FACILITATING EXPANSION OF CROSS-BORDER E-COMMERCE-DEVELOPING A GLOBAL ONLINE DISPUTE RESOLUTION SYSTEM (LESSONS DERIVED FROM EXISTING ODR SYSTEMS –WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW)

Louis DEL DUCA
Colin RULE
Zbynek LOEB*

SUMMARY: I. *The Growing Need for Online Dispute Resolution (ODR).* II. *Existing and Proposed ODR Systems – Substantive Principles for Low Value High Volume Fast Track Claims.* III. *Anatomy of a Global ODR System.* IV. *Work of the United Nations Commission on International Trade Law.* V. *Multi-Stakeholder Model – UNCITRAL Consensus Building.*

I. THE GROWING NEED FOR ONLINE DISPUTE RESOLUTION (ODR)

1. *Birth of the Internet – Origin and Evolution of ODR Systems*

The advent of the Internet and subsequent development of the World Wide Web (or "the Web") ushered in a new era of understanding about the world in which we live and forever changed peoples' conceptions of human inter-

* Louis Del Duca is the Edward N. Polisher Distinguished Faculty Scholar at the Penn State Dickinson School of Law. Colin Rule is formerly Director of Online Dispute Resolution for eBay and PayPal and presently CEO of Modria.com Zbynek Loebl is a member of the Czech Republic delegation to the UNICTRAL Working Group III (Online Dispute Resolution). We wish to express thanks for the excellent research assitance in preparation of this article of Joshua Leaver, The Penn State Dickinson School of Law, J. D. 2011, The Pennsylvania State University, Department of Labor Studies and Employment Relations, M. S. 2012; Maren Miller, Penn State Dickinson School of Law, J. D. Candidate 2013; Anna Strawn, Penn State Dickinson School of Law, J. D. Candidate 2013; and Nathan Volpi, Penn State Dickinson School of Law, J. D. Candidate 2012.

action.[1] Today, individuals can communicate their ideas across continents, retrieve their news from multiple sources simultaneously, and conduct their business in a global marketplace. However, just as disputes can arise in the context of real-world interactions, so too can they arise in the context of online-world interactions.

Before the expansion of the internet, online conflicts were generally considered social issues, not requiring any particular process or technological platform. Users would sometimes get caught in "flame wars," where tempers would flare and insults were exchanged. Forum moderators might intervene to calm down emotions, but that was usually the extent of the response. With the rise of the commercial internet in the mid-1990s online conflicts took on a greater importance. Users were quite skeptical of these new online environments, and it became clear that widespread adoption would be difficult if users weren't assured that any problems they encountered would be quickly resolved. As a result, by the turn of the century ODR had become a priority for both business and government, and ODR providers emerged to handle the cases.

One early example was domain names. In the mid-1990s, the vast majority of the world's population had no idea what a domain name was, but by the end of the decade domain names were highly valued properties, with some selling for millions of dollars. The creation of enormous value from nothing over a very short period of time generated quite a few disputes.

In the real world, one business can often use the same or similar name as another business with little or no conflict, particularly in circumstances where the businesses are small, their goods or services are different, and the areas within which they do business are separate.[2]In the online world, how-

[1] From humble beginnings as a network project (which allowed no commercial use) for an agency within the Department of Defense known as the Advanced Research Projects Agency Network, ARPA, the internet expanded throughout the 1980's to include academic institutions such as the National Science Foundation (NSF), which established the National Science Foundation Network (NSFNET). Commercialization of the network and its transformation into the World Wide Web of today began in 1992 with the Congressional passage of the Scientific and Advanced-Technology Act which granted permission to the National Science Foundation to provide access to members of the education community with both academic and commercial ties. Thus, NSF's system could and did connect to commercial networks. *See* 42 U.S.C. §1862(g) (2002). For more information, *see* Leiner, Barry M. et al, *A Brief History of the Internet*, Internet Society, *available at http://www.isoc.org/internet/history/brief.shtml* (last accessed September 26th, 2011) *and* Gregg, Judd, Rogers, Harold, et al, *Relationship with the Internet Corporation for Assigned Names and Numbers*, Government Accountability Office (2000) (noting footnote 6) *available at http://www.gao.gov/new.items/og00033r.pdf* (last accessed Sept. 29, 2011).

[2] *See* Miller & Jentz, *Human Resource Management and E-Commerce: The Online Legal Environment*, 61-62 (West 2002).

ever, there is only one area of business – cyberspace.[3]Thus, conflicts between parties over the right to use a particular domain name were inevitable, and because of cyberspace's international scope, litigating such disputes was exceedingly burdensome and prohibitively expensive. As a result, devising alternative methods for resolving domain name disputes became necessary.

2. *Developments in e-Commerce and ODR*

The real driver for the expansion of ODR was and is commerce. Business-to-business ("B2B") and business-to-consumer ("B2C") e-commerce have grown exponentially in the past decade, due in large part to the rising number of individuals connected to the Internet.[4] In the late 1990s roughly between two and five percent of the world's population used the Internet.[5] By 2010, however, that percentage had increased to nearly thirty percent,[6] with users dispersed over every geographic region around the globe.[7] The acceptance of the Internet as a commercial trading platform also increased and continues to increase as the number of commercial transactions that consumers complete online continues its meteoric rise, so too does the amount these consumers are spending.[8]

From 1999 to 2009, for example, the value of e-commerce in the United States alone expanded nearly 400% from $33 billion in 1999, at best, to $182 billion in 2009.[9] At the same time, internet usage in the United States

[3] *Ibidem*, at 62.

[4] *Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Note by the Secretariat,* 43rd Sess., 21 June- 9 July, 2010, U.N. Doc. A/CN.9/706.

[5] *See Id*. (citing OECD, "Empowering e-consumers, strengthening consumer protect ion in the internet economy", 8-12 December 2009, DSTI/CP (2009)20/FINAL, para. 13).

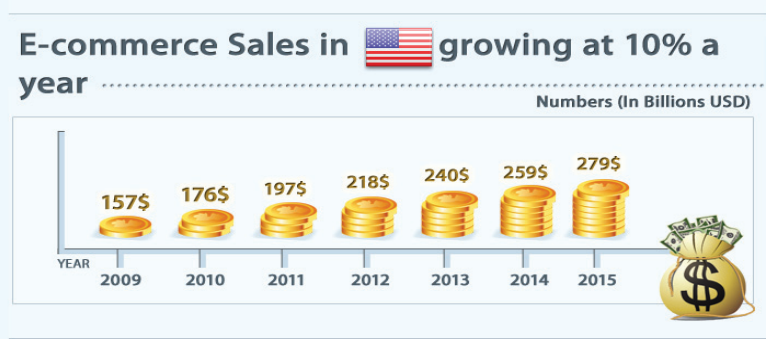
[6] *See Internet World Stats: Usage and Population Statistics* (updated as of April 5, 2011), available at *http://internetworldstats.com/stats.htm*.

[7] There were an estimated 1.4 billion internet users around the world at the end of 2008 and of the 1.6 billion people estimated in 2009, China hosted the largest number of users with 298 million, followed by the United States with 191 million, Japan with 88 million, and Africa with 53 million. While more than half of the population in developed countries has access to the internet, the corresponding share is on average 15-17 percent in developing countries. *Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Note by the Secretariat,* Official Records of the General Assembly, Forty-third Session, United Nations, New York 5 (2010) (A/CN.9/706).

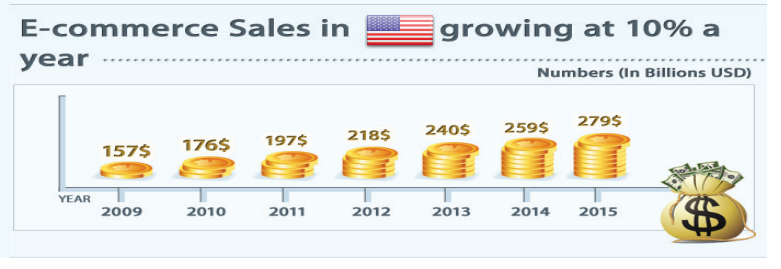
[8] See "E-Commerce and Internet Industry Over-view", *Plunkett Research, Ltd*., available at *http://plunketresearch.com/Industries/EcommerceInternet/EcommerceInternetStatistitcs/tabid/167/Default.aspx* (illustrating that consumers in the U. S. spent $131.8 billion on online commercial transactions in 2009, with a projected increase to $182.6 billion by 2012).

