

E. KATSH IN 'LAW IN A DIGITAL WORLD':
*"THE DATA HIGHWAY OF HEALTH OR COMMERCE OR EDUCATION CAN BE THE SOURCE OF AS MUCH
LITIGATION AS THE PAVED HIGHWAYS OF THE PHYSICAL WORLD."*

**ONLINE DISPUTE RESOLUTION AS A SOLUTION TO
CROSS-BORDER E-DISPUTES**

AN INTRODUCTION TO ODR

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Preface

This “introduction to ODR” is a slightly modified version of the paper I wrote to finish my law study and obtain the Dutch law degree ‘meester in de Rechten’ at the University of Utrecht.

I am very grateful to my supervisor mr. A.W. Jongbloed, who has supported me with his enthusiasm and has given me the opportunity to write a thesis on a ‘new’ subject. He encouraged me to stop reading and start writing when I felt I was drowning in information. This was indeed very good advice. Thank you for all your help!

I would also like to thank my husband Frank Schasfoort, who kept encouraging me to stick to the subject of ODR, even when his e-mediation project went through some rough times. He supported me in every possible way when I decided to go back to University at the age of 31 and kept on encouraging me all the way through. And of course I thank my family and friends, who gave me their support.

Chapter 1: Introduction

Electronic commerce and the Internet offer unprecedented opportunities¹. The explosive expansion of the use of the Internet makes it possible for businesses to expand their markets and render services to large groups of e-consumers. Where off-line transactions can lead to problems and disputes, the same is true for on-line transactions. In other words: e-commerce transactions will sometimes result in e-disputes. To ensure that all parties concerned will feel they can safely participate in e-commerce transactions it is imperative that e-disputes are resolved adequately, because uncertainty over the legal framework may inhibit both consumers from purchasing products or services over the Internet, and companies from entering into the electronic market place.²

The problems will be even more complex when the e-dispute is cross-border. At this particular moment in time there is not yet much empirical evidence on cross-border consumer e-disputes³, but it seems likely that in the EU economy that will soon avail itself of one currency, the Euro, cross border e-commerce transactions will increase, thus potentially increasing the number of cross-border e-disputes within Europe. Of course the number of cross-border e-commerce transactions between Europe and the US and Asia are also increasing daily, potentially increasing the number of e-disputes with it.

It has been recognized that Alternative Dispute Resolution (ADR) will be a helpful means of solving the growing number of e-disputes. ADR will in many cases be far more efficient than regular dispute resolution methods, which will often involve lengthy and expensive legal procedures. This issue has been addressed both internationally and nationally.

In 1999 the OECD has published “Guidelines for Consumer Protection in the Context of Electronic Commerce”.⁴ These guidelines encourage businesses, consumer representatives and governments to work together to provide consumers with meaningful access to fair and timely alternative dispute resolution and redress, without undue cost or burden. Special attention is given to cross-border transactions. Special emphasis is placed on the innovative use of information technologies in implementing ADR systems.⁵

The EU has addressed this issue in the European ‘Directive on electronic commerce’ (98/0325 (COD)).⁶ The first part of article 17 of the directive states:

¹ Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study, Marc Wilikens, Arnold Vahrenwald, Philip Morris (Joint Research Centre), 20th April 2000, p. 2.

² Ibid, p. 2.

³ Ibid, p. 15.

⁴ <http://www.oecd.org/dsti/sti/it/ec/index.htm> (under electronic commerce)

⁵ The Guidelines for Consumer Protection in the Context of Electronic Commerce, principle VI under B (sub iv).

⁶ <http://www.ispo.cec.be/ecommerce/legal/legal.html#common> .

‘Member States shall ensure that, in the event of disagreement between an Information Society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, *‘including appropriate electronic means’*’.

In March of 2000 an EU Workshop on out-of-court dispute settlement systems for e-commerce was held in Brussels. This resulted in a report that also addresses online variants of dispute settlement in an e-commerce environment.⁷

The US Department of Commerce has organized a Public Workshop on Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace in June of 2000.⁸ The US Secretary of Commerce Mr. Daley has already stated in a speech in February 2000 that ADR should be used to solve e-disputes.

