disputes for corporations, insurance companies, self-insureds, municipalities,

government agencies, claimants and attorneys.” The only B2C cases it has handled are fewer than 20 medical malpractice claims. U.S. Settle’s services are available 24 hours/day, 7 days/week, and are provided in English only. Disputes can be submitted by postal mail, e-mail, fax, or telephone, as well as via the U.S. Settle website. Once submissions from both parties are received, U.S. Settle immediately compares submissions. If an offer is 70 percent or more of a demand, both parties are notified that a settlement has been reached at the median figure between the two. (With prior agreement of the parties, U.S. Settle will use other parameters.) The negotiation process continues until a settlement is reached or until one of the parties withdraws their case. The confidentiality of all offers and demands is protected via passwords and encryption. Parties can opt out of the process at any time. It is up to the parties to make settlements binding; U.S. Settle does not appear to require such agreement in advance. A fee of USD 250/party is charged only once a settlement is reached. Parties can submit as many rounds of demands and offers as they wish, at no additional cost. U.S. Settle also offers traditional mediation services (additional cost) where disputes cannot be settled through the online negotiation process. U.S. Settle’s website is information and the service is easy to use. Case results are not published. U.S. Settle claims to have a success rate of between 40% and 50%.

ASSESSMENT

Like automated negotiation services, U.S. Settle is not applicable to the typical B2C dispute. It is potentially useful for higher value consumer disputes where money is the only issue and where the vendor is willing to negotiate in this manner. Among automated negotiation providers, U.S. Settle ranks high in transparency and independence. It is convenient and easy to use. However its fees are on the high side.

WebAssured.com (<http://WebAssured.com>)

Complaints assistance/mediation/arbitration/consumer information

WebAssured.com is a self-regulatory trustmark initiative run by a US-based private corporation. It offers a seal program to e-merchants (currently 4 000+ members worldwide), marketplace information for consumers, and a free on-line dispute resolution system. The ODR process is scaled, beginning with automated complaints assistance and escalating where necessary to mediation, and ultimately arbitration. WebAssured.com’s dispute resolution services are available in respect of all B2B, B2C, or C2C transactions, and regardless of whether the parties are members of WebAssured. However, arbitration services are provided only in respect of member companies. WebAssured.com member companies must adhere to a Code of Practice which includes a commitment “to employ our best efforts to fairly resolve all legitimate complaints in a timely fashion”, to abide by the on-line dispute resolution system, and to be bound by any arbitration settlements derived from that system. Company-specific information regarding legitimate unresolved complaints is posted by WebAssured.com in an online database that is available to consumers free of charge. If WebAssured.com receives a complaint about any company (member or non-member), it will first attempt to use its automated ODR system to assist the parties in resolution. The ODR system works as follows: 1. Upon receipt of a complaint, WebAssured.com forwards the complaint via email to the firm in question. If the complaint is not resolved within two business days, this fact will be noted in WebAssured.com’s database (but not yet in the public database), the consumer will be asked for more information, and a second e-mail will be forwarded to the merchant emphasizing the increasing urgency of the issue. Two business days after the consumer has responded to the first notice, the process is repeated and a second notice is sent via e-mail. Two business days after the consumer has responded to the second notice, a third e-mail notice is sent to the merchant, and the consumer is again asked to verify that the dispute has been resolved. 2. If the complaint remains unresolved after the automated process described above, a WebAssured.com customer service representative will attempt to contact the merchant personally on the consumer’s behalf to resolve the remaining outstanding issues. 3. Unresolved complaints against member firms may be referred to a WebAssured.com “Mediator”, who, after reviewing the complaint

history, conferring with both parties, and consulting with others, renders a written opinion as to the most reasonable and just resolution. Member firms explicitly agree to abide by such opinions and to perform whatever restitution is indicated by the “Mediator”. (NB: This is really arbitration.) In addition to the above dispute resolution service, which is free to consumers, WebAssured.com offers insurance of up to US\$200 on purchases from member firms who have a clean track record for at least six months. A key part of WebAssured.com’s overall service is its compilation and publication of marketplace information. Consumer complaints are monitored and unresolved legitimate complaints are published in ABusiness Background Reports@. Frivolous or unfounded complaints are filtered out through a mix of automated tools and personal assessment by WebAssured staff. In addition to the Business Background Reports, Merchants with several unresolved complaints are placed on “the Watchlist”, a list of disreputable companies available on the WebAssured.com website. As well, WebAssured.com offers an automatic warning service which alerts online shoppers when they enter a website with a poor reputation. This “ShopAssured” Web browser plug-in can be downloaded free of charge by online consumers. To date, the WebAssured.com on-line dispute resolution system claims a 95% success rate resolving complaints against member firms, and 79% success resolving complaints against non-members. Over 80% of resolutions occur within 48 hours of WebAssured.com notification. It is not clear how many B2C disputes this service has handled.

