

5-2011

## Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework

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### Recommended Citation

Michael G. Bowers, Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework, 64 *Vanderbilt Law Review* 1265 (2011)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol64/iss4/5>

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# NOTES

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## I. INTRODUCTION

James Thomas needed new glasses.<sup>1</sup> Not wanting to pay the markup at an established retail store, he decided to try out something a friend recommended: ordering them online. He found a pair on GlassesOnline.com that looked very similar to a designer pair he tried on at the store but at a much lower price. Thinking it was a great deal, he placed the order. When they arrived two weeks later, he discovered that the lenses were ground incorrectly such that the glasses were unusable. E-mailing customer service produced an offer to take the glasses back (shipped at his expense) and a thirty percent refund. Not feeling that this was a fair offer, James looked into how he could get the company to refund his full purchase price. The company, however, had no resources in his state or anywhere else in the United States. He begrudgingly accepted the company's offer and wrote off the remaining seventy percent of the cost. James learned the hard way that, to paraphrase one commentator on the subject, when you buy something from a company in China and the deal goes sour, you need to have a better plan than suing them in North Carolina.<sup>2</sup>

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1. The following story is based on personal knowledge; the names have been changed.

2. Ethan Katsh, *Online Dispute Resolution: Moving Beyond Convenience and Communication*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS 235 (James R. Silkenat et al. eds., 3d ed. 2009) (quoting Peter Phillips).

Online businesses have grown tremendously in the past decade. As a larger percentage of the U.S. economy moves onto the Internet, a larger percentage of people doing business online will find themselves disagreeing with each other. How those disputes are resolved presents an ongoing challenge in a world where traditional ordering mechanisms, like geographical boundaries, become increasingly antiquated. As contracts are formed across state and national lines, dispute resolution systems built around spatial locations become ever more unwieldy. The complications and costs of securing a favorable decision from a far-off decisionmaking body make reliance on geographic-based systems exceedingly difficult.

Out of this situation, a growing number of alternative dispute resolution (“ADR”) options have emerged. As technology evolves, many of these ADR options include new, electronic dimensions. These so-called online dispute resolution (“ODR”) systems represent a blending of traditional ways of solving conflicts while maintaining the advantages of operating online. By creating problem-solving systems which themselves cross borders, ODR systems represent one of the most promising means of ensuring that problems will be fairly resolved. The rate of adoption of ODR procedures, however, remains relatively slow. Despite the need for such systems, many companies opt to leave the issue to be resolved by customers on a case-by-case basis. As a result, many online customers have little confidence that disputes can be taken to anyone but the company with which the consumer transacted. For some potential customers, the risks of doing business online may remain too great.

This Note is intended to advance the debate about ODR adoption by suggesting a new approach. While much has been written about *what* an ODR system should look like, the question of *how* any such system would be implemented remains problematic. Rather than looking to create new ODR requirements country by country, this Note suggests the creation of a new requirement for all businesses operating online: that they provide an ODR process for their customers which can fairly address the disputes that arise between them. This new obligation would be enforced by the consumers themselves, thus constituting a new weapon for customers to wield against companies that mistreat them. The obligation would take the form of a requirement in the domain name registration contract. Should a company refuse to comply, a disgruntled customer could initiate a proceeding which would result in the deregistration of the company’s domain name.

Part II opens with a brief description of how the Internet works and how the registration of domain names provides an opportunity to

regulate online behavior. It also gives an overview of the present state of both ADR and ODR options for businesses and of the only currently employed mandatory international ODR system. Part III describes some of the chief benefits that could be realized through greater ODR usage, as well as the problems with many of the current options for expanding that usage. Part IV lays out the proposed system and details how it could be implemented, and Part V addresses the potential problems raised by the adhesive nature of the registration contracts being targeted by this system.

## II. MOVING DISPUTE RESOLUTION ONLINE: FROM ADR TO ODR

Both ADR and ODR represent alternatives to courts as a means of resolving disputes. Both assist parties in reaching a resolution, either by mutually arriving at an agreement or by submitting the matter to a third party. In many instances, ADR is both less expensive and less time consuming than a traditional court proceeding, accounting for a great deal of its appeal.<sup>3</sup> While ADR, and to a lesser extent ODR, enjoy formal recognition by most governments, only the parties themselves may invoke them. Parties frequently do this via a pre-existing contract specifying the type of procedure to be used and the law or rules that apply to the dispute.<sup>4</sup> Courts are involved only as needed for enforcement of a valid and binding decision or, in a case where the ADR procedure failed, to pick up the matter after the parties have exhausted the ADR process.<sup>5</sup>

This Part begins by describing the basic framework of the Internet, the operation of domain names, and the regulation of those domain names. It proceeds into a discussion of the current types of ADR methods generally employed by parties seeking to avoid court appearances, as well as the sorts of ODR procedures which may be found in use today. A brief overview of the attempts of online businesses to promote consumer trust in online transactions follows: first, an examination of the historical development of ODR providers and their growing use by online businesses, and second, a description of the nascent market in trustmarks, which attempt to encourage consumer confidence through voluntary self-regulation of online businesses. Finally, this Part describes the first international

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3. See Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 22 (2003).

4. *Id.*

5. See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (describing the role of courts in arbitration of disputes generally).

mandatory ODR system along with its implications for creating broader regulatory controls over Internet transactions.

*A. Getting Around on the Internet: A Primer*<sup>6</sup>

The Internet began as a means for the Department of Defense to ensure computer communication among its researchers and staff, even in a time of war.<sup>7</sup> Even as the volume of connected computers increased, it has remained in essence a network of different machines containing files for access (“sites”) and the pointers showing other computers how to get to those files (“addresses”).<sup>8</sup> While the technical nature of the connections between these computers is unimportant for the present analysis, what does matter is that each of these sites must be given a unique address.<sup>9</sup> The computers involved use a series of numbers to identify themselves, their “Internet Protocol address” or “IP address.”<sup>10</sup> The address will comprise a group of numbers each separated by a “.” and will point any computer looking up that address to the appropriate server.<sup>11</sup> Early in the Internet’s development, programmers realized that most people would not be able to easily navigate through dozens of sites known only as numbers, so they created Uniform Resource Locators (“URLs”).<sup>12</sup>

The process of matching domain names with the IP addresses they represent is done by accessing one of the Internet’s Domain Name System (“DNS”) servers. A site’s URL is how it is typically found by users; a web surfer types “http://www.vanderbilt.edu” into their browser instead of “http://129.59.4.44” to access the files which make up Vanderbilt University’s web page. The DNS process matches the text URL with the correct IP address and points the computer to the appropriate server to find the site. Browsers access sites by

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6. I include this section to ensure that readers understand the basic terminology used throughout this Note. Readers already familiar with terms such as URL, gTLD, and ICANN may want to skip ahead to the next Subpart. For a more complete overview of the technical topics discussed here, see, for example, PRESTON GRALLA, *HOW THE INTERNET WORKS* (8th ed. 2006). For an excellent treatment of the history of the Internet and many of the legal issues created by it, see generally JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006); INTERNET GOVERNANCE: INFRASTRUCTURE AND INSTITUTIONS (Lee A. Bygrave & Jon Bing eds., 2009).

7. Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 615–16 (1998).

8. GRALLA, *supra* note 6, at 4–8 (providing a basic overview of the Internet).

9. *Id.* at 32–36.

10. *Id.*

11. *Id.*

12. *Id.*

making use of the given host and domain names.<sup>13</sup> In the example above, the host name is “www.” and the domain name is “vanderbilt.edu.”<sup>14</sup> Each part of the domain name occupies its own place in a hierarchy. The rightmost portion of the name specifies the top-level domain.<sup>15</sup> The most commonly used are called generic Top-Level Domains (“gTLDs”).<sup>16</sup> There are currently twenty-two gTLDs, including “.com,” “.edu,” “.org,” and “.gov.”<sup>17</sup> There are also top-level domains for each country (the country-code Top Level Domains, or “ccTLDs”), including “.au,” “.uk,” and “.cn.”<sup>18</sup> The name to the left of the top-level domain is the second-level domain. Every second-level domain within a given top-level domain must be unique.<sup>19</sup> Thus, while there cannot be two different sites with the domain name “vanderbilt.edu,” there can be a separate “vanderbilt.com.”<sup>20</sup> Likewise, any subsequent level must be unique within the level before it. For example, in the domain name “bbc.co.uk,” “bbc” is a unique third-level domain within the second-level domain “.co,” which is itself unique to the ccTLD “.uk.” Accessing “www.bbc.co.uk” directs the browser to a specific host server—the one named “www.”—located at the “bbc.co.uk” domain name.

The issue of control of the DNS servers and the maintenance of the list of top-level domain names has been discussed extensively.<sup>21</sup> For present purposes, it suffices to say that since the U.S. government funded the research that built the Internet, it has continuously occupied the central role in determining who can design and

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13. *Id.* at 28.

14. The “http” portion refers to the type of protocol used to find the site in question. It functions to specify how the IP address for the specified URL is to be found. GRALLA, *supra* note 6, at 19–21.

15. *Id.* at 30.

16. See INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN), NEW GTLD PROGRAM: NEW GTLD PROGRAM IN BRIEF 1 (2009), available at <http://www.icann.org/en/topics/new-gtlds/factsheet-new-gtld-program-oct09-en.pdf>.

17. *Id.*

18. *Id.* (“There are around 250 two-letter country-code TLDs (ccTLDs), which identify a country or territory.”).

19. GRALLA, *supra* note 6, at 32.

20. Perhaps the most famous example of this fact arose from the development of a pornographic website at “www.whitehouse.com” in the late 1990s. See Jeff Pelling, *Whitehouse.com Goes to Porn*, CNET NEWS, Sept. 5, 1997, <http://news.cnet.com/2100-1023-202985.html>.

21. For one particularly good discussion, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

implement the fundamental architecture of the Internet.<sup>22</sup> The current organization tasked by the Department of Commerce with maintaining the Internet's structure is the Internet Corporation for Assigned Names and Numbers ("ICANN").<sup>23</sup> Under the auspices of its contractual relationship with the U.S. government, ICANN oversees the list of all top-level domains, as well as the operation of the DNS servers, called root servers, among other responsibilities.<sup>24</sup>

While the general usage rights may be controlled by ICANN, the specific registration of a new domain name is handled via a separate registrar.<sup>25</sup> That registration, however, is subject to the terms used by ICANN in establishing the type of domain being created, which are imposed by a contract between the registrar and ICANN.<sup>26</sup> The person seeking to register a new domain name will contact a registrar, which will then enter the proposed name to its WHOIS database.<sup>27</sup> The WHOIS database contains an entry for every individual domain name registered by that registrar, along with information on who owns the name, while the registry WHOIS database has information on all domain names within a given gTLD.<sup>28</sup> The contract between the registrant and the domain name registrar lays out the rights and obligations of the domain name owner, and

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22. See generally *id.* at 43–93 (discussing the role of the U.S. government in the DNS system).

23. ICANN is a nonprofit corporation, founded in 1998, that was tasked by the U.S. government with coordinating the allocation of the domain name system ("DNS"), Internet protocol ("IP") addresses, autonomous system ("AS") numbers, protocol port, and parameter numbers. *About ICANN*, ICANN, <http://www.icann.org/en/about/> (last visited Apr. 4, 2011). For more on the decision to assign these roles to ICANN, see Froomkin, *supra* note 21, at 62–73; Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. & TECH. L. REV. 285, 289–91 (2005).

24. Froomkin, *supra* note 21, at 91–93. See generally Lee A. Bygrave et al., *The Naming Game: Governance of the Domain Name System*, in INTERNET GOVERNANCE: INFRASTRUCTURE AND INSTITUTIONS 147, 151–56 (Lee A. Bygrave & Jon Bing eds., 2009).

25. *ICANN Glossary*, ICANN, <http://www.icann.org/en/general/glossary.htm> (last visited Apr. 18, 2011) (defining "registrar" and noting that most domain names "can be registered through many different companies (known as 'registrars') that compete with one another"). The terms of the current Registrar Accreditation Agreement can be found at *Registrar Accreditation Agreement*, ICANN, <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm> (last visited Apr. 18, 2011).