[9] *Idem*.

expanded from 36.6% of the population to an enormous 78.1%.[10] For the period 2009-2015, as indicated in the graph which follows, e-commerce sales in the United States are projected to rise 10% a year to a total of $279 billion by 2015.[11]



For the period of 2010-2015 worldwide, e-commerce sales are projected to rise at the rate of 19% per year from a total $572.5 billion to $1.4 trillion in 2015, as indicated in the graph which follows.[12]



This significant growth of e-commerce in the last decade and the projected continuing growth has spurred the development of various public and

[10] "World Bank Development Indicators", *World Bank*, last updated Jul. 28th, 2011 (made available by Google, Inc.) available at *http://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=it_net_user_p2&idim=country:USA&dl=en&hl=en&q=internet+usage+statistics#ctype=l&strail=false&nselm=h&met_y=it_net_user_p2&scale_y=lin&ind_y=false&rdim=country&idim=country:USA&ifdim=country&hl=en&dl=en.*

[11] Khalid, "How Big is E-Commerce Industry", *The Invesp Blog*, available at *http://www.invesp.com/blog/* last visited Oct. 11th, 2011.

[12] *Idem.*

private initiatives aimed at providing redress to both businesses and consumers involved in domestic disputes arising out of online transactions.

Disputes arising in the online context can vary considerably and are often extremely difficult for courts to handle for a number of reasons, including: the high volume of claims; the contrast between the low value of the transaction and the high cost of litigation; the question of applicable law (in both e-commerce and consumer protection contexts); and the difficulty of enforcement of foreign judgments.[13] For years, courts all over the world have been promoting the use of Alternative Dispute Resolution ("ADR") as an effective, and even preferred, substitute for litigation.[14] ADR has been praised for its speed, flexibility, informality, and its solution-oriented (as opposed to blame-oriented) approach to conflict resolution.[15] However, traditional ADR methods, such as arbitration, have proven to be less than helpful tools for addressing the complications inherent in judicial resolution of web-based transactional disputes.

Unlike other dispute resolution processes, ODR is a fast, efficient, flexible, and inexpensive mechanism for handling e-commerce disputes, both at the domestic level and across borders. ODR processes provide businesses and consumers with a simple and reliable process through which to resolve conflicts arising out of their online interactions. ODR works the way the internet works, with resolutions built directly into websites and transaction flows, as opposed to being imposed by a central judicial authority that is completely separate from the online environment where the issue arose. ODR is also cross-jurisdictional and independent of any single set of laws or regulations, which is a better fit with the global nature of the internet. ODR offers clear benefits to both buyers and sellers: consumers appreciate the ability to get their issues resolved quickly and painlessly, and merchants like how consumers are more willing to make purchases (and pay higher prices) when they know a fair and painless resolution process is available to them. ODR also unlocks new demand from cross-border buyers who might have been averse to making purchases outside of their home geography without a clear resolution process. In essence, ODR is the best approach to providing redress and justice on the internet.

[13] Rule, Colin *et al*., "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments", 42 *U. C. C. L. J*., 2010, 221, 223-224.

[14] See Arno R. Lodder and John Zeleznikow, "Enhanced Dispute Resolution Through the Use of Information Technology", 8 *Cambridge University Press*, 2010.

[15] *Idem*.

II. Existing and Proposed ODR Systems – Substantive Principles for Low Value High Volume Fast Track Claims

1. *eBay*

eBay, an American Internet company with experience in business-to-business, business-to-consumer, and consumer-to-consumer transactions, launched in 1995 and has made numerous acquisitions over the years, including the PayPal payment service in 2002.[16] In 2009, eBay added to the dispute resolution services available through PayPal and initiated an on-eBay ODR platform for resolving "item not received" and "item not as described" claims.[17] Today, the eBay platform handles over 60 million e-commerce disputes annually. These disputes have an average value of$70-100 and they are processed through a Resolution Center that enables parties to resolve their problems amicably through direct communication. The number of disputes being resolved through eBay's online platform is expanding steadily as the transaction volume on the site increases, about 13% per year.[18] More than forty-five billion dollars in merchandise is sold on eBay each year and eBay has more than ninety-million active buyers and sellers, in 16 languages and 36 countries around the globe as well as Hong Kong.[19]

eBay also provides information to facilitate identification of reliable sellers. It makes extensive use of a Feedback system, which keeps market participants honest and avoids possible disputes. Currently eBay houses more than four billion feedback ratings left by transaction participants for each other.[20] The system allows participants to make informed choices about who they will trade with based on reports of positive or negative experience?[21]

[16] *Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions*, Note by the Secretariat, 43rd Sess., 21 June- 9 July, 2010, U.N. Doc. A/CN.9/706.

[17] *Idem.*

[18] *Corporate Fact Sheet: Q4 2010,2010,* eBay Inc., available at *http://ebayinc.com/content/fact_sheet/ebay_inc_corporate_fact_sheet_q4_2010_* (last visited Oct. 11th, 2011).

[19] eBay.com. identifies the following countries and Hong Kong as countries for which it has a website: Argentina, Austria, Australia, Belgium, Brazil, Canada, China, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Russia, Singapore, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, United Kingdom, Vietnam.; See *Idem*, for statistics on number of sales and users (last visited Oct. 11th, 2011).

[20] See Corporate Fact Sheet: Q4 2010, eBay Inc., available at *http://ebayinc.com/content/fact_sheet/ebay_inc_corporate_fact_sheet_q4_2010_* (last visited Oct. 11th, 2011).

[21] *How do I leave Feedback*?, eBay, Inc. (June 20th, 2011) available at at *http://pages.ebay.com/help.feedback/questions/leave.html* (last visited Sept. 26, 2011).

eBay assigns parties a "star" based on how many positive reviews they have received. For example, if the seller has 10 to 49 positive ratings, they get a yellow star and if the seller has 50 to 99 positive ratings they get a blue star.[22] A seller with a million or more positive ratings is entitled to a "shooting silver star".[23]This system allows buyers to see at a glance, how trusted the seller is by other market participants. Merchants have a strong incentive to take good care of their buyers so as to avoid receiving negative feedback, which can harm their future commercial prospects.

In the feedback system, like the dispute resolution system, buyers and sellers are treated differently. Buyers can leave positive, neutral, or negative ratings while sellers can only leave short comments and positive ratings.[24] Although this is a system which exacts honesty from sellers by the threat of a negative rating, eBay is very clear that feedback extortion and manipulation is not allowed.[25] For example, buyers cannot use threats of poor feedback to demand a refund or some additional good or service which was not included in the purchase price.[26] Similarly, sellers aren't allowed to demand positive Feedback from buyers in return for expedited shipping or other services.[27] While eBay does not issue trustmarks to vendors, prospective buyers nevertheless are able to identify reliable vendors in any one of the 36 countries plus Hong Kong in which eBay operates based on the billions of feedback ratings left by previous transaction participants. This achieves two of the main goals of any trustmark system: empowering buyers with information, and facilitating compliance of vendors with awards so that they will receive positive ratings in the feedback system.

Under the eBay Buyer Protection Policy, buyers can file a report when they have not received an item they purchased or if the item was received but did not match the seller's description. Only consumers who buy items from the U. S. eBay site and use an eligible payment method may file a claim and that claim must be based on a "good faith dispute" between the buyer and seller of "goods".[28] Sellers can also file through eBay when they

[22] *Idem.*

[23] *Idem.*

[24] *Idem.*

[25] *Idem.*

[26] All About Feedback Policies, eBay, Inc. (June 20th, 2011) available at *http://pages.ebay.com/help/policies/feedback-ov.html* (last visited Sept. 26, 2011).