Recently the Dutch minister of the Justice department Korthals has stated that he sees possibilities for a cross border Consumer Complaint Board for e-commerce disputes between the Netherlands and Germany.⁹

On 6 April 2000, the Dutch Consumer Council (Consumentenraad) asked the opinion of the Dutch government about ADR issues in relation to solving e-disputes in Europe. Mr. Van Walsem specifically mentioned the possibility of online dispute resolution. The government is of the opinion that a European ADR network can indeed play a role in solving e-disputes.¹⁰

Some of the major advantages of alternative dispute resolution are the facts that it can solve the problem of jurisdiction, it is swift and can be provided at low or no cost to e-consumers, but quality guarantees are necessary as well as guarantees that the solutions will be followed (compliance).

In my thesis I will start with describing ADR in general and the major forms of ADR, as we currently know them in the Netherlands. I will then go on to describe the forms of online dispute resolution (ODR) as they exist mainly in the US and Canada. After that I will focus on online mediation. Online mediation is the most developed and most studied form of ODR. I will study and describe the key issues related to online mediation.

In the final part of my thesis I will try to answer under what conditions online mediation can provide a solution for cross-border e-disputes in the EU and make recommendations for making online mediation possible in the European context.

⁷ Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study , Marc Wilikens, Arnold Vahrenwald, Philip Morris (Joint Research Centre), 20th April 2000.

⁸ <http://www.ftc.gov/bcp/altdisresolution>

⁹ De automatiseringsgids 16 juni 2000, p.1.

¹⁰ Verslag van een algemeen overleg van de Consumentenraad, vastgesteld 26 april 2000. Tweede Kamer der Staten Generaal, vergaderjaar 1999-2000 , 21 501-15, nr. 50, p. 3.

Chapter 2: Alternative Dispute Resolution (ADR)

Art. 6 of the European Convention on Human Rights states that everyone should have effective access to the courts. This does not imply that parties involved in a dispute cannot choose to resolve their dispute out of court in an alternative way, provided that they both agree to do so and provided there is some form of legal control.¹¹ Alternative Dispute Resolution (ADR) comprises all mechanisms for resolving legal disputes without resorting to litigation, for example arbitration and mediation. In this chapter I will give short outlines of the three main kinds of ADR in the Netherlands. Where necessary I will refer to the relevant Dutch Civil Code.

2.1 Arbitration

Arbitration is a form of alternative dispute resolution in which parties involved in a dispute present their evidence to a neutral "arbitrator" in an informal setting. Once the parties have freely agreed to submit a dispute to arbitration, a party cannot unilaterally withdraw from the arbitration.

After considering all evidence, the arbitrator renders a decision, a so-called arbitral award. Arbitration is used mostly in conflicts between businesses and has numerous advantages over court trials. The disputing parties can obtain a quick decision and resolution of their dispute at a much lower cost than through court proceedings. An arbitration hearing is normally not open to the public, whereas court proceedings are normally open to the public and news media. Parties can select an arbitrator who has extensive legal and practical experience in the specific factual and legal issues in dispute. The rules governing the arbitration can be as informal or complex as the parties agree. The arbitration hearing can be held at a time and place that parties agree upon.¹²

The decision the arbitrator makes is final, legally binding and not appealable, except in very limited instances. In the Netherlands some rules for arbitration can be found in chapter IV of the Dutch Book of Procedural Law (*Rechtsvordering*). International Arbitration is regulated in Treaties, like the New York Convention. This Convention deals with issues of the recognition and enforcement of foreign arbitral awards.¹³

¹¹ H.J. Snijders, M. Ynzonides en G.J. Meijer, *Nederlands Burgerlijk Procesrecht*, 2e druk, Deventer, 1997, nr 378, p. 314.

¹² <http://www.ca-adr.com/faqs.htm> .

¹³ <http://www.epms.nl/arbit/nycmain.htm> .