26. *ICANN FAQs*, ICANN, <http://www.icann.org/en/faq/#gltldrules> (last visited Apr. 4, 2011) ("The rules vary depending on the nature of the gLTD.")

27. Bygrave, *supra* note 24, at 160–63; *WHOIS Behind That Domain?*, NETWORK SOLUTIONS, <http://www.networksolutions.com/whois/index.jsp> (last visited Apr. 4, 2011).

28. Bygrave, *supra* note 24, at 162.



therefore, ICANN's ability to shape usage rights online is extensive.<sup>29</sup> Other than availability, there is no check against what the name to be registered is and whether there may be competing claims to that particular name, such as a third-party trademark.<sup>30</sup>

Once the registrant has secured the rights to a particular URL, that name is then pointed at by a specific IP address indicating where the coding for the site is located within cyberspace.<sup>31</sup> Once a site is active, individual web users can locate the site and, if desired, enter into subsequent purchase agreements with the site owners. While ICANN does not exert control over these third-party interactions directly, ICANN can and does regulate certain aspects of how gTLD users may interact with third parties, particularly regarding third-party intellectual property rights.<sup>32</sup>

### *B. Types of Dispute Resolution Practices*

Dispute resolution, in its myriad forms, has advanced far beyond the days when kings would mete out justice on a whim.<sup>33</sup> As courts the world over become increasingly back-logged and the costs of going to court continue to rise, parties to disputes are turning to other forms of dispute resolution with increasing frequency.<sup>34</sup> The first Subpart below describes what is meant by the term ADR today; the second Subpart describes the types of current ODR practices.

#### 1. The Forms of ADR

ADR generally refers to arbitration and mediation, although the term can encompass any decisionmaking process by which both

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29. For some critics, this ability to shape usage rights is one troubling aspect of ICANN's broad scope of authority. See Froomkin, *supra* note 21, at 96 ("ICANN's conduct and the various agreements it has entered into reveal that a substantial fraction of ICANN's activities go far beyond the setting of technical standards.").

30. See, e.g., *Domain Names FAQs*, VERISIGN, [http://www.verisigninc.com/en\\_US/products-and-services/domain-name-services/domain-information-center/frequently-asked-questions/index.xhtml#q6](http://www.verisigninc.com/en_US/products-and-services/domain-name-services/domain-information-center/frequently-asked-questions/index.xhtml#q6) (last visited Apr. 4, 2011) ("A user requests a domain name from a registrar. . . . If it is available, the registrar registers the domain name with the registry, which adds it to the registry database.").

31. *ICANN Glossary*, *supra* note 25.

32. See *infra* Part II.D.

33. For one of the wiser of those kings, see *1 Kings* 3:16–28.

34. Rabinovich-Einy, *supra* note 3, at 21–22.

parties agree in advance to abide.<sup>35</sup> Arbitration involves the turning over of the matter to a designated third-party neutral whose decision will be binding on both parties. Mediation likewise brings in a third-party neutral, but no decision can be reached without the consent of both parties.<sup>36</sup> Also included in the term are various forms of assisted negotiation. The purpose behind all of these procedures is to dispose of disputes in a way which best accommodates the needs of the individual parties. ADR is thus not necessarily a substitute for the courts so much as it is a system which can stand beside the courts, ready for individual parties to use as they see fit.

Congress first gave formal recognition to a form of ADR with the passage of the 1920 Federal Arbitration Act.<sup>37</sup> The Act made any "written provision" in a contract agreeing to submit future disputes to arbitration "valid, irrevocable, and enforceable."<sup>38</sup> There are a multitude of reasons why a party may prefer arbitration or other ADR processes over recourse to the courts. In addition to generally being less expensive and time consuming, ADR can allow parties greater flexibility in crafting the relief, as well as increased control over the nature of the proceedings themselves. Parties may also opt for confidentiality in the proceedings.<sup>39</sup> Altogether, ADR offers parties a greater degree of flexibility in their dispute resolution process.

Decisions reached by ADR are also enforceable internationally, to the extent allowed by the United Nations ("U.N.") Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").<sup>40</sup> Under the New York Convention, foreign arbitral awards must be recognized by the national courts of the New York Convention signatories and are entitled to enforcement within the signatory countries.<sup>41</sup> The practice is muddled somewhat by the lack of a clear doctrine on how to handle non-arbitration ADR decisions and is further complicated by differing interpretations of the

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35. See, e.g., Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247 (1996) ("ADR refers to a variety of techniques, each implementing different levels of privatization.").

36. Philippe Gillieron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 306 (2008).

37. 9 U.S.C. §§ 1-16 (2010).

38. § 2.

39. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54 (1996).

40. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; see also 9 U.S.C. §§ 201-08 (codifying the treaty provisions).

41. New York Convention, *supra* note 40, art. III.

degree of consumer protection which is required to be observed when foreign awards are challenged.<sup>42</sup>

## 2. The Current Types of ODR

The number of different methods of ODR used by ODR providers will likely continue to expand as businesses continue to innovate in the area. Currently, firms tend to use either manned or automated methods, creating in effect two different types of procedures which parties may use. Likewise, some methods rely on establishing live communications via the Internet, while others are conducted using asynchronous communication, like e-mail.<sup>43</sup>

The manned, or interactive, methods of ODR tend to replicate ADR methods online whereby a mediator or arbitrator is present electronically to assist parties with their disputes.<sup>44</sup> There are a wide range of different providers offering varying degrees of party involvement, options for cyber-juries, and other types of tribunals.<sup>45</sup> Many of these interactive ODR processes seek to recreate the sort of proceedings which occur in the courtroom, including the filing of pleadings, the gathering and presentation of evidence, and the adoption of various rules of evidence.<sup>46</sup> One of the largest such ODR providers, SquareTrade, handled thousands of mediation cases per month,<sup>47</sup> using a set of guidelines encouraging private resolution of problems.<sup>48</sup> Since most claims were resolved in onsite chat rooms without third-party intervention, SquareTrade demonstrates the importance of simply having a convenient forum where aggrieved

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42. See Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT'L L.J.* 823, 867–83 (2004) (describing the difficulties of cross-border consumer arbitration).

43. Melissa Conley Tyler & Di Bretherton, *Online Alternative Dispute Resolution*, 7 *VINDOBONA J. INT'L COM. L. ARB.* 199, 202 (2003).

44. Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution*, 70 *FORDHAM L. REV.* 985, 1001 (2001) (“There have been several providers who have tried to translate the mediation process into cyberspace.”).

45. See, e.g., *Current ODR Projects and Websites*, UNIV. MASS. CTR. INFO. TECH. & DISP. RESOL., <http://www.ombuds.org/center/onlineadr.html> (last visited Apr. 4, 2011).

46. See, e.g., ICOURTHOUSE, <http://www.icourthouse.com> (last visited Apr. 4, 2011) (an example of one such website).

47. *About SquareTrade*, SQUARETRADE, <http://www.squaretrade.com/pages/about-us-overview> (last visited Apr. 4, 2011).

48. Given that many of SquareTrade's clients are eBay buyers and sellers, quick resolution of these cases is ideal. See *id.* (“[T]he SquareTrade Seal is still widely regarded as the single most trusted icon on eBay.”).

parties may go to work out the matter.<sup>49</sup> Users' satisfaction rates remained high, suggesting that the overall framework is one with which online customers would be comfortable.<sup>50</sup> As interactive ODR sites continue to attract greater caseloads and funding, one would expect that the ongoing growth of standards of decisionmaking will increase the confidence in online arbiters and mediators to render decisions in a responsible and fair manner.

The automated, or non-interactive, forms of ODR revolve around software packages designed to stand in for a human being acting as a third-party neutral. In its most common form, the software functions as a blind bid process, whereby both parties agree in advance on the range of values for which they would be willing to settle the case and then input some form of bid or settlement value.<sup>51</sup> The software then compares the proposed settlement figures to the acceptable range and puts forth some form of settlement offer to both parties.<sup>52</sup> If the offer is within the range specified, the parties can agree to adopt the figure; if it is not, then they are free to either continue with the program again or turn to a manned ODR provider. The advantage of the privacy afforded by such a system is that parties are freer to express private preferences without fear of disrupting the negotiation process.

While the range of options available online will generally remain broader than with traditional ADR, the principles remain the same. Perhaps the single largest difference, other than the medium used, is the ongoing question of the enforceability of ODR decisions.<sup>53</sup> While an arbitration conducted via the Internet should seemingly be granted full enforcement in a U.S. court,<sup>54</sup> the international agreements on the subject as they currently stand do not explicitly

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49. *Id.*

50. Over eighty percent of SquareTrade users have indicated they would use the service again. Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOTIATION L. REV. 253, 282 n.121 (2006).

51. See Teitz, *supra* note 44, at 999 (providing an overview of the "fully-automated" settlement process).

52. *Id.*

53. See, e.g., Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 88–89 (2001) (proposing "international cooperation and agreement on the enforcement of ODR settlements without resort to traditional courts").

54. So long as the court could be persuaded that the online arbitration resulted in an "award" as the term is understood under 9 U.S.C. § 9 (2010), that award could then be enforced via an order from the appropriate district court.

address other forms of ODR decisions.<sup>55</sup> Nevertheless, as future efforts at simulating the role of an arbiter or mediator via software will no doubt improve the automated experience, the availability of a third party to assist in the resolution process will continue to be important to both businesses and consumers.

### *C. Dispute Resolution for E-Commerce*

Conducting business transactions online, which is loosely termed “e-commerce,” is here to stay. In the United States, e-commerce between businesses and consumers (“B2C” transactions) has increased over 600 percent in the last decade.<sup>56</sup> But as the volume of B2C transactions has swelled, the legal doctrines available to help online customers resolve disputes with online sellers have had difficulty keeping up. In this regard, the experiences of U.S. courts are illustrative, as respect for the traditional limitations of personal jurisdiction led to the application of a “minimum contacts” doctrine to determine where an aggrieved buyer could sue.<sup>57</sup> The problem, as James’s story above suggests, is that this doctrine creates few practical options when the damage request is low and the seller is in another state. Moving the seller to another country compounds the difficulty of bringing both parties into one courtroom. This realization prompted the first ODR providers to begin selling their services online. Simultaneously, online retailers have begun developing new ways to communicate with their customers through the use of trustmarks, which can serve as stand-ins for traditional indicators of reliability and security. Both of these developments will be described in turn.

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55. See Ponte, *supra* note 53, at 88 (“It is . . . suspect whether a court in another jurisdiction will agree to enforce a decision reached in cyberspace that does not comport with established legal, ADR, and public policy standards.”).

56. Press Release, U.S. Census Bureau, Quarterly Retail E-Commerce Sales: 3rd Quarter 2009 (Nov. 18, 2009), available at <http://www.census.gov/retail/mrts/www/data/pdf/Q3.pdf> (jumping from 0.6 percent of all retail sales to 3.7 percent).

57. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122–26 (W.D. Pa. 1997) (applying the minimum contacts analysis and discussing some of the problems that arise in Internet cases).

### 1. Development of ODR

The first ODR option became available in 1996 as an online arbitration center.<sup>58</sup> This provider, called the Virtual Magistrate, failed to attract more than a single case, illustrating the difficulties of convincing parties to utilize such a novel system.<sup>59</sup> That case, *Tierney v. America On-Line*, involved the display of an advertisement by America On-Line stating that it could provide thousands of its users' e-mail addresses to those desiring a mailing list.<sup>60</sup> The court ordered the company to take down the ad.<sup>61</sup> Following the Virtual Magistrate experience, several other ODR options began to appear, including the Online Ombuds Office, offering virtual mediation services;<sup>62</sup> iLevel, an attempt at providing a public forum for mediation involving public comment and voting on a complaint;<sup>63</sup> and CyberTribunal, which attempted to become one of the first cross-border mediation providers<sup>64</sup> and succeeded in attracting several dozen cases. In all of these first attempts at ODR, cases were difficult to come by, and funding was largely derived from grants by organizations seeking to promote greater acceptance of the ODR framework.<sup>65</sup>

Many of the first adopters of ODR encountered a form of the first-mover problem in that the online marketplace had not yet come to fully trust the technology to handle dispute resolution. This lack of confidence in the system would be enough to undermine any form of dispute resolution. For early ODR providers, lacking the trust of their potential users was enough to render them, by and large, little more

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58. ETHAN M. KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 2–3 (2001).