[27] *Idem.*

[28] Unpaid Item Policy, eBay, Inc. available at *http://pages.ebay.com/help/policies/unpaid-item.html* (last visited Sept. 22nd, 2011).

have not received a payment or when they need to cancel a transaction.[29] The types of claims for buyers offered for resolution under the policy include:

1. The buyer did not receive the items within the estimated delivery date, or

2. The item received was wrong, damaged, or different from the seller's description. For example:

i. Buyer received a completely different item.
ii. The condition of the item is not as described.
iii. The item is missing parts or components.
iv. The item is defective during the first use.
v. The item is a different version or edition displayed in the listing.
vi. The item was described as authentic but is not.
vii. The item is missing major parts or features, and this was not described in the listing.
viii. The item was damaged during shipment.
ix. The buyer received the incorrect amount of items.[30]

The eBay Buyer Protection Policy is not a product warranty of any kind and applies only to the transaction. It covers only the original purchase price and the shipping cost. It does not cover "damages".[31] The buyer therefore retains rights to bring suit in an appropriate forum to recover "damages". eBay also has a more limited dispute resolution system for sellers which permits them to file claims against buyers, but only for nonpayment of an item.[32]

[29] What to do When a Buyer Doesn't Pay (Unpaid Item Process), eBay, Inc. available at *http://pages.ebay.com/help/sell/unpaid-items.html* (last visited Sept. 22nd, 2011).

[30] Unpaid Item Policy, eBay, Inc., available at *http://pages.ebay.com/help/policies/unpaid-item.html* (last visited Sept. 22nd, 2011).

[31] *Idem*.

[32] eBay sellers are able to initiate claim against non-paying buyers, strictly for the recovery of payment. After an auction closes a buyer has four days to initiate payment. If payment is not received in that period, the seller can open an unpaid item case in the Resolution Center. If the case is closed without the buyer paying, there are very few remedies or alternatives for the seller. eBay may credit the seller for the final value fee and may choose to not charge the seller the listing fee if they choose to relist the item. Additionally, eBay may take action against the buyer including indicating a lack of payment on the buyer's account. The time restrictions on the filing of claims are expressed in terms of when payment was made, such as "within 45 days of payment."; See *What to do When a Buyer Doesn't Pay (Unpaid Item Process)*, eBay, Inc. available at *http://pages.ebay.com/help/sell/unpaid-items.html*, last visited Sept. 22nd, 2011 (for general details); See also *Unpaid Item Policy*, eBay, Inc. available at *http://pages.ebay.com/help/sell/unpaid-items.html*, last visited Sept. 22nd, 2011 (for general details); See also Unpaid Item Policy, eBay, Inc. available at *http://pages.ebay.com/help/policies/unpaid-item.html*, last

2. *Concilianet*

In Mexico, Concilianet, an online dispute resolution system run by the Consumer Protection Federal Agency (Office of the Federal Prosecutor for the Consumer, Profeco), has been established to strengthen the protection and defense of consumers' rights. Concilianet provides consumers who have purchased goods or services, either electronically or by traditional means with a cost-effective way to initiate and resolve complaints or claims against participating suppliers via a virtual Internet platform.[33]

Concilianet began as a pilot program in 2008 with two participating providers and moved to small deployment with five providers in 2009.[34] Today, Concilianet has expanded to full national implementation with 26 participating suppliers.[35] According to Profeco, the use of ODR in the initial stages reduced the time for resolving disputes by nearly 50 percent and increased the number of settlements to about 96 percent. Furthermore, 97 percent of the consumers polled reported that they would utilize the Concilianet procedure again.[36]

Under the Concilianet system, a consumer is provided with a username (i.e., his or her email address) and a valid password. This data forms the electronic signature, which will identify the consumer every time he or she uses the online resolution mechanism. The consumer may then file a claim based on any disagreement with a statement of use, e.g., non-compliance with terms previously agreed to in the sale or supply of the product or service, such as:

1. Breach of warranty,

visited Sept. 22nd, 2011, and How Sellers May Be Protected From Losing a Case, eBay, Inc., June 20th, 2011, available at *http://pages.ebay.com/help/policies/buyer-protection.html#policy1*, last visited Sept. 26, 2011 and Conditions Under Which a Case Can Be Filed, eBay, Inc., June 20th, 2011 available at *http://pages.ebay.com/help/policies/buyer-protection.html#policy1*, last visited Sept. 26th, 2011 (for more specific details).

[33] Rogers, Rule and Del Duca, Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments, 42 *U. C. C. L. J.*, 2010, 221, 224 and 225.

[34] *Idem.* The Pilot program started with Aero Mexico and Hewlett Packard. The small deployment included Aero Mexico, Hewlett Packard, Volaris, Office Depot, and Gas Natural.

[35] *Idem*. Aero Mexico, Federal Electricity Commission, Deremate.com, Dorians, Factories in France, Mexico's Natural Gas, Geo Group, Metropolitan Group, HP, Hypercable, LAN, Liverpool, LG Mexico, Mabe, Natural Maxigas, Free market, Mixup, Office Depot, Redpack, Sadasi, Saks, Sanborn's, Sears, Telcel, Telecable, Volaris. The Federal Electricity Commission is the only publicly run company.

[36] *See Welcome to Concilianet*, PROFECO, 2007, available at *http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp,* translated using Google Translate on Sept. 19th, 2011.

2. Breach of contract, or
3. Refusal to surrender.[37]

Concilianet does not cover claims for damages; however, consumers are not barred from bringing actions for damages in court. In fact, Concilianet specifically advises consumers to bring actions for damages in court. Once the consumer has submitted a complaint, Profeco sends a response via e-mail within 5 days. The consumer is responsible for periodically reviewing Concilianet's website in order be aware of the status of his or her complaint. Once Profeco has determined that it is competent to hear the complaint it will schedule the date and time for the settlement hearing, in which the consumer must appear through Concilianet. The settlement hearing takes place in Concilianet' s virtual courtroom, where the consumer, the supplier, and the mediator are all present in order to find the best and most expeditious solution to the complaint.[38]

3. *Internet Corporation for Assigned Names and Numbers (ICANN)*

Since 2000, the Internet Corporation for Assigned Names and Numbers (ICANN) has been operating an online arbitration system to resolve domain name disputes across borders. Instead of forcing a party engaged in trademark infringement to file suit in court, a party can simply submit a complaint to an ICANN-approved dispute resolution provider and resolve the entire matter online.[39] ICANN's domain name dispute resolution system has been highly successful and it resolves thousands of disputes across borders annually.[40]

ICANN lists the types of claims offered for resolution through its online dispute resolution as follows:

1. A Domain Name Transfer
2. An Unsolicited Renewal or Transfer Solicitation
3. Accreditation
4. An Unauthorized Transfer of Your Domain Name
5. A Trademark Infringement
6. A Uniform Domain Name Dispute Resolution (UDRP) Decision

[37] See *Use Provisions*, PROFECO, 2007, available at http://*concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp*, translated using Google Translate on Sept. 19th, 2011.

[38] *Idem*.

[39] See *ICANN Domain Name Dispute Resolution Policies*, ICANN available at *http://www.icann.org/en/udrp/* last visited Sept. 05th, 2011.

[40] *Idem*.

7. A Registrar Service
8. Inaccurate Who is Data
9. Spam or Viruses
10. Content on a Website[41]

Although ICANN offers an array of online dispute proceedings, the remedies are very limited. The remedies are primarily limited to the cancellation or change of a registered name. ICANN has an approval process for selecting providers and requires that a provider have a track record, list of potential panelists, and requested limitation on the number of proceedings.[42]

To initiate a dispute, the Complainant must give the Respondent actual notice about the complaint. Once the Respondent has received actual notice, they have 20 days to respond, The Complainant is responsible to pay all fees.[43] The selected panel will initiate and conduct the proceedings. Panelists are required to be impartial and independent. The panel can determine what remedies to grant. All decisions by the panel are published over the internet. The panel must forward its decision to the provider within 14 days and the provider must relay the decision to the opposing parties within three days.[44]

4. *Better Business Bureau (BBB)*

"The Council of Better Business Bureaus (CBBB) is a not-for-profit organization representing its 122 member Better Business Bureaus throughout the United States and Canada".[45] A local Better Business Bureau (BBB) office is a nonprofit organization supported by local businesses. BBBs assist in the resolution of disputes between a business and its customers. When a marketplace dispute arises, BBBs work with the business and the customer to reach a resolution using various dispute resolution (DR) processes, each of which provides an alternative to going to court. Through the use of an online complaint system, BBBs help to resolve thousands of complaints each year.[46]

[41] See *Have a Problem? Dispute Resolution Options*, ICANN, available at *http://www.icann.org/en/dispute-resolution/* last visited Aug. 30th, 2011.

[42] *Idem*.

[43] *Idem*.

[44] *Idem*.

[45] Cole, Steven J. and Underhill, Charles I., "Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program", 42 *U. C. C. L. J.*, 2010, 443, 443- 444.