2.2 Binding advice

Another form of Alternative Dispute Resolution is the so-called “binding advice” procedure, followed by the various Dutch Consumer Complaint Boards (Geschillencommissies). The basis for the competence of a certain Complaints Board can be found in the terms and conditions of supply employed by the members of the trade associations participating in that Complaints Board. In those terms and conditions it is stipulated that consumers have the option of submitting a dispute with a supplier to a Complaints Board instead of to an ordinary court.

If a consumer has a complaint, he will always have to try and resolve the problem with the supplier first. If this does not lead to a solution, the consumer can present his complaint to a Complaints Board. The Complaints Board will take all information from both parties into consideration and will reach a legally binding decision. It is not possible to lodge an appeal against such a decision. However, it is possible to submit the decision to a court of law within two months after the decision was reached, to have it tested marginally (art. 7:904 of the Dutch Civil Code). This means that a judge can declare the decision not valid if the Complaint Board has ignored fundamental principles of procedural law.¹⁴

When the Complaints Board gives a decision, the trade association guarantees that its members will comply with this decision. If one of its members does not comply, the trade association itself will take over the obligation the Complaints Board has posed on its member. Thus the trade association ensures that decisions made by the Complaints Board are effective. At the moment there are more than 28 Complaints Boards active in the Netherlands, all part of the Foundation for Consumer Complaints Boards (Stichting Geschillencommissies voor consumentenzaken: SGC).¹⁵

Other European countries have their own alternative dispute resolution mechanisms for resolving consumer complaints, but not all of them offer adequate quality guarantees. To ensure that the various procedures in different EU countries will offer a minimum number of quality guarantees such as independence, transparency, efficiency and the respect of law, the European Commission has recently adopted a Recommendation on the out-of-court settlement of consumer disputes that addresses these issues.¹⁶

¹⁴ http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just04_nl_ccb1_en.html

¹⁵ Ibid.

¹⁶ Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE), see http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398X0257.html or http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html

2.3 Mediation

Mediation is a form of alternative dispute resolution, in which parties resolve the dispute themselves, with the help of a neutral mediator. The mediator does not make a decision, but helps the disputing parties to find the solution that is acceptable to all parties involved. One of the major advantages of mediation is the fact that relations between the disputing parties are not unnecessarily damaged.

Mediation always takes place on a voluntary basis; no party can be forced to participate in a mediation procedure. Mediation is also voluntary in the sense that either party may, if it so chooses, abandon the mediation at any stage prior to the signing of a settlement agreement.

In the Netherlands the NMI has published the NMI Mediation Rules.¹⁷ All mediators that are registered by the NMI, observe these rules. According to those rules, parties that have agreed to mediate will enter into a mediation agreement with the appointed mediator. In this agreement the parties and the mediator agree to strict confidentiality. This guarantee of confidentiality is based on the Dutch Civil Code. All persons present at the Mediation are bound by the rules of secrecy and confidentiality.¹⁸ If an agreement is reached, the outcome is recorded in a so-called Settlement Agreement. This written agreement is an agreement according to Dutch Civil Law (art. 7:900 of the Dutch Civil Code).

The settlement agreement is legally binding. This means that in case of non-observance of the agreement, it is possible to take legal action. It is usual however, to agree in the Mediation agreement that parties will submit any disputes with regard to the settlement agreement to mediation, before submitting them to the judgment of a judge or arbitrator(s).¹⁹ In other countries, e.g. the US, parties decide whether or not they wish to make their agreement legally enforceable or not. A reason to make an agreement not enforceable is the fact that the idea of mediation is that parties work their problems out themselves and have reached a decision that is acceptable to both of them and will therefore be honored by both of them without having to resort to legally binding written agreements.

¹⁷ <http://www.nmi-mediation.nl/en/regels/regelsframe.htm>

¹⁸ <http://www.nmi-mediation.nl/en/nmi/mediationframe.htm>

¹⁹ <http://www.nmi-mediation.nl/en/regels/regelsframe.htm>, art. 15 of the NMI Mediation Rules 1995.