ASSESSMENT

WebAssured.com’s dispute resolution service rates highly in terms of many criteria, especially availability, affordability, scalability, and compliance. Its context within a greater trustmark program, which uses publicity to incent compliance and customer satisfaction, and which offers binding arbitration re: member company disputes, adds to the effectiveness of this service. Availability and scale-ability are limited, however, in that arbitration is offered re: member companies only. While WebAssured.Com appears to operate independently of vested interests and in an impartial manner through its focus on customer satisfaction, its Board lacks any representation from consumer groups, and it is unclear whether all Board members (all accomplished businessmen) are truly free of bias. As well, it is unclear how the impartiality of WebAssured.Com’s ODR officers (all internal staff) is ensured, other than via the US\$200 money-back guarantee re: purchases from member companies. WebAssured.Com meets the requirements of transparency with respect to process, governing structure, and Board members, but provides no information on its ODR officers (Amediators@). It is one of the few ODR services to use publicity of ODR results to advantage (and scores highly in this respect), but fails to publish the results of its arbitrations so as to permit third party assessment of its own track record in this aspect of ODR.

WebMediate.com (<http://WebMediate.com>)

Automated negotiation, mediation, arbitration

WebMediate.com is a private business venture run by a team with experience in ADR, ecommerce, law, and business, that launched in the fall of 2000. WebMediate.com’s services are marketed, at least initially, to the insurance and B2B community, primarily through subscriptions with online marketplace operators. It does not accept investments from vested interests (*e.g.*, insurance companies). WebMediate.com’s service is currently available in English only, but the intention is to expand into other languages in the future. There are two fee structures in place. For disputes resolved using the automated settlement process ‘Websettlement’, the fee is based on a percentage of the settlement reached between the two parties, to a maximum of USD 400 (for settlements of USD 5 000 and higher). For regular, online facilitated Webmediation and Webarbitration processes involving mediators and arbitrators, the fee is USD 250 per hour. A suite of online ADR tools is used, the centrepiece of which is a threaded message board system, through which parties can communicate with the mediator/arbitrator and/or each other, confidentially or publicly. Parties are required to sign an agreement in advance agreeing to use applicable

terms of use and procedures. Arbitrations can be made binding by agreement. All mediators and arbitrators used by WebMediate.com are professionally trained and screened for experience, competence, and impartiality. Background information on each mediator/arbitrator is provided on the website. WebMediate.com maintains the confidentiality of all parties in all dispute matters and does not publish the results of its arbitration.

ASSESSMENT

This service appears to be strong in terms of independence, due process, competence, ease of use and transparency re: process. It is useful that information regarding the mediators is available on the site. However, the user fee structure for both the WebSettlement process, and the mediation and arbitration services limit its availability for lower dollar value disputes. As with mediation generally, the confidentiality of case results prevents this service from providing useful marketplace information. Arbitration results, at least, should be published.

Wecansettle.com (<http://Wecansettle.com>)

Automated negotiation

Wecansettle.com is a U.K. ODR site, providing only automated negotiation. It receives no external funding and is supported only by user fees. Settlements reached on the site are considered binding. The blind bidding system begins when the claimant accesses the site and enters the details of their case. They provide the opposing party's contact information and enter the monetary value they are seeking. The claimant can also indicate if they wish any legal fees to be covered by the opposing party. The site then notifies the other party. They enter the value they would be willing to pay. If there is less than a 20% difference between the two values, the claim is settled at the midpoint. However, participants have the option to choose a different range i.e. 10% or 30%. Bidding can continue until a settlement is reached. Participants have the option to take the case to court while bidding is occurring, but once a decision is reached, it is considered binding. There are no fees for either party for joining Wecansettle.com, initiating a claim, or making bids. However, once settlement is reached, the fees are as follows: Up to and including GBP 1 000, each party pays GBP 25. From GBP 1 001 up to and including GBP 3 000, GBP 50 per party, from GBP 3 001 up to and including GBP 10 000 GBP 100 per party, and from GBP 10 000 GBP 150 per party.

ASSESSMENT

While rating highly in terms of transparency (the site is very informative, and provides a large amount of detailed information to assist participants when filing claims), Wecansettle.com, like other automated negotiation services, is of limited applicability to B2C disputes where more than monetary settlement amounts are in issue. As well, the fees charged will be too high for many small value B2C disputes.

WebTrader (<http://Which.net>)

Complaints assistance

WebTrader is a trustmark scheme developed by the UK Consumer's Association and now in use by a consortium of independent consumer groups in six other European countries: Netherlands, Belgium, Italy, France, Spain and Portugal. By linking with similar schemes in other countries, domestic WebTrader programs aim to assist consumers in resolving disputes with WebTrader-accredited merchants in these other countries. The WebTrader scheme was launched in June 1999, with financial support from the European Commission for two years. The UKbased "Which?WebTrader" (WWT) program handled 1274