[46] See, "Dispute Resolution Processes and Guides", *Council of Better Business Bureaus*, 2011, available at *http://www.bbb.org/us/Dispute-Resolution-Services/Process/*, last visited Oct. 11th, 2011.

Most BBBs offer several dispute resolution methods to help resolve disputes, such as conciliation, mediation, informal dispute resolution, conditionally-binding arbitration, and binding arbitration.[47] The BBB Online Complaint System handles disagreements between business and their customers; it will not resolve workplace disputes, discrimination claims, matters that are or have been litigated, or claims about the quality of health or legal services.[48]

A customer's submitted claim is forwarded to the business within two business days. The business is then asked to respond within 14 days, and if a response is not received, a second request is made.[49] The customer is notified of the business's response once the BBB receives it, or is notified that no response was sent. Complaints are usually closed within 30 business days.[50]

The BBB also uses a trustmark system to help consumers in identifying reliable vendors.[51] BBB allows vendors who meet the BBB's standards to be "accredited".[52] These standards include being "trustful", "honest in advertising", and "transparent".[53] Additionally, vendors agree to "fulfill contracts

[47] In conciliation a BBB staff will collect factual information from both parties to a dispute and work to encourage open communication between them. In mediation, a BBB will provide a professionally-trained mediator to talk with the parties and guide them in working out their own mutually-agreeable solutions. In IDS, a BBB will provide a professionally-trained hearing officer who will listen to both sides and make a non-binding decision on how to resolve the dispute. In conditionally-binding arbitration, a BBB will provide a professionally-trained arbitrator who will listen to both sides and make a decision on how to resolve the dispute that is binding on the parties only if the customer accepts the decision. In binding arbitration, a BBB will provide a professionally-trained arbitrator who will listen to both sides, weigh the evidence presented and make a decision on how to resolve the dispute that is binding on all parties. When participating in conciliation, mediation, or informal dispute settlement (IDS) with a BBB, the complaining party is free to take his or her dispute to court if unable to resolve the issue. When participating in conditionally-binding arbitration, the customer is free to go to court if he or she does not like the decision, but the business must abide by the decision so long as the customer accepts it. When participating in binding arbitration, the arbitrator's decision cannot be reviewed by a court except under very limited circumstances. The BBB will contact the complaining party to let him or her know what type of dispute resolution process is applicable to the particular issue at hand.

[48] See, "The Better Business Bureau Online Complaint System", *Council of Better Business Bureaus*, 2011, available at *https://www.bbb.org/file-a-complaint/*, last visited Oct. 11th, 2011.

[49] *Idem*.

[50] *Idem*.

[51] Cole, Steven J. and Underhill, Charles I., "Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program", 42 *U. C. C. L. J.*, 2010, 443, 456 and 457.

[52] See, "The Better Business Bureau Online Accreditation Standards", *Council of Better Business Bureaus*, 2011, available at *http://www.bbb.org/us/bbb-accreditation-standards/*, last visited Oct. 11th, 2011.

[53] *Idem* (noting that in a global online system the compliance with these standards of conduct could be ascertained through an eBay feedback type system); *see supra* note 26).

signed and agreements reached as well as honor representations by correcting mistakes as quickly as possible".[54]Accredited businesses are allowed to display BBB Accredited Business marks (i.e. trustmarks) in their stores, online or in other advertising.[55] This trustmark signals to the consumer that the business meets BBB standards and that BBB dispute resolution will be available to them if they transact with that business.[56]

5. *Organization of American States (OAS)*

In February, 2010, the U.S. Department of State submitted to the OAS a proposal focused on building a practical framework for consumer protection through *inter alia* an OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes: a system "designed to promote consumer confidence by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions".[57] The OAS-ODR Initiative utilizes a central clearinghouse, which, in conjunction with national consumer authorities and national administrators, maintains a single database of certified ODR providers, manages the dispute resolution process, and acts as the central focal point for electronic communication among the parties.[58] The initiative also attempts to simplify enforcement issues by providing for ODR in the vendor's locale. The vendor opts-in to the system with national administrators in the area where the vendor does business and the seat of arbitration for the process is the vendor's State.[59] In the event of non-compliance, the award may be enforced by the national consumer authority or national administrator in the vendor's home country by taking direct enforcement action, requesting assistance from payment networks, or referring the case to collection agencies.[60]

Under the OAS-ODR Initiative, a consumer would be able to file a cross-border complaint online against a registered vendor in another par-

[54] *Idem*.

[55] Cole, Steven J. and Underhill, Charles I., "Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program", 42 *U. C. C. L. J.*, 2010, 443, 456 and 457.

[56] *Idem.*

[57] See Rogers, Rule *et al*., "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments", 42 *U. C. C. L. J.*, 2010, 221, 234.

[58] *Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Note by the Secretariat,* 43rd Sess., 21 June- 9 July, 2010, U.N. Doc. A/CN.9/706.

[59] *Idem*.

[60] *Idem*.

ticipating State. This initial complaint process would involve the buyer completing an online form that includes a checklist of the types of claims available for resolution, including:

1. Non-delivery of goods or non-provision of services;
2. Late delivery of goods or late provision of services;
3. Vendor sent wrong quantity;
4. Delivered goods were damaged;
5. Delivered goods or provided services were improper;
6. Vendor made misrepresentations about goods;
7. Vendor did not honor express warranty; or
8. Vendor improperly charged or debited buyer's account.[61]

Once filed, the complaint would then proceed in the following successive phases: the initiation/negotiation phase, the online arbitration phase, and the award phase.[62] During the initiation/negotiation phase, the buyer and vendor would be provided the opportunity to exchange information and proposals, and negotiate —through electronic means— a binding settlement.[63] If an amicable settlement could not be reached during this initial phase, the case would then be brought to the arbitration phase, at which time an online arbitrator would be appointed by a qualified ODR provider where the vendor is located to evaluate the case and either conduct a facilitated settlement (i.e. mediation) or, if necessary, issue a final and binding arbitral award.[64]

6. *Chargeback Procedures*

Chargebacks are ODR procedures which can be used by buyers if a credit card is used for payment of any type of purchase whether in a store or online. Chargebacks can also be used for purchases made in the service industry, such as at a hotel or restaurant. While each credit card company uses a slightly different process, the general process used by all companies is very similar. Consumers initiate a chargeback after an issue arises following a purchase. Examples of transaction issues that might lead to chargebacks are non-delivery of goods or delivery of substantially different goods. After the consumer contacts their credit card issuer and files a chargeback, the funds are immediately reversed from the seller's merchant account back to

[61] *See* Rogers, Rule *et al*., "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments", 42 *U. C. C. L. J*., 2010, 221, 261.

[62] *Ibidem*, at 236.

[63] *Idem*.

[64] *Idem*.

the buyer. The merchant has the ability to "re-present" the charge, disputing the buyer's assertions, which results in another immediate reversal of the funds back to the seller. The process can continue in this manner for several iterations, with fees charged for each additional reversal. Cases that continue back and forth may eventually be arbitrated by the card network (e.g. Visa or MasterCard), but that arbitration can be quite expensive, so there is a strong incentive to either resolve or give up the case prior to reaching that point.[65]

In the United States, federal law requires credit card companies to allow chargebacks.[66] To take advantage of this system, a buyer must notify the credit card company of the disputed charge within sixty days of receiving notice of the charge from the credit card company.[67] If the buyer alleges that the charge is incorrect because the goods were not delivered "in accordance with the agreement made at the time of the transaction," the credit card company must undertake an investigation to determine whether or not that is true.[68] Under these regulations chargebacks extend only to consumer and not to business transactions.[69] In Europe, credit card companies are not required to provide chargeback services.[70] Although chargebacks are not as prevalent in Europe as in the United States, they are still used fairly frequently.[71] The availability of chargebacks in countries where such a mechanism is not mandated indicates their popularity and usefulness to both credit card issuers and credit card users.[72]

Each credit card company currently has a slightly different chargeback system. For example, the types of claims which they process vary. Visa, MasterCard, and Discover for example, have claims for "Illegible transaction receipt," while American Express does not.[73] However, generally the companies have claims for the same types of transactions. Examples of these in-

[65] *See Chargebacks and Dispute_Resolution*, Visa, Inc., 2011, available at *http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/#anchor_2*, last visited Oct. 11th, 2011.