59. *Id.* at 56.

60. Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 *BUFF. L. REV.* 975, 995 (1997).

61. *Id.* at 996.

62. See ONLINE OMBUDS OFFICE, <http://www.ombuds.org/center/ombuds.html> (last visited Apr. 4, 2011) (“The Online Ombuds Office is a dispute resolution service for persons and institutions who would like an online mediator to assist them in setting [sic] a dispute.”).

63. See ILEVEL DISP. RESOL. SERVS., <http://web.archive.org/web/20001204050000/www.ilevel.com/> (accessed by searching for [www.ilevel.com](http://www.ilevel.com) in the Internet Archive index) (describing how this dispute resolution service works).

64. *History, CYBER TRIBUNAL II*, <http://www.cybertribunal.org/historique.en.html> (last visited Apr. 4, 2011).

65. See Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal*, 7 *J. TECH. L. & POL'Y* 1, 11–13 (2002) (discussing characteristics and shortcomings of early ODR systems).

than social experiments. While the idea could work in practice, it still had a long way to go to attain widespread commercial success.<sup>66</sup>

Since the end of the 1990s, however, ODR has experienced a modest boom. As more people are becoming comfortable operating online, the willingness of individual consumers to turn to online dispute resolution providers continues to increase.<sup>67</sup> Latching onto the entrepreneurial spirit, most ODR providers today are for-profit companies seeking to specialize in resolving commercial disputes.<sup>68</sup> As broadband access continues to increase and the technology creating convenient ODR fora for individual consumers continues to develop, it is likely that the field of possible ODR processes will expand.<sup>69</sup>

## 2. Trustmarks: Improving Consumer Confidence

In response to growing worries of consumer fraud and identity theft online, companies began adopting self-regulating policies intended to instill greater consumer confidence.<sup>70</sup> By creating third-party entities to police common standards regarding security, consumer protection, and the like, Internet companies hope to build the same levels of consumer confidence as are enjoyed by their brick-and-mortar brethren.<sup>71</sup> For instance, VeriSign offers businesses the right to display its checkmark logo in exchange for a fee, but only after the company has consented to a daily scan by VeriSign of its site for malicious software and promised to use up-to-date data encryption methods.<sup>72</sup> Similarly, the Better Business Bureau allows companies which comply with its standards regarding disclosure, privacy, and security practices to display its Accredited Business Seal.<sup>73</sup> The hope of the companies using the trustmark is that a consumer who does not have a relationship with the online seller will instead rely on her

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66. *See id.* at 14–19 (discussing the progression of ODR systems from the early years to the present day).

67. *Id.*

68. *Id.* at 15.

69. *See id.* at 19–21 (discussing the benefits of ODR that are likely to cause it to continue to expand in the future).

70. *See, e.g.,* Sunni Yuen, *Exporting Trust with Data: Audited Self-Regulation as a Solution to Cross-Border Data Transfer Protection Concerns in the Offshore Outsourcing Industry*, 9 COLUM. SCI. & TECH. L. REV. 41, 53–55 (2007) (“The U.S. approach to data regulation is largely predicated on a model of self-regulation.”).

71. *See id.* at 54–55 (discussing some of the methods ODR companies use to instill consumer confidence).

72. *Id.*

73. *BBBOnline Business Program*, BETTER BUS. BUREAU, <http://www.bbb.org/us/bbb-online-business>.

confidence in the company issuing the trustmark to feel secure in making a purchase.

One of the proposed ways of building greater trust in an ODR system is the adoption of national ODR principles and the development of trustmarks which can serve as shorthand for the type of procedure to be used on a given website.<sup>74</sup> Trustmarks can serve an important role in the growth of ODR, with businesses being able to quickly inform their customers of the sorts of ODR services which they are willing to utilize in the event of a dispute.

Trustmarks are also useful for advertising the principles which go into the awarding of the mark. Organizations which certify that companies have satisfied certain standards of fair dealings can build up their own marks, conveying a level of confidence in the operations of the business that customers might not otherwise have.<sup>75</sup> For differing standards of ODR to become practicable, such marks are likely a necessity in order to let consumers know what sort of program they are consenting to at the time of purchase. Marks by different ODR reviewing organizations would be one way of quickly informing consumers of the sort of standards being used, much like how customers are currently made aware of the security settings available at online checkout.<sup>76</sup> If adoption of ODR systems is to be effectively encouraged, trustmarks likely will have to be simultaneously developed that are capable of serving this educational function.

#### *D. The First Mandatory Cross-Border ODR System: The UDRP*

Concerns about trademark infringement prompted the creation of the first mandatory international ODR scheme: the Uniform Domain Name Dispute Resolution Policy ("UDRP").<sup>77</sup> The UDRP is a system of mandatory and binding arbitration designed to regulate trademark disputes in domain name registrations. The system was

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74. See Ponte, *supra* note 53, at 88–89 (discussing the need for international enforceability of ODR agreements); *VeriSign Trust Seal Product Deals*, VERISIGN, <http://www.verisign.com/trust-seal/features-benefits/index.html> (last visited Apr. 4, 2011) (“[A]ny Web site can build trust, credibility, and loyalty online with the Verisign seal.”).

75. See, e.g., *BBBOnline Trustmark Program*, BETTER BUS. BUREAU, <http://www.bbb.org/us/SitePage.aspx?site=113&id=9005b1d9-6a4d-45c1-8263-e801b6d5d44f> (last visited Apr. 4, 2011).

76. See Ponte, *supra* note 53, at 87–88 (“ODR trustmark programs could provide consumers with a level of confidence about their ODR provider regarding basic standards of quality and fairness.”).

77. *Uniform Domain Name Dispute Resolution Policy*, ICANN, available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.



adopted by ICANN in 1999.<sup>78</sup> Because ICANN is in the unique position to effectively regulate the majority of the Internet through its control of the DNS servers, not just the operations within one geographic boundary, these rules apply to all gTLDs regardless of what the host country is for a particular website.<sup>79</sup> ICANN implemented the policy as part of its regulation of the gTLDs currently in use.<sup>80</sup> The UDRP does not, however, extend automatically to ccTLDs, which are controlled by Internet providers within the respective countries, if not the respective countries' governments themselves.<sup>81</sup>

The UDRP procedure was based on recommendations by the World Intellectual Property Organization ("WIPO").<sup>82</sup> Although not without its critics, the UDRP has generally received positive reactions, particularly from the business community.<sup>83</sup> Regarding ODR procedures generally, the framework established by the UDRP has demonstrated the viability of regulating the interactions of Internet businesses with third parties via the initial domain name registration contract.

### 1. The Development of the UDRP

The UDRP is ICANN's answer to the cybersquatting and improper use problems encountered by many businesses as they migrated online in the mid- to late 1990s. Cybersquatting refers to the practice of registering protected trade names or marks as domain

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78. *Id.*

79. See *About ICANN*, *supra* note 23 (listing the first of eleven core values as "preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet").

80. *ICANN and the DNS*, ICANN, <http://www.icann.org/tr/english.html> (last visited Apr. 4, 2011).

81. Cf. *Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/amc/en/domains/cctld/> (last visited Apr. 4, 2011) (listing dispute resolution resources for users who wish to register ccTLD domain names or file disputes in relation to such names).

82. *WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/amc/en/domains/guide/index.html#a1> (last visited Apr. 4, 2011) [hereinafter *WIPO Guide*]. For an overview of the argument that UDRP procedures are unfair as applied, see A. Michael Froomkin *ICANN's "Uniform Dispute Resolution Policy"—Causes and Partial Cures*, 67 BROOK. L. REV. 605 (2002); see also Viktor Mayer-Schonberger & Malte Ziewitz, *Jefferson Rebuffed: The United States and the Future of Internet Governance*, 8 COLUM. SCI. & TECH. L. REV. 188, 194 n.31 (2007) (collecting other criticisms of the UDRP).

83. See Julia Hörnle, *The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing?*, 11 SMU SCI. & TECH. L. REV. 253, 257-71 (2008) (discussing strengths and weaknesses of the UDRP).

names with the intent of then selling the registration to the owner of the trade name or mark, usually at exorbitant rates.<sup>84</sup> Alternatively, companies with famous brands saw sites being registered using intentional misspellings so as to redirect traffic intended for one company to the site of another.<sup>85</sup> In both situations, the owner of a protected mark had a difficult road ahead to shut down the infringing user. Court filings are only effective when the owner can locate the infringing user's home country and either secure a judgment there or have a foreign judgment enforced there.<sup>86</sup> This takes time and may be ineffective, depending on where the infringer located her operations.<sup>87</sup>

The UDRP creates a quick and low-cost alternative to court judgments against infringing domain names.<sup>88</sup> Any third-party right holder believing that the domain name in question impermissibly infringes upon her mark may initiate a claim. The owner of the gTLD registration is bound by her contract with her chosen registrar, and the UDRP policy as enacted by ICANN, to submit to the UDRP proceedings.<sup>89</sup> At the time of filing a complaint, the third party selects one of several pre-approved ODR providers to use.<sup>90</sup> The process then proceeds as a binding arbitration between the parties, with the

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84. John D. Mercer, Note, *Cybersquatting: Blackmail on the Information Superhighway*, 6 B.U. J. SCI. & TECH. L. 11, 14 (2000) (“[C]ybersquatting occurs when an individual or corporation registers a domain name that is spelled the same as a pre-existing trademark, and demands money from the trademark owner before the registrant will release the domain name.”).

85. This is considered “typosquatting.” See Christopher G. Clark, Note, *The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting*, 89 CORNELL L. REV. 1476, 1480 (2003) (“Typosquatting . . . entails identifying legitimate popular websites and purposefully registering deceptively similar or deliberately misspelled domain names in order to lure visitors into visiting unrelated—and often pornographic—web sites.”).

86. See JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 28–29 (2009).

87. See *id.*

88. It should be noted that the UDRP does not, as currently constituted, have authority over the use of domains themselves. This has caused considerable consternation among many mark holders in light of ICANN's decision to allow users to self-select their own domains. Soon it will be possible, for instance, for this author's family to obtain addresses at a “.bowers” domain—raising the specter of all manner of new possibilities for mark infringement. Where before two different entities, one devoted to athletic shoes and one devoted to the Greek goddess of victory, could content themselves to keep separate nike.com and nike.org registrations based upon each organization's purpose, the proper owner of the future registration of nike.nike does not seem to have a clear cut answer. See generally Release, Public Comment: STI Report on Trademark Protection in New gTLDs, ICANN (Dec. 17, 2009), available at <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm> (describing the gTLD expansion and making several recommendations about better protecting trademarks in the new system).

89. See Chad D. Emerson, *Wasting Time in Cyberspace: The UDRP's Inefficient Approach Toward Arbitrating Internet Domain Name Disputes*, 34 U. BALT. L. REV. 161, 171–73 (2004) (discussing factors that undermine the supposedly mandatory nature of the UDRP).