complaints from consumers about traders in the WWT scheme during the 12 months August 2001 to August 2001. Each domestic organization operates the WebTrader scheme slightly differently, but in all cases they make best efforts to assist the consumer in achieving a satisfactory result through an ombuds-type service. The fact that merchants accredited under the WebTrader scheme are required to adhere to a Code of Practice (which includes effective complaints handling) lends more power to the ombuds services than would otherwise be the case. A more formal ADR scheme, including mediation and arbitration services, is expected to be added to the WebTrader ODR service in the future. The UK scheme, operated by “Which?Online”, requires that consumers first attempt to resolve complaints with WebTrader-accredited merchants directly. Because the Which? WebTrader Code of Practice requires traders to deal with complaints quickly and effectively, it is expected that most complaints will be resolved at this stage. Where no resolution is achieved, Which? will contact the trader on the consumer’s behalf, and will request that the trader contact the consumer to resolve the complaint within an agreed time period. Where consumers are dissatisfied with the way in which their complaint was handled by Which? WebTrader, they can complain to a TrustUK, a higher-level body under which Which?WebTrader is accredited. As indicated in the Code of Practice, their independent service is free and available online to all consumers, no matter where they live. It is easy to use and quick, with clear time limits. They file quarterly on their performance to TrustUK. If the consumer does not think the complaint has been handled in accordance with these principles, they can refer it to TrustUK. Which?WebTrader merchants must agree to invite Which?Online customers to post comments about their experience with such merchants in Which?Online forums.

ASSESSMENT

WebTrader’s online “ombuds” service, while limited to complaints involving WebTrader-certified merchants, ranks high in terms of its independence from industry, and its effectiveness - especially affordability, ease of use, cross-border coordination, and enforcement/incentives for compliance. It is not clear whether case reports are published, so as to enhance transparency. Nor is the competence of ombuds personnel clearly established. On the other hand, WebTrader is the only ADR service identified in this survey to have a built-in oversight mechanism, through its accreditation by TrustUK. The fact that it is offered only in the language(s) of the host country clearly limits the availability of this service. WebTrader’s mediation and arbitration services are not yet operational, and so cannot be confidently evaluated, but the addition of these services to the site should enhance its value.

*Appendix III***GENERAL CHART OF ODR INITIATIVES**

Chart of initiatives based on data from “Research into Online Dispute Resolution”, report prepared for the Department of Justice, Victoria, Australia, 21 March 2003

Initiative	Website	No longer operating	No online services detected
ACI (A Commercial Initiative for Dispute Resolution)	www.aci-adr.com		X
ADRonline	www.adronline.com.au		
AllSettle	www.allsettle.com	X	
American Arbitration Association WebFile	www.adr.org		
Arbitraje y Mediación (ARyME)	www.aryme.com		
Asian Domain Name Dispute Resolution Centre	www.adndrc.org		
Bankers Repository Corporation	www.bbbonline.org		
Beachfire		X	X
Better Business Bureau Online	www.cpradr.org		
Camera Arbitrale di Milano	www.camera-arbitrale.com		
CEDR (Centre for Dispute Resolution)			X
Chartered Institute of Arbitrators	www.arbitrators.org		
Cibertribunal Peruano	www.cibertribunalperuano.org		
Claim Resolver	www.clicknsettle.com	X	X
ClaimChoice	www.claimresolver.com	X	X
clickNsettle	www.123Settle.com		
Complain.com.au	www.complain.com.au		
Consumers Association of Iceland	www.ns.is		
CPR Institute for Dispute Resolution	www.claimchoice.com		
Cybercourt	www.cybercourt.org	X	X
Cyberlaws.net	www.cyberarbitration.com		
Cybersettle	www.cybersettle.com		
CyberTribunal	www.cybertribunal.org	X	X
Dispute Manager	www.disputemanager.com		
e@dr	www.e-adr.org.sg		
E-commerce Mediation Committee of Korea	www.ecmc.or.kr		
Electronic Consumer Dispute Resolution (ECODIR)	www.ecodir.org	X	X

Initiative	Website	No longer operating	No online services detected
e-Mediator	www.consensusmediation.co.uk		
eNeutral	www.eneutral.com		
eResolution	www.eresolution.ca	X	X
e-Settle.co.uk	www.e-settle.co.uk		
European Advertising Standards Alliance	www.easa-alliance.org		
EZResolve from Labormate		X	X
FSM	www.fsm.de		
Global Arbitration Mediation Association (GAMA)	www.gama.com		
iCourthouse	www.i-courthouse.com		
iLevel	www.ilevel.com	X	X
IntelliCOURT	www.intellicourt.com	X	X
Internet Ombudsman	www.internetombudsmann.at		
Internet Ombudsman	www.internetombudsmannen.se		
InternetNeutral	www.internetneutral.com		
Intersettle	www.intersettle.co.uk		
IRIS Médiation	www.iris.sgdg.org/mediation		
JAMS	www.jamsadr.com		
Mediate-net	www.mediate-net.org	X	X
Mediation America	www.mediationamerica.com		
Mediation Arbitration Resolution Services (MARS)	www.resolvemydispute.com		
Michigan Cybercourt	www.michigancybercourt.net		
Mosten Mediation			X
MyClaim.com	www.myclaims.com	X	X
National Arbitration Forum	www.arbitration-forum.com		
New Court City Online	www.newcourtcity.com	X	X
NotGoodEnough.com.au	www.notgoodenough.com.au		
Nova Forum	www.novaforum.com		
Ombuds Office Online	www.ombuds.org	X	X
Online Confidence	www.onlineconfidence.org		
OnlineDisputes Inc.	www.e-arbitration-t.com	X	X
Public Disputes Online	www.publicdisputes.org		
Rent-a-Court.com	www.rent-a-court.com	X	X
Resolution Canada	www.resolutioncanada.ca		
Resolution Forum Inc	www.privatejudge.com		
Resolution Private Judge	www.onlineresolution.com		
Resolve It Now	www.resolutionforum.org	X	X
Retail Tenancy Unit Online Mediation	www.retailtenancy.nsw.gov.au		