[66] 15 U. S. C. A. §1666 (2010); *See* 12 C. F. R. pt. 205.14 (1999); *See also* Perritt, Henry H., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol., 2000, 675, 692.

[67] 15 U. S. C. A. §1666(a), 2010.

[68] 15 U. S. C. A. §1666(a)(3)(B)(ii), 2010.

[69] *See* 12 C. F. R. §226.3, 2011; *see also* Perritt, Henry H., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol., 2000, 675, 690.

[70] Perritt, Henry H., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol., 2000, 675, 693.

[71] *Idem.*

[72] *Idem.*

[73] See Chargebacks and Dispute Resolution, VISA INC., 2011, available at *http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/#anchor_2*.

clude fraudulent and counterfeit transactions, declined authorizations and failure to receive merchandise.[74]

While many of the reasons for a chargeback do not include any buyer-seller interaction, there are a number of situations in which the buyer-seller interaction may lead to a chargeback.[75] The four most common reasons for a chargeback which involves interaction of buyers and sellers are a) non-delivery, b) delivery of non-conforming goods or services, c) charges after cancellation of a recurring transaction, and d) duplicate processing of a single transaction.[76]

Consumers cannot receive damages in a chargeback process. They will either be re-billed, with the new bill showing an absence of the disputed charge, or their account will be credited with the disputed amount.[77]

Quite often a payment facilitator is also involved in the chargeback process. For example, PayPal, a company which helps consumers pay electronically online, does not begin or administer chargebacks, but does facilitate the process from the seller's side.[78] After a buyer has independently initiated a chargeback with their credit card issuer, the card network contacts PayPal and PayPal places a hold on the seller's PayPal funds related to the chargeback.[79] PayPal then requests information from the seller that could help to determine whether the charge should be "re-presented" to the buyer, effectively disputing the buyer's account of the issue.[80] PayPal uses the chargeback system as a separate process, distinct from another dispute resolution process handled entirely by PayPal. Buyers must choose which system to use, the PayPal claims process or the credit card chargeback process.[81] They may not pursue claims using both systems,[82] so if the buyer initiates a PayPal claim process and subsequently files a chargeback through their card issuer, the PayPal claim is immediately shut down and the chargeback process takes precedent. In dealing with Chargebacks, PayPal works only with the seller, be-

[74] *Idem.*

[75] *Idem.*

[76] *Idem.*

[77] See Chargeback Cycle, VISA INC., 2011, available at *http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/chargeback_cycle.html.*

[78] See Your Guide to Chargebacks, PAYPAL (2011), *available at https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=security/chargeback_guide.*

[79] *Idem.*

[80] *Idem.*

[81] *See PayPal User Agreement*, PAYPAL (2011), *available at https://cms.paypal.com/cgi-bin/marketingweb?cmd=_render-content&content_ID=ua/BuyerProtection_full&locale.x=en_US#13. Protection for Buyers.*

[82] *Idem.*

cause the buyer is working through their card issuer.[83] PayPal specialists help sellers by disputing the chargebacks on their behalf, because PayPal is actually the merchant of record in the transaction.[84] Some credit card companies also have detailed instructions on their websites dedicated to helping sellers avoid and dispute chargebacks.[85]

7. *E-Commerce Redress Interchange (ECRI) and NGO Fast Track Substantive Principles - Common ODR Data Standards*

The E-Commerce Redress Interchange (ECRI) Working Group, has proposed a standardized communication system in order to facilitate the growth of global ODR systems.[86] This proposal would include textual information localized by language, but would also include "graphic and audio communications as appropriate".[87] The group notes that the "ECRI standard *can be incorporated with automatic translation tools* to offer maximum flexibility to parties in choosing their preferred method of communication", (emphasis original) which suggests a potential synergy with online translation services like those offered by eBay, which provides instantaneous online translation into 16 languages, and Google, which provides instantaneous online translation into 58 languages.[88]

A second group consisting of 20 non-governmental organizations (NGO's) and a member of the European Parliament[89] has submitted a pro-

[83] *See Your Guide to Chargebacks*, PAYPAL (2011), *available at https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=security/chargeback_guide.*

[84] *Idem.*

[85] *See Preventing Chargebacks*, PAYPAL *(2011)*, *available at http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/preventing_chargebacks.html, https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=security/chargeback_guide.*

[86] Loebl, Zbynek *et al.*, *The E-Commerce Claims Redress Interchange (ECRI) Working Group Standards Proposal*, ECRI WORKING GROUP (2010) available at *http://www.odr2012.org/files/ECRIstandard.doc*.

[87] *Ibidem* at 1.

[88] *See Ibidem* at 1. See also What is Google Translate?, *Google, Inc.*, available at *http://translate.google.com/about/index.html*, last visited Sept. 19th, 2011, and eBay's Homepage available at *http://www.ebay.com/*, last visited Oct. 14th, 2011.

[89] The participating NGO's and member of the European Parliament are: The American National Standards Institute; Arbeitsgruppe Rechtsinformatik, Institut für Europarecht, Internationales Recht und Rechtsvergleichung, Universität Wien; Center of Negotiation and Mediation of Law Faculty at UNAM (Mexico); Centre for Socio-Legal Studies, University of Oxford; ADR.eu, Czech Arbitration Court; Chartered Institute of Arbitrators (Singapore) Limited; Dispute Resolution Division, Council of Better Business Bureaus, Inc.; Faculty of Law, Potchefstroom Campus, Northwest University, Potchefstroom, South Africa; Gould Ne-

posal to the United Nations Commission on International Trade Law's Working Group III.[90] This proposal recommends creation of "a comprehensive set of standardized codes for dispute cases".[91] These codes would be numeric and would "[provide] redress in low value, high volume e-commerce transaction disputes".[92] These codes would facilitate communication between parties that do not share a common language by providing a common reference for them to state their grievances and desires.[93]

The proposal states that the initial deployment must be limited in scope, focusing upon four primary fact-cases: 1. Goods/services not delivered. 2. Goods/services not ordered. 3. Goods/services not as described. 4. Settlement not complied with.[94] These four fact-cases could then be "enhanced step by step as the system develops".[95]

III. Anatomy of a Global ODR System

These examples of current ODR systems and coordination efforts give an indication of the current global landscape and what types of solutions have been most successful in scaling to higher volumes and lasting for multiple years. However, it is clear that these systems are still quite disconnected and uncoordinated. To most effectively respond to the challenge of global redress and consumer protection a broader, coordinated ODR system is clearly need, with efficient mechanisms for communicating standardized procedures and case details across borders and enforcing outcomes.

gotiation & Mediation Program, Stanford Law School; Hong Kong Internet Forum; Hong Kong Institute of Arbitrators (HKIArb); Institute of Commercial Law, Penn State Dickinson School of Law; Institute of Law and Technology, Faculty of Law, Masaryk University; International Association for Commercial and Contract Management (IACCM); International Law Department of China Foreign Affairs University; ODR LatinoAmerica; The School of Law at the University of Leicester; and Universitat Oberta de Catalunya (Spain); Zuzana Roithova (Member of the European Parliament), the National Center for Technology and Dispute Resolution and the Pace Law School; *See also* Institute of International Commercial Law, et al, *Creating a Cross-Border Online Dispute Resolution Data Exchange System*, U.N. Comm. on Int'l. Trade Law, Working Group III (2011) (note submitted to, but not adopted by, Working Group III) available at *http://www.odr2012.org/files/system.docx*.

[90] *Idem*.

[91] Institute of International Commercial Law, et al, *Creating a Cross-Border Online Dispute Resolution Data Exchange System*, U.N. COMM. On Int'l. Trade Law, Working Group III, 2011 (note submitted to, but not adopted by, Working Group III) at 2.

[92] *Ibidem*, at 1.

[93] *Idem*.

[94] *Ibidem*, at 2.

[95] *Idem*.

The design we propose for this system draws from the lessons learned in all the ODR implementations just described. From eBay we observed how to automate a resolution system so that it can handle millions or tens of millions of cases by leveraging software. From Concilianet we noted how conciliation and mediation approaches can be combined with synchronous interactions to generate very high satisfaction. From ICANN we learned some of the risks of selection bias, and the benefits of a truly global roster of ODR providers so as to work multiple cultural contexts. The BBB demonstrates the power of having offices in each geography and the marketing effectiveness of a strong brand. The OAS design, as well as the ECRI standard, highlights the need for clear protocols to facilitate cross-border coordination. In this section we attempt to knit together these lessons and lay out a blueprint for how such a global system could be designed and implemented.