90. *WIPO Guide*, *supra* note 82 (“The Complaint may be submitted to any accredited dispute resolution service provider.”).

registration holder having an opportunity to respond to the allegations of improper use before a decision is rendered.<sup>91</sup>

Two aspects of the UDRP warrant closer consideration in light of the present proposal. First, the procedure offers only one remedy: the transfer of the registration from the original registrant to the trademark holder.<sup>92</sup> No damages or other compensation are available.<sup>93</sup> The UDRP is not exclusive, and thus a trademark holder may opt for a traditional court filing with the accompanying broader range of remedies.<sup>94</sup> However, in most instances, and certainly the ones the UDRP was meant to address, simply shutting down the offending site is enough to satisfy the proper right holder. Second, with the UDRP, ICANN has in effect laid down a ground rule for online participation at the gTLD level: no registrant in the cyber-world may infringe upon a valid trademark. Given the dearth of current regulations universally applicable online, this development could be seen as either a welcome model for future “ground rules of participation” or an intrusion into the communal nature of the Internet.<sup>95</sup>

When evaluating claims of improper use, the terms of the UDRP require that a registration must be made in bad faith for it to be transferred.<sup>96</sup> This bad faith standard has existed since the program’s inception, and after more than a decade continues to evolve. The development and application of this standard represents one of the first truly global adoptions of a form of quasi-common law.

Since its adoption, the UDRP process has overseen the resolution of several thousand claims.<sup>97</sup> It has proven attractive enough that many countries have voluntarily entered their own country codes into the UDRP process.<sup>98</sup> The primary criticisms of the

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91. For a fuller description of the procedure, see *WIPO Guide*, *supra* note 82.

92. See Holger P. Hestermeyer, *The Invalidity of ICANN’s UDRP Under National Law*, 3 MINN. INTELL. PROP. REV. 1, 9–10 (2002) (noting the existence of and explaining the procedure).

93. *Id.* at 10.

94. *Id.* Even after the completion of the UDRP procedures a timely filed appeal to a court invalidates the panel’s decision. *Id.*

95. See *id.* at 13–15 (discussing a proposal by President Clinton’s Secretary of Commerce).

96. *Uniform Domain Name Dispute Resolution Policy* ¶ 4(b), ICANN (1999), available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

97. See, e.g., Press Release, WIPO, Record Number of Cybersquatting Cases in 2008, WIPO Proposes Paperless UDRP (Mar. 16, 1999), [http://www.wipo.int/pressroom/en/articles/2009/article\\_0005.html](http://www.wipo.int/pressroom/en/articles/2009/article_0005.html) (noting that over 2,300 UDRP cases had been filed with WIPO’s Arbitration and Mediation Center in 2008 alone).

98. A list of these countries is available at WIPO’s *Domain Name Dispute Resolution Service for Country Code Top Level Domains*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/amc/en/domains/cctld/index.html> (last visited Mar. 7, 2011).

UDRP have focused on the pro-business results of most of the decisions rendered under it.<sup>99</sup> Even among its critics, the basic framework of regulating the activities of online domain name users as they relate to the rights of third parties has not been questioned.<sup>100</sup> Given the practical impediments preventing any front-end analysis of domain names as they are proposed, it is unclear what a more effective system would even look like. At the very least, the UDRP demonstrates the feasibility of relying on domain registration contract terms to regulate the Internet.

## 2. Relying on a Third-Party Initiated Process for B2C Protections

The UDRP arguably represents the first step into a wider array of Internet regulations, designed not to be enforced by any singular regulatory body but instead to rely on private enforcement via ODR processes. It does so by finding a balance along two competing axes. On the one hand, the intensity of resource allocation necessary to resolve disputes must be balanced against the success rate of catching wrongdoers. On the other hand, the degree of front-end control and policing necessary must be weighed against the freedom of creation, arguably one of the hallmarks of the Internet.<sup>101</sup> For the first axis, as any police force can attest, the ability of a regulator to identify and prosecute those who have harmed others is inherently tied to the funding backing that regulator.<sup>102</sup> Given the paucity of resources currently available for any system of global Internet regulation and policing, it is clear that any overly intensive regulations of B2C transactions will be doomed from the start. Additionally, the complicated global nature of some of these transactions suggests that the parties themselves are likely in a better position to police their own transactions, calling in the assistance of an outside regulator only in the most egregious of situations.

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99. See, e.g., Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 *BROOK. J. INT'L L.* 903, 925–26, 929 (2002) (discussing a number of cases where complainants were victorious in three-member panel cases).

100. See *id.* at 925–26 (noting relevant criticisms, not including those that address rights of third parties).

101. ICANN's stated core values require that it respect "the creativity, innovation, and flow of information made possible by the Internet." *About ICANN*, *supra* note 23.

102. See, e.g., *THE EFFECTIVENESS OF POLICING* (R.V.G. Clarke & J.M. Hough eds., 1980) (compiling sources that explore how policing applies to companies that employ advancing technologies).

The balancing of control versus freedoms plagues international discussions of new Internet regulations,<sup>103</sup> but again the resource constraints are perhaps the biggest obstacle to widespread adoption of comprehensive consumer protection regulations. Again, the availability of funding for the regulatory body will determine the degree of control that body can effectively wage. In order for B2C regulations to take hold in the short term, they must be couched so as to avoid creating too many claims for the system to handle. In many ways, the U.S. approach of providing more freedom to businesses to set the terms of the deal, at least to start out, seems to be the only practical solution, at least until the financing question can be resolved.

Finally, any system, once created, must be empowered to protect an agreed-upon set of laws or principles. In this regard, intellectual property provided an ideal starting point because of the high degree of international cohesion concerning the treatment of trademarks.<sup>104</sup> The inherent tensions between different countries' treatments of contract norms and consumer expectations mean that the B2C situation presents a more difficult arena to regulate internationally. However, as long as the underlying system ties into a standard of bad faith, as with the UDRP, there can be international convergence toward what should constitute a violation.

### III. THE BENEFITS AND PITFALLS OF USING CROSS-BORDER ODR TO CREATE INTERNATIONAL DISPUTE RESOLUTION SOLUTIONS

The trend toward the adoption of ODR methods is likely to continue as e-commerce becomes more prevalent in the global marketplace.<sup>105</sup> As more people turn to the Internet to do business, the legal community has become increasingly aware that cyber-disputes will become part of the permanent landscape.<sup>106</sup> The difficulties

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103. See *supra* Part II.C. (discussing the developments of ODR and trustmarks).

104. See, e.g., General Information on the Madrid System, WORLD INTELL. PROP. ORG., <http://www.wipo.int/madrid/en/general/> (last visited Apr. 4, 2011) (describing the 119-year history of the Madrid System of international trademark law).

105. See GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 5 (2004) (defining ODR "either as a sui generis form of dispute resolution or as *online* alternative dispute resolution").

106. See, e.g., Am. Bar Ass'n's Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415 (2002) (examining challenges within electronic commerce); Am. Bar Ass'n Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801 (2000) (discussing adaptations necessary for electronic commerce).

encountered by many of the institutions which are currently in use to overcome the cross-jurisdictional nature of online transactions greatly complicate the problem of how to handle these disputes.<sup>107</sup> ODR is an attractive means of resolving cyber-disputes, particularly the low-value claims frequently at the heart of B2C-related disputes.

This Part begins by addressing the advantages, as well as some of the criticisms, of ODR use. Additionally, this Part highlights one of the greatest potential strengths of an international ODR system: the possibility of the proceedings to tap into a body of universal trading principles and thus bypass some of the jurisdictional problems currently hampering international dispute resolution. Finally, this Part discusses the difficulty of getting numerous nations to agree on what the best practices of an international ODR system would be and the difficulties of implementing such a system even with widespread international agreement.

#### *A. The Inherent Benefits and Concerns of ODR*

Conducted via electronic communications (specifically computer to computer, or “C2C”) instead of the more traditional face to face (“F2F”) communication, ODR procedures present several advantages to the average e-commerce consumer and seller. First, the nature of ODR procedures means that anyone with a computer and an Internet connection may access them.<sup>108</sup> While ODR systems may in time become a viable option for addressing non-online disputes,<sup>109</sup> they remain ideal for cyber-disputes.<sup>110</sup> The fact that a dispute developed online ensures that both parties have access to online means of resolving that dispute, something which cannot be said for more traditional measures.<sup>111</sup>

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107. See Mohamed Wahab, *Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 INT'L J.L. & INFO. TECH. 123, 149–51 (2004) (discussing various obstacles to the development of effective ODR).

108. See E. Casey Lide, *ADR and Cyberspace: The Role of Alternate Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 218 (1996) (noting that ODR “might appeal strongly to less sophisticated, individual parties with cyberspace grievances”).

109. See, e.g., Alejandro E. Almaguer & Roland W. Baggot III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 719 (1998).

110. See Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 188–92 (1998) (discussing the benefits of applying ADR to online disputes).

111. While ODR has the advantage of ensuring that all parties have access to the system when used to resolve cyber-disputes, the parties may still not have equal access to the Internet. Depending on the method of resolution used factors such as connection speed, access to hardware

Second, the nature of the ODR proceedings does not inconvenience parties any more than is necessary while the proceeding is ongoing.<sup>112</sup> Compared to a traditional dispute resolution forum, there are no operating hours to contend with, nor must the parties travel to a common location to proceed.<sup>113</sup> Documents may be reviewed at each party's leisure, and all responses may be measured and thought out (although the extra time may not always prove advantageous). Perhaps most importantly, ODR procedures need not interfere with the ordinary business practices of an online retailer any more than a traditional proceeding.

Third, ODR proceedings are, generally speaking, significantly cheaper than their brick-and-mortar alternatives.<sup>114</sup> For instance, the cost of using a mediator on SquareTrade was only twenty dollars;<sup>115</sup> the filing of a complaint there was free.<sup>116</sup> This is especially important in the online B2C context, as the average online transaction involves only a little over \$100.<sup>117</sup> Given that such small amounts are typically in controversy, any system which requires large expenditures would mean that the rational consumer would simply write off a bad purchase as an unavoidable cost of buying goods online. Once initiated, many B2C disputes need not involve outside counsel, and thus, the only significant cost will be that of a third-party decisionmaker, if one is involved.<sup>118</sup>

The low cost of ODR proceedings underlies another primary advantage of these systems: the increased availability of judicial proceedings for consumers. Given the costs involved in bringing a traditional court case or even a traditional ADR proceeding, it is only

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(such as web cameras), or other inequalities of resources may reduce one party's access to the forum selected. *Id.* at 183.

112. See George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 712 (1997) ("The benefits are enhanced if the parties conduct the 'hearing' electronically, since the need to deal with the logistics of travel vanishes.").

113. *Id.*

114. See *id.* (noting that communicating electronically is cheaper than faxing).

115. Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 279 (2004).

116. William Krause, *Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 462 (2001).

117. See Press Release, comScore, Inc., Green Tuesday? Tuesday, December 15 Reaches Record \$913 Million in Online Spending (Dec. 20, 2009), available at [http://www.comscore.com/Press\\_Events/Press\\_Releases/2009/12/Green\\_Tuesday\\_Tuesday\\_December\\_15\\_Reaches\\_Record\\_913\\_Million\\_in\\_Online\\_Spending](http://www.comscore.com/Press_Events/Press_Releases/2009/12/Green_Tuesday_Tuesday_December_15_Reaches_Record_913_Million_in_Online_Spending) (describing the weekly average online retail sale figures for late November and early December, 2009).

118. See Friedman, *supra* note 112, at 712 (addressing the economics of online ADR).

with ODR procedures that a large swath of cyber-disputes could be resolved.<sup>119</sup> While even a brick-and-mortar B2C transaction contains some risk that the consumer will find herself aggrieved without cost-effective recourse, the availability of ODR procedures would help alleviate one of the most commonly cited reasons for people's reluctance to shop online: a lack of trust in the company.<sup>120</sup> Ensuring that online transactions can be taken to a third party for resolution, with little expense, in the event of a dispute would likely help allay these fears.