Initiative	Website	No longer operating	No online services detected
Self-Settle.com	www.self-settle.com	X	X
Settlement Online	www.settlementnow.com		
SettlementNOW	www.settleonline.com	X	X
SettleOnline	www.resolveitnow.com	X	X
SettleSmart	www.settlementonline.com	X	X
SettleTheCase	www.settlesmart.com		
Settlex	www.vnpartners.com	X	X
SmartSettle	www.settlethecase.com		
Square Trade	www.smartsettle.com		
The Claim Room	www.theclaimroom.com		
The Hearing Room	www.auscript.com.au	X	X
The Virtual Magistrate	www.squaretrade.com		
TRUSTe	www.vmag.org		
USSettle.com	www.truste.com	X	X
Web Dispute Resolutions		X	X
Web File	www.thebrc.com		
Web Trader	www.whichwebtrader.net		
WebAssured	www.ussettle.com		
WEBdispute	www.webassured.com		
WebMediate	www.webdispute.com		
WeCanSettle	www.wecansettle.com		
Word&Bond	www.wordandbond.com		
World Intellectual Property Organisation (WIPO)	www.wipo.int		
1-2-3 Settle	www.123Settle.com	X	X

Appendix IV

**ADR EDUCATIONAL INSTRUMENT FOR SMES –
RESOLVING E-COMMERCE DISPUTES ONLINE:
DOING THE RIGHT THING ABOUT CONSUMER COMPLAINTS**

Introduction

E-commerce gives you access to a world-wide market at a cost that has never been so low. It also raises some practical questions concerning your ability to gain the confidence of the potential users of your Web site and your liability under the legislation and in the courts of the countries where your Web site is going to be used.

In order to gain the confidence of potential users, the first step is to put yourself in the shoes of such users and ask yourself what you would look for in a Web site. What you might first look for is contact details such as a phone number or an e-mail address so you can contact the business if something goes wrong. You might also look for information about privacy protection, terms and conditions and the business' customer complaint services or money-back guarantees. You might also look for information about the business' policies on dispute settlement. In addition, some online businesses are part of "seal" or "trust mark" programmes that certify that a business meets certain minimum standards. As a potential buyer, you might also look for an escrow service, through which a third party can hold your money until you get the goods or services you ordered. Other companies offer insurance programmes through which you can get your money back if you don't get the products or services you ordered. All of these elements should be thought out when you think of doing business on line with consumers.

There can be no doubt that well-presented and well-managed internal complaint handling systems and procedures can provide a measure of assurance to consumers that a business is abiding by some standard of service or reliability. Not only do the presentation and operation of such systems and procedures represent an investment in creating and maintaining your market share, they also significantly reduce the likelihood of costly, cross-border legal battles. Such systems and procedures also have the potential benefit of improving your public image and providing valuable customer feedback that will help you improve your offering.

Although internal complaint handling systems and procedures should aim to erase all differences and succeed in solving most, your business will inevitably encounter the odd dispute that won't go away. Even if your system does iron out virtually all differences, it is helpful to have an external ADR (alternative dispute resolution) option that both the consumer and yourself can trust to help resolve outstanding issues impartially, at a reasonable cost. The development of information and communications technology has made ADR more accessible and better adapted to small cross-border transactions. Online ADR, also called online dispute resolution (ODR), can be offered to the consumer as an on line, neutral third-party option that can be used from the comfort of home (where the disputed transaction may have taken place) with no need to travel and at minimal cost. In most cases involving a cross-border consumer e-commerce transaction, ODR stands a very good chance of being more satisfactory to both the consumer and your business than court action.

Although an ODR process can be initiated by the consumer irrespective of whether you overtly offer it, you should remember that you are in the best position to set it up and make it work for both you and the consumer. Even though a consumer often has the right to take legal action against you under his or her own law in his or her own courts, ODR might still be more attractive. The expense, time, complexity and uncertainty of judicial processes often make court action impractical for small amounts, a fact that is compounded in cross-border settings by jurisdiction, applicable law and enforcement difficulties. Your overriding concern should be to ensure that as many disputes as possible are resolved out of court.