1. *What is a Global ODR System?*

In describing the anatomy of a global ODR system, we mean a global system for disputes related to cross-border e-commerce transactions. Functioning cross-border ODR means that ODR programs participating in the system will:

- Meet consistent criteria and operate under similar rules;
- Either be accredited or reviewed by national regulator(s) prior to their participation;
- Be assisted by interlinked consumer centers providing guidelines to consumers and outreach to domestic online sellers;
- Incorporate common ODR procedural language/communication standards understandable to all ODR providers and consumer centers, in order to facilitate resolution by the parties as well as resolution by third-party mediation/arbitration; and
- Operate as an online platform, implementing common ODR language.

2. *Components of a Global ODR System*

Any future cross-border ODR system must provide:

- Minimum common ODR rules and standards for ODR providers and neutrals, i.e. results of the work of UNCITRAL Working Group III (hereinafter "Working Group III");[96]
- Cross-border ODR infrastructure interconnecting all ODR stakehold-

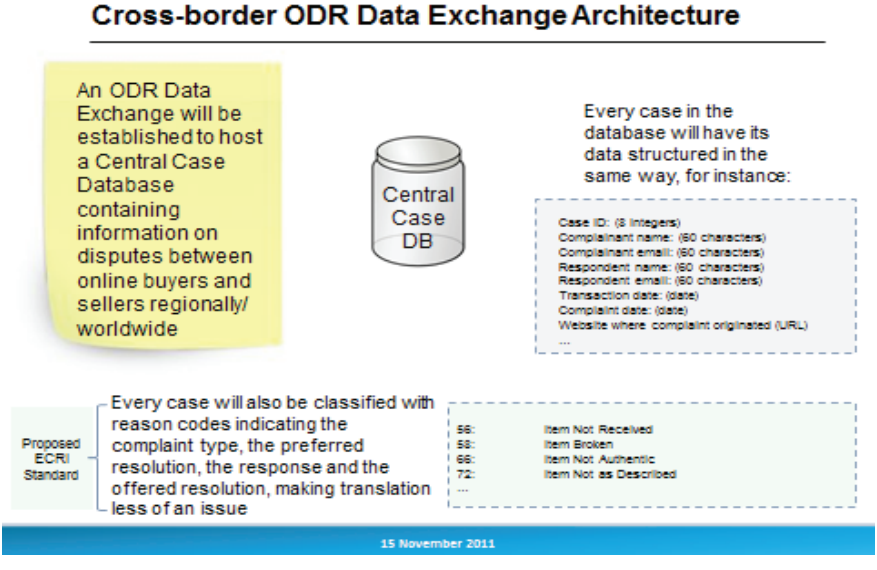
[96] *See* part IV, *infra*, for further discussion of the work of UNCITRAL.

ers and

- Available way to set up and incorporate the Minimum Common ODR Rules and the Cross-Border ODR Interconnecting Infrastructure Rules while at the same time supporting the establishment of various ODR programs on a global or regional basis competing and complementing one another.

3. *Cross-Border ODR Infrastructure*[97]

It is becoming increasingly clear that such a cross-border resolution system will only be possible if there is a complementary system enabling the various resolution end-points (e. g. government agencies, buyers and sellers, online dispute resolution service providers, entities involved in enforcing judgments etc.) to exchange information in real time in multiple languages. This information may include new dispute filings, messages between disputants, and proposed solutions, resolution status, and agreement adherence. This information exchange system will not provide case adjudication or enforcement of outcomes; it will only enable data about disputes to be shared around the globe in multiple languages in an efficient and seamless manner. Structurally, the cross-border ODR data exchange architecture is illustrated as follows:



[97] This part of the article is based on a paper authored and delivered at the May 2011 Working Group III meeting by Colin Rule, Zbynek Loebl, Vikki Rogers, LeahWing and Ethan Katsh. *See also* footnote 89*supra*.

The data exchange architecture may operate in the following way:

Immediate Roles of the Database

- Common Data Structure. A common data structure will be created and used, vetted, and agreed upon by all the participants in the system. This structure will describe each individual piece of data that will be included in a single case, along with specified data types, lengths, and dependencies.
- Comprehensive Set of Standardized Codes. As a necessary component of this data structure, the participants will agree on a comprehensive set of standardized codes for dispute cases. These standardize codes will also encompass reason and resolution codes and also codes used by the parties in the negotiation and self-directed dispute resolution stages of their dispute. These numeric codes will correlate to every common dispute, response, and resolution type, so that when a case is shared between nodes the reason code will describe the exact nature of the dispute and the resolutions. These codes will also greatly facilitate communication between parties who do not share a common language, because simply knowing the codes and their meanings will be adequate to understand the most important aspects of the case.
- *E-Commerce Claims Redress Interchange Standard (ECRI*). The common data structure described above has been proposed as an international multi-lingual communication standard for ODR under the name E-Commerce Claims Redress Interchange Standard (hereinafter "ECRI").[98] The idea of ECRI is that the ODR standard codes can be represented not only in textual and numeric form, but also as symbols/images or even sounds. This will enable using a very wide range of existing devices to access ODR systems, including mobile phones etc. It will also enable full unlimited participation into redress systems for persons who may have difficulty communicating effectively with textual communication. The use of ECRI will greatly facilitate participation through the reduction of barriers for certain populations.
- *Data Structures for Simple Fact-Based Cases.* Initially, the data structures will be developed for simple fact-based cases like the following: (i) goods/services ordered but not delivered; (ii) goods/services not ordered; (iii) goods/services not as described; and (iv) settlement not complied with.[99]

[98] *See E-Commerce Redress Interchange (ECRI) and NGO Proposals, supra* notes 86 and 89.

[99] *See supra* note 94.

These initial data structures will then be enhanced step by step as the system develops. An associated system/application will enable rapid, seamless, and continuous updating of the data structures.

- *Essential Architecture for Resolution of Disputes and Efficient Enforcement.* The common data structures will provide the essential architecture not only for the resolution of cross-border e-commerce disputes but also for eventual efficient cross-border enforcement. It will enable the interconnection of public and private redress systems. This interconnection will be an essential component of cross-border enforcement across all payment channels and internet intermediaries.[100]
- *Global/Regional Case Database.* A global and/or regional case database will be created and made available to all system participants through web services, so that cases can be voluntarily shared between nodes around the globe. Information sharing is happening on an ad hoc basis between groups now, but these systems are incompatible overlapping systems usually worked out between individual nodes. This new architecture will enable instant exchange between all system participants, as well as a universal view of cases around the globe, enabling better holistic monitoring and response.

4. *Additional Roles of the Database*

In addition to the above described principal functions, the ODR Data Exchange may gradually assume additional roles/responsibilities, such as any of the following:

- *Information System for Buyers.* It can help to organize information awareness campaigns and become the principal information system for cross-border buyers where they will learn about their rights, opportunities for ODR, and all available information and enforcement channels.
- *Automated Negotiation Data Exchange Platform.* It can operate an automatized negotiation data exchange application/platform, which the disputing parties use to try to resolve their issues amicably before contacting an ODR provider for facilitated settlement or arbitration. Such assisted self-directed dispute resolution should significantly reduce the number of cases going to third parties for dispute intervention as is evidenced by statistics of the private global ODR players like eBay.
- *Point of Entry for Cross-Border Environment – Global Logo.* In case there is a

[100] *See* Cross-Border Data Exchange Diagram *supra* at page 17.

strong international coordination on a global or regional basis it can even become a single point of entry into the cross-border ODR environment for buyers and sellers, offering a universal service represented by a global logo. Dissatisfied buyers can then simply click on the logo displayed on the seller's website to get easy, instant access to consumer redress.

- *Facilitating Central Clearinghouse Management – Facilitating Participation of Online Sellers.* If coordinated efforts of the key ODR stakeholders mentioned above occur (perhaps only on a regional basis) the stakeholders can input the information to enable the central clearinghouse to manage the finances required to make the redress system self-sustaining. Proceeds collected from online traders for the usage of the ODR logo can be aggregated by the central clearinghouse and distributed appropriately to all the participants in the system, enabling the central clearinghouse to monitor the system. This global logo would also facilitate participation of online sellers in the system and cover the system's administrative costs. Even small regular contributions from online sellers on a global scale will result in adequate resources.
- *Assist Providers in Administrating the ODR Process.* The ODR Data Exchange could: (i) help ODR providers administer the ODR process; and (ii) develop financial records and also allow for resolution of disputes while maintaining confidentiality, data protection and privacy interests of its users as information flows across borders.