Finally, the simple fact that ODR proceedings are C2C can help avoid some of the problems inherent in F2F techniques. While there are certainly advantages to conducting matters F2F, as will be discussed in the next Subpart, the ability to avoid the emotional outbursts and other potentially distracting circumstances associated with an F2F meeting must be considered as one of the possible advantages of an ODR procedure.<sup>121</sup>

There are, however, several problems with the feasibility of the widespread adoption of an international ODR system. First, commentators worry about the availability of the hardware and software prerequisites for any form of ODR to happen; namely, an individual must have access to an Internet-enabled computer equipped with whatever software the ODR process will require in order for the procedure to be used.<sup>122</sup> Of course, this objection goes more toward the impracticability of bringing ODR to non-Internet-based disputes, since the fact that a dispute arose online establishes that both parties are likely equipped to deal with one another electronically.<sup>123</sup>

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119. *See id.* (addressing the costs of online ADR). Absent any allegations of systematic consumer fraud, widespread breach of warranty, or other repeated harms, no common class claim could be assembled either. What makes many of these cases so difficult is that the businesses involved *are* getting it right most of the time, and so the residual conflicts with customers are not the sort that are appropriate for aggregate treatment. *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28–31 (2000) (emphasizing the class action requirement that common issues of law or fact predominate over questions affecting only individual plaintiffs).

120. *See* Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 442 n.3 (2002) (discussing results of several consumer confidence surveys).

121. Tyler & Bretherton, *supra* note 43, § 4.8.

122. Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1336 (1998).

123. Friedman, *supra* note 112, at 707–08.



More troubling are the limitations built into that equipment. No electronic system can ever fully recreate the F2F situation, and thus many of the sources of information available in a more traditional ADR process cannot be recreated in an ODR system.<sup>124</sup> Losing out on the ability to view one's opponent and her accompanying body language or tone can hinder the information-gathering process. Additionally, the emotional release that can come from voicing and having one's perspective heard—a release that can facilitate effective settlement—may not be possible for the parties. The isolated nature of online communications may in fact worsen the emotional situation of the dispute since parties are not limited by ordinary social conventions against using insults or other inflammatory language while discussing their problems.<sup>125</sup> Cross-cultural transactions can further aggravate this situation, since what is innocuous to one may not be to another when interpreted through a different cultural lens.<sup>126</sup>

The increasing availability of videoconference technology may obviate these problems. A videoconference allows the parties to see one another and experience some, if not all, of the benefits associated with F2F communication.<sup>127</sup> Low-cost videoconferencing options are expanding, and it seems likely that technological improvements will help alleviate many of these concerns.<sup>128</sup>

### *B. The Growth of a "Lex Electronica" and a Borderless Approach to Cyber-Disputes*

One of the principal advantages of the emergence of ODR procedures is the ability to avoid cross-jurisdictional issues associated with many cyber-disputes.<sup>129</sup> Since one of the hallmarks of online

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124. See Eisen, *supra* note 122, at 1338 (discussing the danger of unequal resources within ODR); Zavaletta, *supra* note 65, at 21 (discussing the effectiveness of ODR versus traditional ADR).

125. A quick visit to any nonmoderated comments section online will prove this point. See also Zavaletta, *supra* note 65, at 21 (noting that the impersonal nature of e-mail can lead to angrier statements between parties).

126. *Id.* A further interpretation problem is raised by translation issues, since registration contracts and UDRP proceedings are in English. See Holger P. Hestermeyer, *The Invalidity of ICANN's UDRP Under National Law*, 3 MINN. INTELL. PROP. REV. 1, 38–42 (2002).

127. Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000).

128. Consider the example of Skype, which provides for free video conferencing so long as the individuals have computers equipped with webcams.

129. For a fuller discussion of this problem, see HÖRNLE, *supra* note 86, at 19–29, 44–45. For an analysis of some of the earliest judicial opinions to address this problem, see Michael A. Geist,

business is the potential to reach customers all over the world, disputes can now arise outside the scope of the ordinary channels of resolution. As U.S. courts have illustrated, there is no ready answer to the question of personal jurisdiction in online transactions, and this problem will only continue to get worse as cross-border transactions become more commonplace.<sup>130</sup> Indeed, with the growing number of foreign manufacturers selling their goods directly to consumers via the Internet, the number of cross-border B2C transactions will likely increase dramatically in the near future.<sup>131</sup> It is not clear what, if any, brick-and-mortar dispute resolution mechanism could adequately handle a conflict between, for example, a Chinese eyeglass manufacturer and an American customer.

With ODR, on the other hand, there is no limit on the ability of B2C cyber-disputes to be resolved anywhere in the world, potentially rendering the question of where the dispute originated moot.<sup>132</sup> The potential for ODR to avoid the jurisdictional issue may take two forms. First, parties can simply contract around jurisdictional problems by agreeing in advance to what dispute resolution procedure would apply.<sup>133</sup> Of course, there are other issues inherent in contract solutions to jurisdictional problems—most notably, enforcement. But, the potential for more rapid and accessible resolution of problems suggests that parties, with proper encouragement, may be more willing to rely on their previously agreed-upon contract solution.<sup>134</sup>

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*The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 531–45 (1998).

130. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122–26 (W.D. Pa. 1997) (determining what Internet ties are sufficient to establish minimum contacts); Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341, 342 (2000) (discussing whether or not having a home page is sufficient to establish minimum contacts in a jurisdiction).

131. One of the more surprising aspects of online transactions is the ability to eliminate the need for brick-and-mortar retail even in traditionally customer-service-heavy areas. Two ready examples of this trend can be seen in the booming market for shoes and eyeglasses where consumers buy the items online without having ever gone in for a fitting or seen the goods in advance. See Sidra Durst, *Shoe In*, BUS. 2.0 MAG., Mar. 15, 2007, [http://money.cnn.com/magazines/business2/business2\\_archive/2006/12/01/8394993/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2006/12/01/8394993/index.htm) (describing the \$3-billion-a-year online shoe business); Farhad Manjoo, *How to Get an Unbelievable, Amazing, Fantastic, Thrilling Deal on New Glasses*, SLATE, Aug. 27, 2008, <http://www.slate.com/id/2198746> (describing several of the more popular online prescription eyewear sites).

132. Of course ODR has the potential to obviate jurisdictional concerns in much broader contexts as well. See generally Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3 (1997) (discussing the international implications of the Internet).

133. See Zavaletta, *supra* note 65, at 26 (discussing potential options for arbitration).

134. See *infra* Part IV.

Tied into the potential to avoid jurisdictional issues is the resolution of the choice-of-law problem via the application of a “lex electronica.”<sup>135</sup> The idea of a lex electronica parallels that of the lex mercatoria used throughout Europe in the Middle Ages. The lex mercatoria, or “law merchant” as it has come to be called, was a body of international trading principles used by merchants at international fairs and other transaction-heavy gatherings to immediately resolve commercial disputes as they arose.<sup>136</sup> Based on principles of equity and justice, law merchant principles were applied regardless of where the transaction in question occurred.<sup>137</sup> Thus, any greater protections afforded by a particular host country were sacrificed in favor of expediency. Several commentators have suggested that ODR providers could, and should, develop similar universal principles to govern online transactions.<sup>138</sup> These principles would constitute a limited body of substantive commercial law which could form the basis of B2C ODR decisions. Such a system would move the debate away from synthesizing different countries’ approaches to B2C dispute resolution and towards identifying the set of protections that online consumers across the world expect when entering the online marketplace. Armed with such a lex electronica, an ODR provider would be able to bypass many of the choice-of-law issues that hampered previous attempts at B2C ODR procedures.

### *C. The “Best Practices” Problem: What Form Should International ODR Take?*

Many of the difficulties in establishing widely used international ODR systems are tied to the competing views of consumer protection across countries.<sup>139</sup> Any B2C measure meant to

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135. See Almaguer & Baggot, *supra* note 109, at 719 (“A formalized ADR mechanism, grounded in custom, is a logical and natural step for the resolution of disputes that arise on the Internet.”).

136. E. Casey Lide, *ADR and Cyberspace: The Role of Alternate Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 196 (1996).

137. See Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT’L. L.J. 221, 274–77 (1978) (describing how the law merchant developed as a universal law).

138. See, e.g., Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law,”* 15 OHIO ST. J. ON DISP. RESOL. 705, 725 (200) (“There may, ultimately, be an overarching and indigenous law of cyberspace and a range of generally accessible legal institutions and processes.”).

139. See Bates, *supra* note 42, at 830–44 (highlighting the differences between the policies of the United States and European Union toward ODR).

stretch across international borders will have to satisfy these competing views on how to adequately balance the demands of consumer protection with the need to not overly burden business.<sup>140</sup> Much of the conflict surrounding ODR is based on the differing views espoused by various countries about where the appropriate balance lies.

The easiest means of illustrating this split lie in the divide between the United States and the European Union, which, simply stated, fall on opposite sides of the consumer/business protection line.<sup>141</sup> Within the United States, policies meant to police B2C transactions have generally trended toward allowing businesses to set their own terms of doing business, including the inclusion of arbitration provisions.<sup>142</sup> Generally, consumers bear the burden of monitoring what those terms state and of ensuring that they are willing to abide by them at the time of purchase.<sup>143</sup> Excepting certain extreme behaviors, courts generally uphold the choices of businesses in dictating the terms of their sales, including with regard to dispute resolution procedures.<sup>144</sup> The worry is that anything onerous could disadvantage businesses compared to their foreign competitors by increasing the cost of doing business, perhaps even driving businesses from the marketplace entirely.<sup>145</sup> Where the U.S. system does intervene is to counter fraudulent or other harmful business practices.<sup>146</sup> Instead of regulating the B2C transaction per se, the focus remains on weeding out those B2C transactions which prove particularly harmful to the consumer.<sup>147</sup> Thus, the U.S. position often adopts a more hands-off approach when it comes to setting ODR standards.

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140. *See id.* (describing different views on protection).

141. *See id.* at 842–44 (elaborating on major areas of disagreement).

142. *See* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 100 (2000).

143. *Id.* at 103.

144. *See, e.g.*, *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258 (11th Cir. 2003) (noting that arbitration agreements will usually be upheld unless the party challenging the agreement can prove that the party will “likely” incur prohibitively high costs); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (“[T]he preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered, a concern which ‘requires that we rigorously enforce agreements to arbitrate.’” (quoting *Dean Whitter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985))).

145. *See* *Bates*, *supra* note 42, at 831–35 (discussing attempts in the United States to control arbitration costs).

146. *Id.* at 854 (“Contract defenses such as fraud, duress, or unconscionability may invalidate such [arbitration] agreements.”).

147. *Id.*

The European Union, on the other hand, typically focuses more on regulating the front-end transaction in the B2C relationship.<sup>148</sup> It has enacted much stricter consumer protection laws than are seen in the United States, and has generally extended those laws to ADR practices as well.<sup>149</sup> These protections limit the range of possible dispute resolution options and also govern how any such agreement on a dispute resolution procedure may be made.<sup>150</sup>

These differing views on consumer protection effectively result in a serious impasse regarding international ODR standards.<sup>151</sup> Simply put, as the example of the U.S. and the EU governments show, there is little international willingness to compromise to any significant degree on the amount of protection to be given, nor on the nature of the agreement which establishes a dispute resolution procedure.<sup>152</sup> Calls for international treaties establishing ODR norms or standard practices are thus limited by the ability of the countries to agree on practical regulations that will satisfy both types of governments. Waiting on such a perfect negotiation to occur would severely limit the ability of ODR practices to grow so that individual consumers could rely upon their availability.

#### *D. Implementation Concerns*

Even assuming the relevant regulators could agree on international best practices, effective implementation of an international ODR system may be difficult. Several obstacles stand in the way of any such ODR system, particularly in the areas of financing it, enforcing the resulting decisions, and cultivating trust in the system among its users. The financial obstacles of any international ODR system have been the subject of considerable discussion.<sup>153</sup> Ultimately, any ODR system would have to be financed by some form of tax levied against the users, whether in the form of

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148. *Id.* at 838–42 (providing an overview of the European approach to regulating arbitration agreements).

149. *See generally* Council Directive 93/13, *Unfair Terms in Consumer Contracts*, 1993 O.J. (L 95/29) (detailing European consumer protection policies).

150. *See* NICHOLAS LOCKETT & MANUS EGAN, *UNFAIR TERMS IN CONSUMER AGREEMENTS: THE NEW RULES EXPLAINED* 21–26 (1995) (explaining the EU's test for unfair contract terms and how such terms may be struck by the courts).

151. *See* Bates, *supra* note 42, at 842–43 (highlighting U.S. and EU disagreements on recognizing binding predispute arbitration clauses).