To determine how to establish your policy, procedures and offerings with respect to consumer complaints and ADR, consider the following questions:

Key Questions

- 1) *How do I establish a complaint handling system?*
- 2) *What kinds of online ADR mechanisms are available?*
- 3) *How do I choose a particular form of ADR?*
- 4) *How do I choose a particular ADR provider or scheme?*
- 5) *Where can I locate ADR providers that could meet my needs?*
- 6) *What if ADR can't help?*

1. How do I establish a complaint handling system?

Although it would be impossible to provide a full list of elements that should be considered in relation to complaint handling systems, there are some key points that are generally thought to be particularly important:

- Establish, implement and communicate policies that are designed to prevent problems from occurring and guarantee a positive result should a problem occur.
- Designate and communicate a clear and accessible location where complaints will be received and promptly acknowledged.
- Ensure effective record-keeping to facilitate flexible assignment, treatment, monitoring, and analysis.
- Ensure that the consumer's side of the story is heard and track developments.
- Keep the consumer informed throughout the process and follow-up in case of settlement.
- Establish, implement and communicate any ADR scheme that is made available.

Many governments have published standards, guidelines or tools for the establishment of complaint handling systems.

2. What kinds of online ADR mechanisms are available?

Mediation and arbitration are already well known and used in the offline world, and are increasingly available on line. Automated negotiation is a new form of ADR that takes special advantage of the online environment.

What is mediation?

In mediation, a neutral third party – a mediator – helps you and the other party try to resolve the problem through facilitated dialogue. However, it is up to you and the other party to reach an agreement. Other names for similar approaches to ADR include “assisted negotiation”, “facilitation”, and “conciliation”.

What is arbitration?

Arbitration involves a neutral third party – an arbitrator – who gathers information from you and the other party and makes a decision. Usually, the arbitrator’s decision is intended to be binding.

What is automated negotiation?

Automated negotiation is a computerised process, mostly designed to settle disputes over monetary amounts. It is often based on a system of “blind bidding”, whereby a computer system automatically generates a settlement when secret bids come within a pre-agreed range of each other.

3. How do I choose a particular form of ADR?

As an online business, you may specify in your terms and conditions that a particular form of ADR may be used or will be used if there is a dispute about the transaction. In thinking about which form of ADR would be best for your business, ask yourself the following questions to help you determine which ADR mechanism or scheme to use.

What role do I want the third party to play?

In arbitration, the third party makes the decision. In mediation the role of the third party may vary, but your own active involvement in proposing compromises and finding solutions is essential. In automated negotiation, a solution is generated by a computer programme according to parameters that you have defined with the consumer at the beginning of the process.

Should the third party have special qualifications/expertise?

Arbitrators and mediators may have formal qualifications. If your business or offering involves highly technical issues, or requires a particular area of expertise, make sure the third party has sufficient and appropriate expertise. If it is a simple dispute where, for example, you and the consumer might disagree on the facts, formal qualifications may be less necessary. In either case, having a third party with experience in the subject matter of your dispute will be helpful.

Do I want to agree to be bound by the outcome?

You may be bound to obey the outcome of an arbitration. However, in many situations, consumers cannot validly give up their right to go to court. Where they can, a well-informed, voluntary choice is required and may have to be made after the dispute has arisen. Consider whether you are prepared to abide by the result of a process that might be binding on you only.

4. How do I choose a particular ADR provider or scheme?

There is general consensus that ADR mechanisms and schemes should have the minimal following attributes: impartiality, accessibility, transparency, low cost to the consumer and speed. These should be your primary considerations. In addition, you may consider the following:

Does the provider adhere to a code of conduct or guidelines?

An ADR provider may refer to a set of guidelines or a code of conduct. Usually, this means that the ADR provider has voluntarily agreed to respect certain rules. Check the Web site of the ADR provider for details about these types of measures. The ADR system might be part of a broader “seal” or “trust mark” programme.

What will it cost to use this ADR programme?

Some programmes are free to consumers, which will mean, more often than not, that the business side of the transaction will cover the costs entirely. Others charge a flat rate or a rate based on the consumer’s ability to pay. There are also schemes that work on the basis of business subscription. Ensure that your arrangements with the ADR provider or the entity that runs the scheme does not jeopardise the integrity, independence, impartiality, or appearance thereof, of the neutral third parties entrusted with mediating or decision-making.

How long will the process take?

It varies. Often, ADR can be much speedier than going to court. ODR is even faster than traditional ADR.

What about language?

Chances are you won’t be able to offer an ADR option that works in any language. Ensure that your ADR option allows the consumer to use the language that was used for the transaction. Enquire about the proficiency of ADR providers and neutral third parties. Communicate the extent to which you are prepared to offer multiple languages.

How does it work?

The actual process of communicating may take many different forms, ranging from a simple exchange of e-mails to all parties being “present” via Web cams. The level of security needed will depend on the sensitivity of the information sent. Although many small-value disputes will not require encryption, you should avoid sending highly sensitive business information in a standard e-mail. If the dispute itself involves highly sensitive information, consider using ADR programmes that have secure Web pages to transmit information.