Setup and Implementation of the Global ODR System[101]

In addition to a Data Exchange infrastructure, any global ODR system requires a network of service providers to actually facilitate and decide cases. A design for a pilot private initiative has been proposed based on the ODR Rules and other documents under preparation by Working Group III.[102]

The basic concept of the proposed pilot is the following:

- *Participation in the Pilot.* Participation in the pilot will be open to any reg-

[101] Charles Underhill from the Better Business Bureau also contributed substantially to this part in addition to the authors of this article.

[102] *See infra* note 119; *See also Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Note by the Secretariat,* 24th Sess., 14-18 Nov., 2011, U.N. Doc. A/CN.9/WG.III/WP.109, para. 7 *and Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Note by the Secretariat,* 23rd Sess., 23-27 May, 2010, U.N. Doc. A/CN.9/WG.III/WP.721, para. 140 (noting minimum criteria for the accreditation of ODR providers and neutrals, substantive legal principles and enforcement appendix).

ulator and consumer organization and/or ADR/ODR provider(s) following input and/or endorsement by respective national regulator(s). In the future system, ADR/ODR providers will administer cases and consumer organizations will provide guidance to consumers and liaise with involved domestic online sellers to ensure their wide participation in the cross-border ODR.

- *ODR Infrastructure Platform*. The cross-border ODR infrastructure platform will be piloted as a set of services to participating ADR/ODR providers and possibly consumer centers; the platform itself will not be an ODR provider but will provide its services to the participating ODR providers and possibly consumer centers. The service will be developed by an international team of technical experts (service team) with input from national regulators, consumer centers and ODR providers.
- *Publication of an Open Communication Standard and Minimum Technical Requirements – Communication of Modifications*. Consistent with the above, at the conclusion of the pilot, the technical experts will finalize and publish an open communication standard and minimum technical requirements so that future ODR providers are able to implement their own unique ODR solutions in compliance (or consistent) with the published specifications. There should also be a duty of every user to communicate all additions or modifications of the communication standard to the service team and the right of the service team to publish selected additions and/or modifications as updates of the published communication standard.
- *Provider Supplemental Rules*. Participating ODR providers will be able to issue supplemental rules. Such supplemental rules cannot be in conflict with the ODR Rules but can complement them.
- *Tracking and Confirming Costs – Preventing Forum Shopping*. The pilot will track and confirm the costs of maintaining the cross-border ODR infrastructure platform and specifications as well as the best ways to prevent forum shopping and cherry picking among participating ODR providers.
- *Localizing Communication Standards*. Participants in the platform will agree to localize the communication standard(s) into their language(s) and to encourage the use of the UNCITRAL ODR Rules in their respective countries.
- *Encouraging Participation in Cross-Border ODR – Opting in on a Case-By-Case or Formal Public Participation*. One role of the participating ODR providers (including public and/or private consumer centers and trustmark programs) will be to encourage appropriate online sellers to develop and

participate in cross-border ODR as a standard business practice and provide a valuable service to customers. Businesses may opt into cross-border ODR either on a case-by-case basis or through formal, public participation in various ODR and/or trust mark programs.

The pilot was announced on 15November 2011 at the meeting of the UNCITRAL Working Group III in Vienna. The pilot will begin with an initial stage, during which the following principle tasks are to be provided:

- Verification and testing of the proposed functions of the cross-border ODR infrastructure platform and information about the services to be provided by the service team;
- Clarification of costs involved for ODR providers with administering cross-border ODR disputes;
- Necessity/desirability of some type of coordination structure of the participating ODR stakeholders;
- Contacts and discussions with payment channels;
- Contacts and discussions with large online sellers and associations of online sellers

The future cross-border ODR system will probably emerge step by step by connecting the most active current players and expanding further to include new ODR providers, consumer centers as well as new types of disputes. There might be differing ODR programs in different countries or regions with different types of disputes and funding models or a strong internationally coordinated central system. All this will depend on activities and projects of key ODR stakeholders. Nevertheless, the underlying foundation of the global ODR system might be developed in the near future, during the next one or two years.

IV. Work of the United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law ("UNCITRAL") established by the United Nations General Assembly in 1966, promotes the progressive harmonization and unification of international trade law for the purpose of achieving efficiency and predictability and reducing

transaction costs in transnational ventures.[103] UNCITRAL has prepared a wide range of conventions, model laws, legislative guides and other instruments dealing with the substantive and procedural law governing transnational trade.[104]

The 60 members of UNCITRAL (hereinafter "the Commission"), in plenary session, determine its projects, programs and agenda and create working groups, which are assigned to specific areas of research and development.[105] The Commission's Secretariat provides logistical assistance for these working groups and in particular facilitates their meetings by preparing drafts of proposed instruments.[106]

Members of the Commission are all voting members of every working group. In addition although not entitled to voting privileges, states that are not members of the Commission, as well as international governmental organizations, may attend sessions as observers and participate in deliberations.[107] Invited international NGOs may also attend sessions as observers and represent their organizations' views on matters where the organization concerned has expertise or international experience.[108]

In its June 2000 New York meeting, the Commission held a preliminary exchange of views and proposals on the subject of including ODR in its future work program.[109] During this exchange, the Commission determined that special attention should be given to the ways in which alternative dispute procedures might be made available to businesses and consumers.[110] States noted that traditional dispute mechanisms, including litigation through the

[103] *See The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*, U.N. (2007), *available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf.*

[104] *Idem*.

[105] *Idem*; The current 60 members of UNCITRAL are: Algeria, Argentina, Armenia, Australia, Bahrain, Benin, Bolivia, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Fiji, France, Gabon, Georgia, Germany, Greece, Honduras, India, Iran, Israel, Italy, Japan, Jordan, Kenya, Latvia, Malaysia, Malta, Mauritius, Mexico, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Philippines, Poland, Republic of Korea, Russia, Senegal, Singapore, South Africa, Spain, Sri Lanka, Thailand, Turkey, Uganda, Ukraine, the United Kingdom, the United States of America and Venezuela, an official list is *available at http://www.uncitral.org/uncitral/en/about/origin.html*, last visited Oct. 14th, 2011.

[106] *Idem*.

[107] *See Annotated Provisional Agenda*, 22nd Sess., 13-17 Dec., 2010, U.N. Doc. A/CN.9/WG.III/WP.104.

[108] *Idem*.

[109] *Idem*.

[110] *Idem*.

courts, were inadequate for addressing low-value/high-volume, cross-border e-commerce disputes because they were too costly and time-consuming in relation to the value of the transaction in controversy. They also noted that difficult issues often arise in the cross-border context regarding jurisdiction and applicable law.[111] Since the parties voluntarily agree to use the ODR procedure and the procedure incorporates substantive principles to be applied in the resolution of the disputes, use of this procedure bypasses and avoids the highly controversial jurisdiction and applicable law issues which otherwise would arise.[112]

At its July 2010 New York session, the Commission discussed the scope of work to be undertaken. It was initially observed that the scope should be limited only to B2B transactions, as issues related to consumer protection were difficult to harmonize because consumer protection laws and policies varied significantly from State to State.[113] It was further stated that work in that area should be conducted with extreme caution in order to avoid undue interference with consumer protection legislation.[114] UNCITRAL ultimately gave the task of researching ODR solutions to Working Group III (Online Dispute Resolution) (hereinafter 'Working Group III').[115] Working Group III was given the mission to work specifically on issues pertaining "to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions".[116] The new working group was composed of all the member states of UNCITRAL and was to hold take up the issue in Vienna from December 13-17, 2010 at its twenty-second session.[117]

In response to these observations, the view was expressed that, in the present electronic environment, consumer transactions constitute a significant portion of cross-border electronic and mobile commercial transactions.[118] The Commission concluded that, although the scope of work undertaken must be carefully designed not to affect the rights of consumers, it would be feasible to develop a generic set of rules applicable to both kinds

[111] *See generally* Rogers, Rule *et al.*, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments", 42 *U. C. C. L. J.* 3, 2010.

[112] *Idem*.

[113] *Ibidem,* at 4.

[114] *Idem*.

[115] *Idem*.