152. *Id.*

153. *See* Ponte, *supra* note 120, at 461.

fees charged for the services rendered<sup>154</sup> or else as a general fee charged to all domain name registrants as a cost of doing business online.<sup>155</sup> How to raise these funds in a practicable way is a subject beyond the scope of this proposal.

Enforcement of an ODR decision is also potentially problematic, even with the widespread acceptance of ADR decisions. The New York Convention<sup>156</sup> ensures cross-border respect for arbitral awards, and many countries have adopted its provisions.<sup>157</sup> In the United States, acceptance of international arbitration agreements is guaranteed by the Federal Arbitration Act, which allows individuals who obtain an international arbitration agreement to enforce that judgment in U.S. courts.<sup>158</sup> However, even in countries that have adopted the New York Convention, the laws often still allow for varying sorts of defenses against enforcement of the foreign award, including those based on unfairness or unconscionability.<sup>159</sup> International respect for ODR practices will depend on the reliability of the ODR practices, lest parties become able to secure unfair judgments via unreliable practices. The wide range of opinions on reliable practices, though, will make creating uniform procedures difficult.<sup>160</sup> Some commentators suggest that prior to international recognition and easy enforcement, systems of trustmarks should be adopted. These systems would verify that certain ODR providers have taken steps to ensure basic fairness of the systems being used.<sup>161</sup> As ODR procedures gain more widespread acceptance and usage, there is little reason to doubt that easier international enforcement of ODR decisions will follow.

Perhaps the greatest hurdle to be overcome is that of building trust in the ODR processes themselves. No system of dispute resolution can be relied upon or become widely used unless the

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154. This cost could be assessed either to each individual user or the business involved could cover the entire cost. *See id.* at 462.

155. It is not clear how effective such a fee collection scheme would be, given the variety of domain name registrants currently operating and their ability to operate in countries having advantageous exchange rates relative to that of the country of origin.

156. New York Convention, *supra* note 40.

157. *See, e.g.*, 9 U.S.C. §§ 201–08 (2010) (adopting the New York Convention in the United States); English Arbitration Act, 1996, c. 23, §§ 100–04 (adopting the New York Convention in the United Kingdom).

158. 9 U.S.C. § 211 (stating that “[f]oreign arbitration awards will be upheld”).

159. New York Convention, *supra* note 40, art. II(3).

160. *See, e.g.*, W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 111 (1992).

161. *See supra* Part III.C.2 (discussing how trustmarks can improve consumer confidence).

individual parties involved have faith that a fair and enforceable decision will be reached. In many ways, this has become a chicken-and-egg scenario: trust requires greater usage, but greater usage requires trust. Along with ensuring easy enforcement of ODR decisions, the trust of individual consumers could be cultivated by increasing awareness of ODR options and by encouraging businesses to offer ODR possibilities to their consumers. By doing so, both parties could gain increased knowledge, and, in some cases, direct interactions with ODR practitioners, increasing the likelihood that such systems could effectively develop over time.

#### IV. MANDATING ADOPTION: IMPLEMENTING ODR BY REGULATING DOMAIN REGISTRATION CONTRACTS

Some international agreement on the acceptability and adoption of ODR would facilitate the further growth of e-commerce. Several mechanisms for doing so have been suggested.<sup>162</sup> Instead of trying to create a universal ODR policy—particularly problematic while the procedure remains in its infancy—one of the easiest ways to encourage businesses to develop ODR procedures is to incentivize their adoption. To put it more specifically, this Note proposes creating one binding ODR procedure that applies a body of generalized *lex electronica* principles. This procedure could be accessed by all customers of businesses operating top-level domain names in the event those businesses failed to adopt their own ODR procedures for resolving B2C disputes. Doing so can take advantage of mechanisms already in existence, while spurring the development of ODR applications.

##### *A. Regulating the gTLD Registration Contract*

From the above discussion, it is clear that any short-term international attempt to regulate B2C transactions should focus on regulating the post-transaction situation instead of attempting to enforce a wide array of *ex ante* consumer protection standards. By following the example of the UDRP and applying its framework to the

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162. See Bates, *supra* note 42, at 881–85 (discussing the legal problems that arise from international e-commerce and proposals for addressing some of these problems); see also Edward C. Anderson & Timothy S. Cole, *The UDRP: A Model for Dispute Resolution in E-Commerce?*, 6 J. SMALL & EMERGING BUS. L. 235, 253 (2002) (discussing the desirability of a universal e-commerce ADR system).

availability of ODR procedures to aggrieved consumers, the beginnings of an international agreement may be seen—specifically, one in which ICANN implements a policy mandating top-level domain registrants to provide an ODR policy to their customers. This requirement would be enforced by creating a single international ODR mechanism to police the ODR policies of individual companies for fairness. These fairness determinations would be based on a *lex electronica*-inspired concept of good faith and fair dealings, and thus would sidestep the choice-of-law questions, at least as they relate to the relationship of the purveyor of a website and her domain name registrar. Allowing each individual company to select the ODR policy that makes the most sense for its own needs will encourage private ODR providers to develop a range of ODR services flexible enough to meet the needs of any style of business. At the same time, the pressure from consumers to encourage fair decisionmaking will protect against overly pro-business ODR providers. Online businesses would be compelled to devise dispute resolution processes, but this requirement would extend only to making certain those processes are fair.

### 1. The Proposed System

This Note proposes the creation of a mandatory ODR process applicable to all B2C transactions online. Such a system could be called an international ODR mechanism (“IOM”) and would only receive cases in two situations: (1) where site owners engaging in B2C transactions have refused to implement dispute resolution procedures, or (2) where users believe that the procedures chosen by site owners are unfair. Using the UDRP process as an example, the goal of the IOM would be to regulate the registration contract by creating another “rule of the road” for registrants: all gTLDs which are used to engage in commerce should plan for, and accommodate, the handling of consumer disputes. Failure to do so subjects the site owner to binding proceedings backed by the resources at play in the registration contract—namely the registration itself or the credit card used to pay for it.<sup>163</sup>

The proposed system would function as a backstop in all B2C transactions to ensure that, regardless of where the parties were situated, aggrieved consumers would have access to some form of

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163. See Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT’L ECON. L. 563, 577–78 (2000) (describing the rights of merchants in credit card charge-back programs).



ODR. The IOM is not meant to address the underlying dispute itself, but rather the means, if any, used by the business to address that dispute. This system would thus stand alongside, not in the place of, traditional judicial remedies.<sup>164</sup> The goal of the IOM would be fostering the growth of a robust system of dispute resolution within the virtual world of the Internet so as to allow parties the opportunity to avoid the problems of traditional adjudication.<sup>165</sup> The principles guiding these procedures would be those of a *lex electronica* surrounding a requirement of good faith and fair dealings in selecting an ODR mechanism. The remedies of the central system, like the UDRP, would not try to make parties whole. Instead, the IOM would police the market to keep out unscrupulous merchants and to encourage private parties to utilize private ODR mechanisms.

The IOM would be constituted much like the UDRP is presently: with the introduction of a general policy requiring that all online merchants provide for dispute resolution services for their customers or else consent to the IOM proceedings and risk losing their domain registration.<sup>166</sup> This practice would differ from that of the UDRP in an important way, however, since the standard is set intentionally low to allow businesses an easy way to avoid the IOM entirely.<sup>167</sup> Similar to the UDRP, third-party customers would initiate IOM proceedings based upon the behavior of the domain name registrant. When triggered, the IOM would have to decide one of two questions: (1) whether the procedures adopted by the site owner were in fact adequate to constitute a good faith effort to resolve the consumer dispute, or (2) where the site owner has made no prior attempt to resolve the dispute, whether the refusal to engage the consumer constitutes a breach of the principle of fair dealings. The

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164. Similar to the relationship of the UDRP to the courts. *See supra* Part II (explaining in introduction how the ADR/ODR framework coexists with traditional courts).

165. *See supra* Sections II.B–D.

166. The UDRP requires all those seeking to register a domain name to make certain representations, including that the domain name does not infringe on the trademarks of third parties. *See ICANN, supra* note 96, § 2 (stating that one of the representations registrants must make is that their domain names do not infringe on another's rights). ICANN avoided the problem of having the policy only apply to new registrants by including a provision that "maintain[ing] or renew[ing] a domain name registration" constituted making the same representations and subjecting the owner to the same mandatory administrative proceedings if a third party contested the registration. *Id.* While this language has not been tested in court, similar language could be used to implement the proposed ODR policy and, if nothing else, start generating public awareness of the desirability of making ODR available to online customers.

167. The goal is similar to that of state regulations regarding the purchase of automobile insurance: what matters is more the insurance policy's existence than any particular details about it.

hope is that the latter situation would rarely arise. This is not to say that the IOM procedure would be onerous to site owners, but rather that the lack of control on the part of businesses in choosing the forum would be incentive enough for them to set the rules before a dispute arose.

The principles guiding the decisions of the IOM would be the community standards—or *lex electronica*—of online transactions. One goal of encouraging the growth of ODR systems in general would be to more easily recognize the modern *lex mercatoria* principles that should govern electronic transactions and thereby create a better guide for online behaviors.<sup>168</sup> While this would mean the rise of a more American style of consumer protections, at least initially, such a minimalist approach would be easier to implement. The system would also be capable of growing into a more comprehensive, European-style system as the program develops, if that is the direction that parties wish to take.<sup>169</sup> Indeed, for such a system to work, the IOM need not be a stand-alone entity, separate from other ODR providers which arise to meet the demand for their services. Much as the UDRP allows the third party to select the decisionmaker in the case, so too could a customer select from certain pre-designated ODR providers to act as the IOM in judging the question of the adequacy of business-appointed procedures.<sup>170</sup> The overall intent of the law is simply to force businesses to address the sometimes difficult question of how to ensure that their customers will have recourse in the event of an unresolved dispute.

Finally, either through the adoption of a loser-pays arbitration fee provision or the adoption of sanctions for frivolous claims, certain procedural safeguards should be built into the system to provide some protection to businesses against overzealous consumers. The goal is to create a program whereby parties are fully incentivized to take action on their own, lest they cede control over their site to consumers. The

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168. See Thomas Schultz, *Private Legal Systems: What Cyberspace Might Teach Legal Theorists*, 10 YALE J.L. & TECH. 151, 153 n.1 (2007) (summarizing several of the different views on the role of *lex electronica* as it applies to online transactions).

169. Some have argued that such organically grown regulations are more effective at policing a marketplace, since more onerous restrictions imposed by fiat tend to push against previously established community norms. In these circumstances both compliance rates and the rates of the reporting of noncompliance can suffer. See Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1226–29 (2002) (describing how the Internet is a unique environment in which state regulation is less desirable than private ordering).

170. See *supra* Part II.B.

IOM should not create a club to be wielded by consumers any time they want to take advantage of a business.

## 2. Practical Implementation of the System

Education of the parties involved is paramount for any ODR system to work effectively. Especially important is convincing the parties to take their disputes to new channels different from those to which they have become accustomed.<sup>171</sup> While any new regulation will require a fair deal of awareness-raising before it can be effective, the UDRP example is telling, as the number of cases filed increased significantly in its first five years.<sup>172</sup> The proposed IOM would likewise be expected to increase the public awareness of, and, hopefully, the public desire for, widespread ODR options. For many large and established online sites, any requirement for ODR options would be redundant given their already established provisions.<sup>173</sup> For smaller online merchants, such a new requirement would likely encourage greater use of pre-existing ODR options.<sup>174</sup> In neither case would there need to be out-of-pocket costs until a dispute must be submitted to the selected ODR provider, creating a strong incentive for businesses to resolve matters before they escalate to that point. In practice, the only claims which would be expected to receive ODR attention would be those that the company would have the greatest incentive to simply ignore right now, since there is little incentive to resolve them.<sup>175</sup>

As the proposed IOM system grows, the ability of the communal norms to handle a wider variety of problems would increase, as would individuals' confidence in the community to enforce those norms. This is the primary benefit of a more robust concept of *lex electronica*. In order to fully encourage individual consumers to

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171. See Friedman, *supra* note 112, at 717.