Is the provider under a duty of confidentiality?

Some ADR providers may ask your consent to make an anonymised version of the outcome of your dispute public. This information can be useful to others evaluating whether to use a particular ADR provider and inform users with similar problems about possible solutions.

5. Where can I locate ADR providers that could meet my needs?

There are a number of ADR inventories and surveys you can consult. Examples of organisations that publish such inventories or surveys include:

- The OECD (www.oecd.org);
- The Global Business Dialogue on Electronic Commerce (www.gbde.org); and
- The Consumers International (www.consumersinternational.org).

6. What if ADR can't help?

The risk of a dispute ending up in court will never be entirely eliminated by ADR, which means that you have to be prepared for this scenario and take account of cross-border litigation in your risk-management strategy.

Consult the resources put at your disposal by your government concerning the establishment of a business with international operations. You might have to consider the fairly complex issues of jurisdiction and applicable law. The adoption of a strict and generally recognised code of conduct might enable you to comply more easily with the various consumer protection rules that might apply to the benefit of the consumer using your Web site.

*Appendix V***DOING THE RIGHT THING ABOUT
BUSINESS DISPUTES****Introduction**

Engaging in e-commerce can open up world-wide markets at very low costs. But the ease with which cross-border business can now be conducted should not lead you to underestimate the legal risks involved in doing business across borders. The management of these risks require that you look at some questions concerning contract practices and dispute resolution. The following concerns the dispute resolution options you should consider in connection with business transactions. For guidance as to how to handle consumer complaints, please refer to: "Doing the Right Thing about Consumer Complaints".

The main legal risks involved in doing business across borders stem from the uncertainty relating to the law that will apply and the court that will be competent with respect to a dispute arising out of a contract. International treaties have not solved these issues. Nor have they solved the problem of enforcement of judgments across borders. Even if you obtain a judgment in your country, you might very well be unable to do anything with it in the country where the defendant has assets. And even if you are able to obtain a valid court judgment and to get it enforced, the cost of the necessary procedures, including the cost of cross-border legal advice, might very well exceed the amount that can be recovered. SMEs are in a particularly difficult and vulnerable position. The expense, time, complexity and uncertainty of judicial processes make court action impractical for small amounts, a fact that is compounded in cross-border settings by jurisdiction, applicable law and enforcement difficulties.

The key to keeping legal risks under control is often a question of keeping the prospects of court litigation to a minimum. Good business practices are of course essential to reducing the likelihood of disputes. But you will inevitably encounter the odd dispute that won't go away: disputes remain a fact of life in business. You must therefore ensure that you do everything you can to minimize the negative impact they have on your balance sheet and your reputation. The methods and mechanisms used in cross-border business to ensure that disputes do not result in court litigation are referred to as ADR, which stands for alternative dispute resolution.

For decades, ADR mechanisms have been used by large multinational enterprises as the normal way of managing and solving cross-border contract disputes. The growing presence of SMEs in cross-border commerce, thanks partly to electronic commerce, has created a need for ADR to adapt in terms of both flexibility and costs. This need, with the development of information and communications technology, has made ADR more accessible and better adapted to small cross-border transactions. Online ADR, also called online dispute resolution (ODR), is a dispute resolution option that can be used without the need for travel and at minimal cost.

Your overriding concern should be to ensure that as many disputes as possible are resolved out of court. This requires advanced planning. To determine how to establish your policy and contract practice with respect to ADR, consider the following questions:

Key Questions

- 1) *How does ADR work?*
- 2) *What kinds of online ADR mechanisms are available?*
- 3) *How do I choose a particular form of ADR?*
- 4) *How do I choose a particular ADR provider?*
- 5) *Where can I locate ADR providers that could meet my needs?*

1. How does ADR work?

ADR refers to a wide range of mechanisms and processes designed to assist parties in resolving disputes out of court. The most common forms of ADR are, from the most flexible to the most formal, negotiation, mediation, and arbitration. ADR normally involves an external ADR provider, with whom the case is typically filed. The provider notifies the other party of the complaint or claim. The parties then participate in a more or less formal exchange in an attempt to settle the dispute, with the possible intervention of a neutral third party. The third party, who is usually a mediator or an arbitrator, could instead be a set of software tools designed to facilitate a settlement.

Although ADR may be resorted to at any time after a dispute has arisen, it is advisable to provide for it in your contract documents by means of a dispute resolution clause. In the case of negotiation and mediation, the clause will facilitate the initiation of a process intended to result in an amicable settlement of the dispute. In the case of arbitration, the clause will prevent the parties from going to court and force the resolution of the dispute by arbitration. One mechanism does not exclude the other. It is common and often advisable to insert an “escalating” dispute resolution clause in cross-border contracts. Such clauses typically include a negotiation phase, followed by a mediation phase, followed by arbitration. Care is required in drafting such clauses and legal advice may be called for. In order to avoid difficulties, it is advisable to use standard drafting proposed by dispute resolution providers.