[116] *Ibidem*, at para. 4.

[117] *Ibidem,* at para. 6.

[118] *Idem*.

of transactions. Working Group III is now in the process of developing a system of legal standards that will facilitate the increased use of ODR mechanisms necessary to provide for the quick resolution and enforcement of both low value-high volume B2B and B2C disputes across borders.

At its December 2010 meeting in Vienna, Working Group III requested that the Secretariat prepare draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border, low value-high-volume transactions.[119]

On March 17, 2011, the Secretariat distributed a note containing an updated annotated draft of fast-track procedural rules ("the Rules") incorporating suggestions made at the December 2010 meeting.[120] This draft was the basis of discussion at the May 2011 meeting of the Working Group in New York. According to the Secretariat, these "*simple, user-friendly generic rules…reflect the low-value of claims involved, the need for a speedy procedure, and… emphasize conciliation, since the majority of cases are resolved at that stage*".[121]

Working Group III decided to follow a four-phases development plan to produce instruments for ODR.[122] First, it should create procedural rules to facilitate ODR.[123] Second, an appendix to the preliminary rule should provide "*substantive legal principles for deciding cases*".[124] Third, an appendix should consider minimum requirements for ODR providers to aid consumers and, fourth, the Working Group should consider "a cross-border enforcement mechanism".[125]

On September 17, 2011, the Secretariat distributed its updated annotated draft of fast-track procedural rules to be used as the basis for the Working Group discussion for its November 14-18 meeting in Vienna. Section 1 (1)provides that the UNCITRAL online dispute resolution rules ("the Rules") are intended for use in the context of cross-border low-value, high-volume transactions conducted in whole or in part by the use of electronic means of communication. Section 1 (2)provides that:

[119] *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules*, Note by the Secretariat, 23rd Sess., 23-27 May, 2011, U.N. Doc. A/CN.9/WG.III/WP. 107.

[120] *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules*, Note by the Secretariat, 23rd Sess., 23-27 May, 2011, U.N. Doc. A/CN.9/WG.III/WP. 107.

[121] *Ibidem*, at para. 7.

[122] See *Report of Working Group III (Online Dispute Resolution) on the Work of its Twenty-Third Session*, 23rd Sess., 23-27 May, 2011, U. N. Doc. A/CN.9/WP.721, at para. 52 *and* para. 54.

[123] *Idem*.

[124] *Idem*.

[125] *Idem*.

> The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as Annexes and form part of the Rules]:
> (a) Guidelines for online dispute resolution providers;
> (b) Online dispute resolution provider supplemental rules;
> (c) Guidelines and minimum requirements for neutrals;
> (d) Substantive legal principles for resolving disputes;
> (e) Cross-border enforcement mechanism;
> …

During the May 23-27, 2011 meeting in New York, Working Group III reaffirmed that there was a need to address "*disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response which was rapid, effective and inexpensive*".[126]At its previous meeting in December 2010 Vienna had also Working Group III noted that the language barrier was a significant challenge to addressing this issue that would prevent businesses and consumer from effectively communicating with each other although progress has been made in this area.[127] Although this problem remains an issue, considerable progress has been made by eBay, Inc. and Google, Inc., which both offer extensive online translation services.[128]

At its May 23-27, 2011 New York meeting, Working Group III reviewed its first draft of procedural rules governing cross-border electronic commerce transactions.[129] It noted that this first draft was for *"fast-track procedural rules that could be used as a model by ODR providers*".[130] It was also noted that the draft procedural rules were generic and that they could apply equally to B2B as well as B2C transactions provided "that those transactions have the common feature of being *low-value*" (emphasis added).[131] This was in keeping with the mandate from UNCTRIAL, which was that "*work on [ODR]*

[126] *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat,* 23rd Sess., 23-27 May, 2011, U.N. Doc. A/CN.9/WG.III/WP.107, at para. 5 (citing Official Records of the General Assembly, 65th Sess., Supplement num. 17, U. N. Doc. A/CN.9/716 at para. 16 (21 June – 9 July, 2010)).

[127] *Report of Working Group III (Online Dispute Resolution) on the Work of its Twenty-Second Session,* 22nd Sess., 13-17 Dec., 2010, U. N. Doc. A/CN.9/716 at para. 22.

[128] *See supra* note 88.

[129] *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat,* 23rd Sess., 23-27 May, 2011, U. N. Doc. A/CN.9/WG.III/WP.107.

[130] *Ibidem*, at para. 6.

[131] *Idem*.

topic should focus on ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions".[132]

At its meeting in New York, May 23-27, 2011, Working Group III reaffirmed use of a three phase: i.e. "negotiation", "conciliation" and an "arbitration phase" *process*.[133] The Draft Procedural Rules proposed by the Working Group reflect this structure by incorporating a "negotiation", "conciliation", and "arbitration" three stage approach as follows:

- In the first phase, the parties would negotiate with each other;
- In the second phase a neutral would be appointed for the purpose of facilitating a solution; and
- In the third phase to resolve the very few cases not resolved by use of the first two phases, a neutral (possibly the same neutral used in the second phase) would arbitrate the dispute.

It has been suggested that by limiting the conciliation efforts of a competent and independent neutral independent in this second phase so as to prohibit ex parte discussions, the impartiality of the neutral and the integrity of the process would be preserved, thereby facilitating use of the same neutral in the second and third phases of the process.

Discussion has occurred suggesting that a substantially identical result could be achieved by utilizing a two phase process in which the second phase would combine phases 2 and 3 and be designated as the "Conciliation-Arbitration" phase. Under this process, a neutral who meets the standards of competence, independence and impartiality, and who would be prohibited to have ex parte discussions would initially attempt conciliation and proceed to arbitration if the conciliation was unsuccessful.[134]

Working Group III is scheduled to further refine its draft procedural rules at its November 14-18, 2011 meeting in Vienna.

[132] *Idem*.

[133] *See Report of Working group III (Online Dispute Resolution) on the Work of its Twenty-Third Session*, 23rd Sess., 23-27 May, 2011, U. N. Doc. A/CN.9/721; *See also Report of Working Group III (Online Dispute Resolution) on the Work of its Twenty-Second Session*, 22nd Sess., 13-17 Dec., 2010, U.N. Doc. A/CN.9/716.

[134] These so-called "web-arb" procedures are flexible and can be adjusted to meet varying needs. *See* Fullerton, Richard, "Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals", *Dispute Resolution Journal*, May-October 2010; Blankley, Kristen M., "Keeping A Secret From Yourself? Confidentiality When The Same Neutral Serves as Mediator and Arbitrator", *Baylor Law Review*, Spring 2011; Bartel, Barry C., "Med-Arb as A Distinct Method of Dispute Resolution: History, Analysis, and Potential", *Willamette Law Review*, Summer 1991.

V. Multi-Stakeholder Model – UNCITRAL Consensus Building

In developing a fast track system for ODR it is important to maintain balanced consideration of the concerns of all stakeholders. Therefore, developing a Multi-Stakeholder Model is not only desirable, but necessary in order to successfully create the system.[135] Interested stakeholders include:

- Public agencies (as policy makers, legislators and regulators);
- Consumers;
- Online businesses;
- Payment channels; and
- ODR providers.

Differences may also exist in the needs and interests of sub-groups within these individual stakeholder classifications. For example, when high value/low volume claims are involved, stakeholders (irrespective of whether they are business or consumer stakeholders) need and in most cases will utilize sophisticated dispute resolution procedures. Conversely, when low value/high volume claims are involved, stakeholders (irrespective of whether they are business or consumer stakeholders) will need in most cases and utilize fast track low cost less sophisticated dispute resolution procedures.[136]

The challenge is to incorporate within the ODR system options which give stakeholders the choice of using a fast track, simplified, inexpensive process for low value/high volume claims or a slower, sophisticated, costly but more detailed process for high value/low volume claims.[137]

[135] Del Duca, Louis F., *Options for Low Value/High Volume and High Value/Low Volume Claims*, Proposals for the 11th International Online Dispute Resolution Forum (Sept. 9, 2011), comment in response to Loebl, Zbynek, *Discussion on pre-dispute binding arbitration agreement*, Proposals for the 11th International Online Dispute Resolution Forum (Aug. 7th, 2011) both available at *http://www.odr2012.org/node/14*, last accessed Sept. 27th, 2011.

[136] *Idem*.

[137] *Idem*.