Chapter 3: Online Dispute Resolution (ODR)

The collective term “On-line Dispute Resolution (ODR)” is used internationally for different forms of on-line dispute settlement by means of ADR-methods. ODR supplements existing ADR methods based on the assumption that certain disputes (more specifically e-disputes) can also be resolved quickly and adequately via the Internet.

ODR can be defined as the deployment of applications and computer networks for resolving disputes with ADR methods. Both e-disputes and brick and mortar disputes can be resolved using ODR. At the moment there are four types of ODR systems:

- Online settlement, using an expert system to automatically settle financial claims;
- Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators;
- Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints;
- Online mediation, using a website to resolve disputes with the aid of qualified mediators;

Not all of these types of ODR are fully developed yet. Online settlement and online mediation are currently the most advanced.

3.1 Online Settlement

Online settlement of financial claims is already very well developed in the US. This is not a form of ODR that is especially connected with e-disputes. It is however the most developed form of online dispute resolution in the strict sense. The first website to offer online settlement of financial claims was Cybersettle²⁰ followed shortly afterwards by Clicknsettle.²¹ Cybersettle offers online settlement of insurance claims by using an expert system. Clicknsettle offers parties with any kind of monetary dispute the possibility of reaching a settlement, also with the help of an expert system. The systems are built in such a way that parties do not know the amount the other party is asking for or offering. An expert system matches double-blind offers and demands. The Cybersettle system lets the claims representative make three offers, the plaintiff can counter these with three demands. Clicknsettle gives parties the possibility of submitting as many offers or demands as they want during a 60-day period.

Both sites guarantee that these settlement offers and demands are completely confidential. If an offer and a demand are within an agreed-upon formula, the claim will automatically be settled for the median amount. Both sites seem to use

²⁰ www.cybersettle.com .

²¹ www.clicknsettle.com .

the same algorithm for matching the offers and demands. If no settlement is reached, parties will still be able to negotiate without prejudice, because they will not know the amount the other party has offered or demanded during the e-settlement procedure. These websites were set up to shorten the duration of a negotiation or litigation process and to reduce the expenses endured by the individuals involved.²² Younger sites like Ussettle and Settlesmart are based on the same idea and use the same mechanisms.²³

3.2 Online arbitration

To the best of my knowledge, online arbitration is at the moment only being used by Canada based eResolution, a virtual tribunal to settle domain name disputes.²⁴ The ICANN (Internet Corporation for Assignment Names and Numbers) has accredited eResolution to settle domain name disputes online. The domainname disputes are resolved in accordance with the ICANN Uniform Domain-Name-Dispute-Resolution Policy.²⁵

A domain name complaint can be submitted online by means of a secure²⁶ web based complaints form or by e-mail. The arbitrator will deal with the parties' claims in conformity with ICANN's Policy²⁷ and ICANN 's Rules²⁸ and eResolution's own supplemental rules²⁹. When both parties have had the opportunity to make their case, the arbitrator will issue a legally binding decision.³⁰ Anyone registering a domain name is bound by the ICANN Rules, because they are incorporated by reference into the Registration Agreement, and set forth the terms and conditions in connection with a dispute between parties other than the registrar over the registration and use of an Internet domain name registered by a party.³¹

Currently there are believed to be over 10,000 disputed domain names. The cybersquatting phenomenon and, more generally, Web conflicts perse are directly linked to the exponential development of e-commerce. According to CyberAtlas, over 88% of US firms and in excess of 57% of European firms will have Web sites this coming year. In 2003, according to DataQuest Research, the overall

²² www.cybersettle.com and www.clicknsettle.com .

²³ <http://www.ussettle.com> and <http://www.settlesmart.com> .

²⁴ <http://www.eresolution.ca> .

²⁵ <http://www.icann.org/udrp/udrp-policy-24oct99.htm> .

²⁶ Author's note: Security is achieved by means of encryption. Public key cryptography and PKI technology can be used, in combination with digital signatures to ensure confidentiality, integrity, authentication and non-repudiation. See chapter IV, par. 4.3.2.