Negotiation and mediation, when successful, result in a voluntary statement by the parties, often called a settlement agreement. It is usually contractual in nature and therefore binding; in some situations it may be registered with a court and become enforceable like a judgment. Where negotiation and mediation fail, the dispute will be settled in court, or by arbitration if the parties have provided for it in their contract or agree to it after the dispute has arisen. Arbitration results in a decision that is both binding and enforceable internationally.

2. What kinds of online ADR mechanisms are available?

Mediation and arbitration are already well known and used in the offline world, and are increasingly available on line. Automated negotiation is a new form of ADR that takes special advantage of the online environment.

What is mediation?

In mediation, a neutral third party – a mediator – helps you and the other party try to resolve the problem through facilitated dialogue. However, it is up to you and the other party to reach an agreement. Other names for similar approaches to ADR include “assisted negotiation”, “facilitation”, and “conciliation”. Use of the term mediation often means that the neutral third party will be proactive in looking for solutions and in doing so will talk to each of the parties separately.

The core advantage of mediation is that your consent is required all the way through. This means a number of things:

- You remain in control of the process.
- You can explore solutions based on future interests, not just past rights.
- You are certain that you’ll be happy with the solution if there is one.
- Your business relationship will be intact if you succeed.

Where successful, mediation is also much faster and cheaper than arbitration and courts. The downside of mediation’s consensual nature is that it doesn’t always work. And in some situations, where there is no hope whatsoever of a settlement, mediation can be experienced as a waste of time and money. Doing mediation on line accelerates the process and makes it cheaper. But distance, in some cases, may make mediation less effective.

What is arbitration?

Arbitration involves a neutral third party – an arbitrator – who gathers information from you and the other party and makes a decision based on the appropriate legal rules. The arbitrator’s decision is intended to be binding and will be enforceable internationally. Advantages of arbitration include:

- You, with the other party, get to choose the arbitrator.
- You may choose the legal rules the arbitrators will apply.
- You can be certain you will get a final decision (there is no appeal).
- You will be able to enforce that decision internationally.

The weak points of arbitration include its similarity to a court process and the fact that usually at least one party will feel they have lost. Doing arbitration on line may accelerate the process and make it cheaper. Care must be taken, however, that mandatory rules of law applying to this process are respected.

What is automated negotiation?

Negotiation is normally the first thing to try when a dispute arises. Information and communications technology now makes negotiation tools available that can in some cases be helpful. Automated negotiation is a computerised process, mostly designed to help settle disputes over monetary amounts. It is often based on a system of “blind bidding,” whereby a computer system automatically generates a settlement when secret bids come within a pre-agreed range of each other.

3. How do I choose a particular form of ADR?

In order to use ADR to resolve disputes, both parties to a transaction have to agree. This can be done after the dispute has arisen. Or it can be done before a dispute arises, by means of a clause in the contract documents supporting the transaction. In order to decide which form(s) of ADR are best adapted to your situation, the following questions are worth considering, remembering that one form is usually not exclusive or another.

What role do I want the neutral third party to play?

In arbitration, the third party makes the decision. In mediation the role of the third party may vary, but your own active involvement in proposing compromises and finding solutions is essential. If you feel the intervention of a third party may help you to come to a mutually agreed solution with the other party, then mediation is worth trying. In negotiation, your own active involvement is also crucial; in automated negotiation, a solution may be generated by a computer programme according to parameters that you have defined with the other party at the beginning of the process.

Should the third party have special qualifications/expertise?

Arbitrators and mediators may have special qualifications. If your business involves highly technical issues on which there can be disputes, or requires a particular kind of knowledge, make sure the third party has sufficient and appropriate expertise. If you are looking at a simple dispute, special qualifications may be less important. In either case, having a third party with experience in the subject matter of your dispute will be helpful.

What role do I want the law to play?

In mediation, the role of the law is usually limited because the process is geared to helping you find a mutually agreeable solution independently of the legal rights of the parties. This enables you to look at your interests in the larger business picture. For example, mediation allows you to make concessions that are not necessarily based on the merit of the other party's legal claims but in consideration of future business prospects with that party. The legal rights of the parties may form the backdrop of a mediation process but they cannot confine that process.

In the case of arbitration, the third party will decide the case based on rules of law. Arbitrators are not allowed to decide based on their conception of what is "fair" unless the parties have expressly given them that power. In order to avoid any surprise as to which rules of law will apply, it is advisable to provide for the governing law in your contract documents. This can be the law of your own jurisdiction, the law of the other party's jurisdiction, the law of a third, neutral jurisdiction or "general principles of commercial law". The governing law applies to the merits, not to the procedure.

Rules surrounding arbitration

Arbitration is a legal process to which rules of various sources may be found to apply:

- The arbitrators will apply the contract's governing law (or applicable law) to the merits (substance) of the dispute;
- The arbitrators will apply the rules of procedure contained in the rules of arbitration you have chosen (usually by selecting an arbitration service provider);
- The place of arbitration, which is independent from the place where the service provider is located, will determine the legal rules supporting the arbitration (e.g. default rules of procedure where none have been agreed upon, judicial assistance where needed, judicial review in case of due process violations, etc.).