172. See *UDRP Proceedings Arranged by Commencement Date*, ICANN, <http://www.icann.org/en/udrp/proceedings-list.htm> (last visited Apr. 4, 2011) (providing a comprehensive list of UDRP proceedings between January 1, 2000 and December 9, 2006).

173. One example is the relationship eBay has established with SquareTrade. See *supra* notes 47–48.

174. Most likely by simply selecting one of several ODR providers with positive reputations within the business community, much the way businesses currently select UDRP centers.

175. Currently, reputational costs are the only real damage a company has to risk when ignoring online customers' complaints. While these are real and can result in significant lost earning potential, the prevalence of anecdotal evidence condemning many online merchants for simply ignoring the "problem cases" or otherwise making it difficult for consumers to secure adequate redress for their problems suggests that for many companies reputation may not be a fully sufficient motivator. See generally Nicole B. Cásarez, *Dealing with Cybersmear: How to Protect Your Organization from Online Defamation*, PUB. REL. Q., Summer 2002, at 40.

have confidence in conducting their business online, though, they must be aware of those norms, and those norms must be enforced in a predictable fashion.<sup>176</sup> The growth of a *lex electronica* which generally mandates online fair dealings accomplishes that goal by highlighting and attempting to resolve the question of what exactly the term should mean.<sup>177</sup>

### *B. Encouraging Private Alternatives*

The ultimate goal of any ODR-encouraging system is the creation of the appropriate environment for ODR procedures to develop more fully. By mandating ODR services in B2C transactions, the IOM would protect consumers by ensuring access to a convenient dispute resolution forum to handle the matter instead of relying upon the willingness of companies to adopt such provisions on their own. Such a system would be shaped by the interactions between the demands of both providers and consumers of ODR proceedings; this interplay of interests is what will ultimately stimulate future ODR growth.

#### 1. Effects on the Providers of ODR Services

By requiring businesses to compete for customers based partly on the quality of their dispute resolution policy offerings, the IOM would help ensure that ODR service providers did not come to unduly favor either businesses or consumers. Currently, the lack of widespread adoption of ODR among online businesses has hindered the rise of private ODR providers.<sup>178</sup> The overall availability remains limited as many of these ventures have stumbled due to lack of customers.<sup>179</sup>

Also lacking has been the development of notification systems to inform the individual consumers seeking to do business online of the businesses' willingness to be subjected to ODR procedures. Several solutions have been proposed, all related to providing some easy identifier that customers could rely on.<sup>180</sup> Whether by using a series of trustmarks or other form of easy identification by consumers, the style

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176. See Friedman, *supra* note 112, at 321.

177. See *id.*

178. See Bates, *supra* note 42, at 843.

179. See *supra* Part II.C.

180. See Irina D. Manta, *Privatizing Trademarks*, 51 ARIZ. L. REV. 381, 402–06 (2009) (discussing examples of “Certification Marks”).

of web order forms and other contracting devices must evolve to include this additional piece of information.<sup>181</sup>

In this regard, the providers will be competing with one another for business clients, raising the possibility of certain providers becoming overly critical of consumer claims in the hopes of attracting more business.<sup>182</sup> To counter this problem, the proposed system would offer two safeguards. The first is simply the role of the consumer to choose among competing businesses. In this respect, the choice of ODR provider becomes one more basis upon which individual consumers can make their consumption choices.<sup>183</sup> Secondly, unlike with the UDRP, any selection by the business of an ODR provider which has too lopsided of a track record is subject to subsequent fairness review initiated by the consumer via the IOM identified earlier. The fact that both parties will be exerting pressure to become the favored party in any ODR proceedings strongly suggests that impartiality would become the chief stock-in-trade of ODR service providers and a significant baseline on which different providers would be compared.

As the ODR providers work to develop a *lex electronica*, basic concerns for efficiency and the competitive push for fairness identified above will drive the creation of many of the features that people have come to expect of adjudication systems, including publication of opinions, records of past decisions, and the ability to predict with some degree of certainty how decisions will be made in like circumstances in the future.<sup>184</sup> Because of the technological advantages already possessed by ODR procedures, it is likely that these fundamental issues can become better coordinated than are more traditional ADR

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181. See *id.* at 401 (claiming that such a system would provide for greater flexibility and productivity than the current one).

182. Some argue that this has already been seen in the UDRP, as demonstrated by the shift in complaint filing rates per arbitration provider after the providers began publishing their decisions. Once mark holders could identify the organization with the highest rate of granting the domain name transfer—WIPO—the majority of complaint filings migrated to that provider. For more details and a breakdown of the numbers, see Pamela Segal, Note, *Attempts to Solve the UDRP's Trademark Holder Bias: A Problem that Remains Unsolved Despite the Introduction of New Top Level Domain Names*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 2, 10 (2001). For a critique of the system based on these disparities, see Jennifer Arnette-Mitchell, Note, *State Action Debate Reborn Again: Why the Constitution Should Act as a Checking Mechanism for ICANN's Uniform Dispute Resolution Policy*, 27 HAMLIN J. PUB. L. & POL'Y 307, 323–26 (2006).

183. This is the same rationale that leads consumers to consider such secondary matters as security features on the page and the encryption offered at check out when making consumption choices online. See generally Ponte, *supra* note 53.

184. The ability to publish decisions and tease out the underlying principles (or patterns) guiding the decisions is something at which a web-based approach would be expected to excel. See Friedman, *supra* note 112, at 711–13 (describing the strengths of ODR).

processes.<sup>185</sup> This open system allows individual industries to determine what sorts of ODR procedures work best for them, thus minimizing the potential for problems that could result from an attempted one-size-fits-all approach.

## 2. Effects on the Consumers of ODR Services

Educating individual consumers of the existence and variety of ODR services available is the first step toward seeing more comprehensive dispute resolution taking place online. Arming consumers with the information to choose between businesses based on ODR options, though, does little good if the companies simply bury ODR information in the terms of use and adopt a click-through or other form of less-than-explicit acceptance. In order for consumers to both be aware of and be able to choose between company websites, the information about the company's ODR procedures should be made part of the standard disclosure information available at checkout online, as other trustmarks are currently.<sup>186</sup> Allowing consumers the chance to see and know what will happen in the event that a dispute arises is a necessary step in the development of a more adequate and comprehensive ODR system.

Another component of building consumer trust in an ODR system is in ensuring the reliability and the perceived fairness of the proceedings.<sup>187</sup> As discussed previously, there are certain advantages lost in the switch from F2F to electronic forms of communications,<sup>188</sup> and part of building a successful system involves counteracting those lost advantages to the extent practicable.

Besides building consumer trust, encouraging more choices helps alleviate concerns about adhesive contracts with companies forcing consumers into particular dispute resolution options.<sup>189</sup> By giving the system greater flexibility, it is more likely that individual consumers will be able to find a system with which they are comfortable.

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185. *See id.* (listing ways in which ODR can improve on traditional ADR processes).

186. *See* Tietz, *supra* note 44, at 1015 (“[B]asic disclosure is necessary to protect the users of ODR in the anonymous world of cyberspace.”).

187. *See* Andrea M. Braeutigam, *What I Hear You Writing Is . . . Issues in ODR: Building Trust and Rapport in the Text-Based Environment*, 38 U. TOL. L. REV. 101, 102–03 (2006) (emphasizing the need for rapport in ODR).

188. *See supra* Part II.B.

189. *See* Ponte, *supra* note 53, 491–92 (reviewing issues that must be resolved before gaining the trust of consumers).

## V. A STICKY ISSUE: THE ADHESION PROBLEM FOR ICANN CONTRACTS

The problem of adhesion contracts presents one of the more troubling aspects of any mandatory ODR system.<sup>190</sup> Electronic contracts are particularly troublesome given the ability of businesses to bury the terms of the agreement within a website or otherwise obfuscate the basic question of what, exactly, the customer is agreeing to when making a purchase.<sup>191</sup> Commentators have rightly argued that the UDRP represents one of the more extreme forms of an adhesion contract in that all website owners must agree to the terms established by ICANN in order to participate in any Internet transactions.<sup>192</sup> Creating a new system of mandatory ODR provisions would represent an even more intrusive measure than the trademark-protection measures underlying the UDRP.<sup>193</sup> Additionally, by incentivizing the adoption by businesses of ODR procedures, this policy could actually increase the degree to which customers unwittingly sign away access to certain forms of dispute resolution while contracting online.<sup>194</sup> This Part begins by looking at adhesive contracts from the perspectives of both businesses and consumers. Next, this Part describes the U.S. laws governing electronic contracting as an example of how such laws can increase the risk of creating more contracts of adhesion. Finally, it develops an argument as to why the problem is overstated, namely that it is a misnomer to consider it a contract of adhesion to force an online business to live up to the obligations of an equivalent brick-and-mortar facility, or to force

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190. Generally, a contract of adhesion is one where the terms are set by one party and presented as a take-it-or-leave-it decision. See Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1982) (laying out, as one of seven characteristics of a contract of adhesion, that after one party has laid out all "except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document").

191. See Anthony M. Balloon, Comment, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and A New Model for Consumer Protection in Internet Transactions*, 50 EMORY L.J. 905, 933 (2001) (justifying mandatory presale disclosure of warranties in electronic consumer sales).

192. See, e.g., A. Michael Froomkin, *Commentary: Time To Hug a Bureaucrat*, 35 LOY. U. CHI. L.J. 139, 152 (2003) (describing the inability of parties to escape ICANN's UDRP-consenting contract term).

193. *Id.* However, the adhesion problem could be mitigated by adopting a fair-play analysis of the issue. See Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 IOWA J. CORP. L. 331, 352-53 (1996) (providing for reasonable stability and predictability, while ensuring fairness).

194. See Froomkin, *supra* note 192, at 153 (taking issue with ICANN having had successes).

a consumer to accept a procedure for resolving disputes when otherwise there would be none.

### *A. The Potential for Adhesion in ODR Selection Clauses*

Both website registrants and website users have reason to worry about problems of contracts of adhesion in the proposed ODR requirements. For those doing business online, the proposed requirement would function as a prerequisite to entering the marketplace. For consumers, the worry would be that new terms would be buried inside hard-to-find terms of sale or otherwise couched in incomprehensible legalese.<sup>195</sup>

The worry for businesses would involve questions of fairness regarding the erection of new barriers to entry into what had previously been a remarkably open space. When the UDRP was enacted, its purpose was to counteract certain infringements of intellectual property rights.<sup>196</sup> Both the regulated activity—selecting a name under which to do business—and the right in question—the third party's property right in a particular name—were identical online and off-line. Conceptually, the UDRP operates much like a court whose only remedy was a permanent injunction against an offending party preventing that party from using a particular business name.<sup>197</sup> In that regard, an off-line obligation simply migrated online. But the proposed ODR requirement differs in an important way: it requires businesses to affirmatively enact and uphold an ODR policy, as opposed to refraining from infringing on someone else's rights. Unlike a court, mandatory ICANN policies cannot be avoided by moving to a different jurisdiction. Deciding whether to comply thus becomes an existential question for an online business. Forcing a business to accept such an obligation based on ICANN's control of gTLD registration agreements seems to be the very definition of an adhesive contract.

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195. See generally Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 153 (2008) (describing the two-pronged test of procedural and substantive unconscionability).

196. WORLD INTELL PROP. ORG., FINAL REPORT OF THE FIRST WIPO INTERNET DOMAIN NAME PROCESS 23 (1999), available at <http://www.wipo.int/amc/en/processes/process1/report/index.html>.

197. Such remedy limiting measures are themselves subject to considerable questioning in the literature. See, e.g., Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 111–12 (2006) (arguing that arbitration provisions that work to limit remedies may in some instances be unconscionable).