It is advisable to make provision in your contract documents for the governing law, the rules of arbitration (usually through the choice of a provider), the place of arbitration (even if the process is to take place on line) and the number of arbitrators (which should be one if the amount at stake in the arbitration is not likely to be high).

Do I want to bind myself to the process and the outcome?

Dispute resolution clauses are binding at several levels. In some situations, it is possible for a mediation clause to be binding. An arbitration clause is always binding in the sense that, once the dispute has arisen, you must go through the process even if you no longer wish to do so. Once the process has started, mediation will not bind you to any result you do not agree to; but once a settlement agreement is reached, you are bound to its terms. Arbitration will bind you all the way through to the final, enforceable decision of the arbitrator, which is called an award. When you agree to arbitration, you waive your right to go to court and you agree in advance to implement the arbitral award.

The New York Convention of 1958

The Convention for the recognition and enforcement of foreign arbitral awards is an international treaty which imposes clear obligations on the judges of member-states:

- They must refuse to hear a case on the merits and refer the parties to arbitration if there is a written arbitration clause in the contract;
- They must enforce foreign arbitral awards, save in rare, clearly specified situations such as a violation of due process by the arbitrators.

The New York Convention has been ratified by 135 countries.

4. How do I choose a particular ADR provider or scheme?

Online dispute resolution is a new phenomenon. Business models are shifting and the market of online dispute resolution providers is evolving. There are no established oversight mechanism in place to regulate this market. In selecting a provider, you should exercise due diligence and consider the following:

Learn as much as you can about the provider

An ADR provider may refer to a set of guidelines or a code of conduct it undertakes to abide by. Usually, this means that the ADR provider has voluntarily agreed to respect certain rules. Take a look at

them. The ADR provider might be part of a broader “seal” or “trust mark” programme. Take a look at what the seal or mark actually entails. You should try to work out how the provider is financed in order to check for stability and independence. You should also try to obtain an independent opinion about the provider. You should learn as much as you can about the neutral third parties the provider refers cases to and their relationship with the provider, including their method of appointment. If you are contemplating online arbitration, ensure that the provider has at its disposal the necessary international legal expertise. Best practices would suggest that a provider make the following clear on its Web site:

- Contact and organizational information, including a physical address, an e-mail address and the jurisdiction of incorporation or registration to do business.
- Terms and conditions of use and disclaimers.
- Explanation of services and processes and, for each: applicable rules and procedures, binding character for each party, other legal consequences of the outcome and explanation of further possible avenues of legal action.
- Identification of any legal services affiliation or activity and identification of the method employed to separate neutral services from legal services and to avoid conflicts of interest.
- Indication that the ODR proceedings will meet basic standards of due process.
- Any prerequisite for accessing the service, such as membership or geographical location or residence, or a minimum claim value.

Take a careful look at the process and the online tools you are selecting

Take in all the information you have on the process and ensure that it is adapted to the kinds of contracts and the kinds of disputes you are contemplating. Make sure you understand the “online” aspect of the service. The actual process of communicating may take many different forms, ranging from a simple exchange of e-mails to all parties being “present” via Web cams. The level of security needed will depend on the sensitivity of the information sent. Although many small-value disputes will not require encryption, you should avoid sending highly sensitive business information in a standard e-mail. If the dispute itself involves highly sensitive information, consider using ADR systems that have secure Web pages to transmit information. Make sure the provider’s system is technically accommodating and does not impose undue technical burdens on the parties.

Think about privacy and confidentiality

Security of communications is not the only concern you should have about the information you will inevitably give the provider when a dispute arises. You should also look into privacy and confidentiality. The provider should have a privacy policy posted on its Web site. Take a look at that policy. As for confidentiality, you should not take it for granted. Some ADR providers may or may not ask your consent to make a redacted version of the outcome of your dispute public. This information can be useful to others. You should know what the provider’s policy is.

Ensure you are aware of both direct and indirect costs

The provider should disclose detailed information about the pricing levels, structures and mechanisms for its services. Check all the details concerning disk space or log time limitations and applicable additional costs for extras. Consider the cost of digitizing documents. Most important of all, make sure you are clear about the remuneration of the neutral third party. As for the costs of representation, if any, account for the fact that an arbitrator may order you to pay for the other party’s costs.

Verify language capabilities

No ADR provider will work in all languages. You should ensure that there is a common language between the parties and the provider and that the language of the software interface will not cause difficulties and will support digitized documents and information in the required languages. You should also ensure that where the provider gets to appoint the neutral third party, it is in a position to appoint a qualified person with the right language proficiency.

5. Where can I locate ADR providers that could meet my needs?

Standard research on the Internet will work fairly well. There are also ADR inventories and surveys you can consult. One such ODR inventory which includes B-to-B initiatives was published in 2003 by the Department of Justice of Victoria, Australia (www.justice.vic.gov.au). Free information on ODR can be found on www.odr.info, at the Centre for Information Technology and Dispute Resolution.