For consumers, the adhesion problem is not related to any actions of ICANN but rather to the manner in which companies would likely implement the ODR requirement. Terms-of-use and terms-of-sale agreements can sometimes be difficult to locate online and often even more difficult to understand. And as courts have indicated, not taking the time to hunt down the terms of an agreement does not stand in the way of a company enforcing those terms against a customer.<sup>198</sup> Simply clicking through a form<sup>199</sup> or even browsing a page<sup>200</sup> can be enough to form a contract. In this context, forcing businesses to offer forms of ODR may wind up undermining consumer protection standards as small businesses which may not have realized their ability to create adhesive contracts become aware of their potential while researching ODR options. Alternatively, even companies dedicated to protecting their own customers may well find themselves in situations where trying to explain the terms of ODR procedures to prospective clients is too time consuming or otherwise bothersome, and they may begin looking to play hide the ball.

### *B. The U.S. Approach to Electronic Contracts*

The potential for adhesion is exacerbated by the ease with which most jurisdictions recognize the formation of an electronic contract. U.S. laws are illustrative of this point, both because the United States, as the home of the inventors of the Internet, has had the longest exposure to electronic contracting, and because its laws demonstrate the generally indifferent attitude the law may have regarding protecting consumers from themselves online.

The Internet was not intended to function as a vehicle for private commerce, but as research gave way to private use, its creators eventually acceded to the demands for business to be conducted online in 1991.<sup>201</sup> Five years later, the U.N. Commission on International Trade Law promulgated its first model law governing

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198. See *ProCD, Inc. v. Zeidenberg* 86 F.3d 1447, 1452 (7th Cir. 1996) (refusing to void a contract on such terms); *Step-Saver Data Sys., Inc. v. Wyse Tech., Inc.*, 939 F.2d 91, 98 (3d Cir. 1991) (same).

199. See, e.g., *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451–52 (E.D.N.Y. 2004) (enforcing a click-through agreement).

200. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–03 (2d Cir. 2004) (finding that plaintiff's multiple uses of defendant's site meant that it must have been aware of the terms of use, regardless of whether it actually looked at them before using the site).

201. ANDREW WYCKOFF & ALESSANDRA COLECCHIA, *THE ECONOMIC AND SOCIAL IMPACT OF ELECTRONIC COMMERCE: PRELIMINARY FINDINGS AND RESEARCH AGENDA* 9 (1999).

the formation of electronic contracts.<sup>202</sup> The model law specified that contracts were not to be denied legal effect solely on the basis of their electronic origin.<sup>203</sup> It also included details on the nature of electronic signatures and other principles of contract formation and enforcement which were meant to increase the international potential for electronic contracting.<sup>204</sup> Following the passage of the international model law, the U.S. National Conference of Commissioners on Uniform State Laws began formulating its own model law, culminating in the promulgation of the Uniform Electronic Transactions Act ("UETA").<sup>205</sup> The hope of the UETA was to guide the formation of U.S. federal and state laws, potentially avoiding some of the cross-jurisdictional variation in the common law of contracts.<sup>206</sup>

At the federal level, the principal law governing electronic contracts is the Electronic Signatures in Global and National Commerce Act (the "E-SIGN").<sup>207</sup> The E-SIGN does not create new substantive law on contracts, but rather was intended as a way to migrate much of the existing common law of contracts into the world of the Internet.<sup>208</sup> Taking its lead from the UETA, the E-SIGN afforded electronic contracts and signatures legal validity<sup>209</sup> as well as electronic copies of other records.<sup>210</sup>

Problems of adhesion arise because of the ease with which individuals may contract online. Both the UETA and the E-SIGN were meant to be technology-neutral, meaning that no particular method of forming an electronic contract was to be given legal preference.<sup>211</sup> The E-SIGN explicitly prohibits the states from passing laws which afford preference to any particular manner of forming contracts.<sup>212</sup> This

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202. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Dec. 16, 1996).

203. *Id.* art. V.

204. *Id.* arts. III–VI.

205. UNIF. ELEC. TRANSACTIONS ACT § 7A, U.L.A. 23 (2002 & Supp. 2004).

206. S. REP. NO. 106–76, at S5,282 (2000) (Conf. Rep.).

207. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001–31 (2006).

208. Benjamin Suksomnil, *An Analysis of the Electronic Signatures in Global and National Commerce Act and Its Effects on E-Commerce and the Online Consumer*, 2002 SYRACUSE L. & TECH. J. 2, § V.

209. 15 U.S.C. § 7001(a).

210. § 7001(b)(1).

211. See Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 583, 601–02 (1999) (describing how digital signatures became the favored form of technology used).

212. § 7002(a)(2)(A)(ii) (states may not "accord[ ] greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing

arrangement is advantageous for contractors as it does not prevent them from adopting new technologies as they emerge. The difficulties lie with contractees, who may not be sufficiently protected from unwittingly agreeing to disadvantageous terms.<sup>213</sup> Since the E-SIGN defines a signature quite permissively,<sup>214</sup> nearly anything which could conceivably manifest assent may be used.<sup>215</sup> One of the more heavily commented-upon forms of electronic signature, the click-through or click-wrap agreement, involves nothing more than clicking on an “I agree” or similarly worded button.<sup>216</sup> In contracts such as these, there is little reason to believe that individuals have actually understood or even read the terms to which they are agreeing,<sup>217</sup> and the resulting lack of informed consent is what undermines any mandatory ODR system.<sup>218</sup> Courts in the United States generally have taken a fairly lenient standard when reviewing mandatory choice-of-law or arbitration clauses.<sup>219</sup> While the general trend is toward enforceability, this area of law remains in flux.<sup>220</sup>

### *C. Loosening the Adhesive: Creating Informed Choice*

From both the business’s and the consumer’s perspectives, these contracts may seem adhesive. In both cases, though, this characterization omits the fact that if the B2C transaction took place off-line it would already be covered by some form of mandatory dispute resolution. As with the UDRP, such a provision would not represent a genuinely new burden on businesses so much as a forcing

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the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures”).

213. See, e.g., Jonathan E. Stern, *Business Law: The Electronic Signatures in Global and National Commerce Act*, 16 BERKELEY TECH. L.J. 391, 406 (2001) (describing the technology-neutral approach used in E-Sign).

214. § 7006 (an electronic signature is “an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record”).

215. See Stern, *supra* note 213, at 395 (giving examples of different ways to manifest assent).

216. See, e.g., Christina L. Kunz et al., *Click-Through Agreement: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401, 401 (2002) (describing strategies designed to give a margin of error to practitioners with respect to the validity of assent in these types of agreements).

217. *Id.* at 423.

218. See generally Zhang, *supra* note 195, at 130–42 (arguing that there is a lack of mutuality and lack of autonomous decisionmaking when accepting a contract of adhesion).

219. Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173, 179–83 (2007) (reviewing the precedent in the area of mandatory electronic contract terms from various jurisdictions around the country).

220. *Id.* at 182–83.

of businesses to recognize and accommodate an obligation that would otherwise clearly exist but for the nature of e-commerce in the first place. One of the primary functions of any court system is the provisioning of a ready forum to handle disputes as they arrive in a venue which is convenient for the parties involved.<sup>221</sup> One of the great disadvantages of the ease of transacting with anyone from around the world is the sudden disappearance of such convenient fora, particularly for cross-border transactions. The recommendation here for the creation of a mandatory ODR process does not hinder a company's ability to choose for itself what form of ODR to adopt, only that it must do so. In that way, selecting an ODR procedure is more in line with the goal of ensuring that B2C transactions may be easily and cheaply resolved for the parties and that customers are not left without recourse when problems arise with low-value purchases.

Consumers in the proposed system have two main worries: (1) whether the ODR procedures businesses adopt are fair, and (2) whether their decision to contract with a given merchant is made fully informed of the consequences, particularly if the ODR provisions of the contract are less than desirable. In response to the first worry, the fairness of the ODR provisions would, in effect, be dually policed. First, the online reputation of a company which treated its customers unfairly in an ODR process would quickly turn negative.<sup>222</sup> Second, by creating the possibility of appeal to a central, binding decisionmaker any business contemplating harsh or unfair treatment of its customers would be subjected to a review of its practices before a body of the customer's choosing. Taken together, it is unlikely that customers would be genuinely harmed by unfair terms under this proposed system.

The greater worry would be for customers unintentionally waiving certain rights or agreeing to unwanted procedures via click-through agreements or other, similar arrangements. In this situation, traditional unconscionability analysis would suggest that the procedural flaws with the contract would be enough to render it unenforceable and that the customer should be released from the

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221. See 28 U.S.C. §§ 1391, 1404 (2010) (establishing venue and allowing it to be transferred “[f]or the convenience of parties and witnesses”).

222. See Batya Goodman, *Honey, I Shrink-Wrapped the Customers: The Shrink-Wrap Agreements as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 329 (2000) (discussing the tendency of online users to share information among themselves).

binding agreement.<sup>223</sup> For electronic contracts, however, courts have split on the question of whether difficult-to-find terms actually constitute such procedural unfairness as to warrant voiding the contract, or whether the burden lies with the customer to find the terms in advance.<sup>224</sup> If, however, the presence of favorable ODR terms becomes a point upon which businesses compete to distinguish themselves, then it would become more likely that the consent to the ODR terms was explicit and informed. While encouraging the development of trustmarks and other methods of identifying ODR procedures in use, basic customer education remains the best policy. Even if trustmarks or other forms of consumer education and notification are not put into general use, a worry of consumers clicking away rights is not as much of an issue when the rights in question would not exist but for the policy. The general worry of uninformed customers being bound by disadvantageous terms in online contracts is one which is not soon to disappear. Adopting the proposed modest form of consumer protection would not actually harm customers, though, even if they found themselves adhesively bound to employ ODR.

## VI. CONCLUSION

The growth of e-commerce is remarkable both for its rapidity and for its ability to establish its own norms independent of traditional mores. One of the areas where the Internet has outpaced the ability of traditional institutions to keep pace is that of dispute resolution, particularly given the ease with which well-established concepts like jurisdiction can be circumvented. As consumers increasingly turn to the web for their purchases, the potential for B2C disputes will continue to climb. Without taking steps to ensure more systematic adoption of fair and easily accessible fora to resolve those disputes, customers will continue to remain hostage to the largesse of the companies themselves for adequate resolution of their problems. The crux of the problem is that so long as access to courts requires a local presence, there can be no reliable way to bring in third parties except when businesses decide on their own that such measures are appropriate. Indeed, this uncertainty surrounding dispute resolution

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223. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 454 (D.C. Cir. 1965), *rev'd* 198 A.2d 914 (D.C. 1964) (finding a contract unenforceable due to unconscionable terms and describing the test to be used).

224. *See Zhang, supra* note 195, at 151–56 (describing the different courts' approaches).

is one of the obstacles to be overcome in order for customers to trust e-commerce as much as traditional avenues of commerce.

One such way would be the creation of a central ODR provider responsible for ensuring that all online businesses offer some form of ODR to their customers. The freedom to choose what form of ODR is appropriate is what allows businesses to avoid any onerous restrictions on their operations, while also creating the freedom of experimentation necessary for the continued evolution of ODR processes and technologies. Such requirements can be added by ICANN into all new gTLD registration contracts. While practical concerns—chief among them being financing<sup>225</sup>—have yet to be fully resolved, this conceptual framework aligns the different parties' incentives in such a way as to encourage the development of fair and inexpensive procedures which would substantially increase a customer's certainty that problems that develop online can be handled online. By forcing companies to act and allowing the consumers themselves to police results, the Internet's capability to develop its own sets of community principles and standards could be harnessed to articulate doctrines of enforcement on which online consumers could rely. Removing the uncertainty inherent in remote business relationships would constitute a substantial boon for Internet businesses and consumers alike. And by doing so, the virtual world could be made a little more like the real one.

*Michael G. Bowers\**

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225. However, the trend towards businesses absorbing the entire cost of binding ADR procedures suggests that ODR fees may become simply a cost of doing business.

\* Many thanks to all those whose helpful comments and other support made this Note possible, and to the editors at the VANDERBILT LAW REVIEW, whose guidance and help throughout this process was superb. All remaining errors are solely the fault of the author.

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