²⁷ http://www.eresolution.ca/services/dnd/p_r/icannpolicy.htm .

²⁸ http://www.eresolution.ca/services/dnd/p_r/ICANNrules.htm .

²⁹ http://www.eresolution.ca/services/dnd/p_r/supprules.htm .

³⁰ Author's note: This form of dispute resolution is called arbitration, but it is not arbitration in the sense of the New York Convention, because the result of the procedure is not an executorial writ. Strictly speaking it would be better to call this form of dispute resolution a binding advice procedure.

³¹ http://www.eresolution.ca/services/dnd/p_r/icannpolicy.htm , see par. 1 and 4.

global value of e-commerce will reach \$US1 trillion.³² Every website has its own domainname. As the number of domainnames registered grows, so will the possible number of domainname disputes. There will most likely be a growing number of disputes that will be handled through online arbitration.

3.3 Online resolution of consumer complaints

BBB*OnLine*, a subsidiary corporation of the Central Better Business Bureau (CBBB), is developing the online handling of consumer complaints in the US. More than 132 Better Business Bureaus in the US are part of the CBBB. The first Better Business Bureau was founded in 1912 and the BBB system of Alternative Dispute Resolution to solve consumer/business problems offline has developed over the years.³³

The CBBB's vast offline experience with alternative dispute resolution (ADR), combined with an almost 100% name-recognition made it possible for them to take the first steps towards ODR by means of BBB*OnLine*. Complaints can already be submitted online, but cases are not yet handled completely online.³⁴ After receiving a consumer complaint, BBB*OnLine* will initially try a form of simple conciliation, by approaching the right person within a company. This often solves the problem immediately. If conciliation does not work, in many cases a simplified mediation process is started, using e-mail correspondence and telephone.³⁵ Again not completely online, but the first steps have been taken. It does, however, not seem very likely that it will soon be possible to handle consumer complaints completely online.

If these informal, semi-online efforts do not lead to a solution, BBB offers more formal options of offline dispute resolution, like face-to-face mediation and several arbitration programs.³⁶

³² <http://www.eresolution.ca/pr/eresinnews.htm>, e.g. the article in the Montreal Gazette dated the 4th May 2000.

³³ C.I. Underhill, S.J. Cole and A. Cohen, *CBBB and BBBOnLine, Alternative Dispute Resolution for Consumer Transactions in the Borderless Society*, Arlington, March 21, 2000, p. 2. (<http://www.ftc.gov/bcp/altdisresolution/comments> , see Cohen or Cole).

³⁴ *ibid*, p. 4.

³⁵ *ibid*, p. 5.

³⁶ *Ibid*, p.5.

3.4 Online mediation

Currently there is very much interest in online possibilities of mediation. In the US there are several initiatives. In Europe there is the Dutch e-mediation initiative and the British e-mediator initiative that was launched shortly afterwards.³⁷

The Centre for Information Technology and Dispute Resolution at the University of Massachusetts has conducted a study project in 1999 to ascertain how effective an online mediator could be to solve e-disputes arising out of online auction transactions on the eBay website.³⁸ eBay is the largest online auction site on the web. Through a link on the eBay customer service page 225 buyers and sellers filed a complaint during a two-week period. The link was not publicised and two levels down on the eBay site!³⁹ The study project is described in chapter 4.

One of the reasons the researchers chose online mediation over online arbitration was the fact that online arbitration projects have had great difficulty in obtaining cases, because potential respondents do not wish to consent to the decision-making authority of an arbitrator.⁴⁰ This probably also explains the fairly successful launching of several online mediation initiatives and the lack of online arbitration initiatives.

Where meeting face-to-face is essential in offline mediation, online mediation takes place in virtual reality, where the parties to a dispute and the mediator do not actually meet face-to-face. This means that people in different parts of the world can use online mediation to resolve a dispute, by using secure encrypted e-mail or secure chatrooms or in some cases videoconferencing.⁴¹ By using passwords, it is possible for the mediator to have contact with just one of the parties in a separate “room”, while the other party waits in another “room”. The Centre for Information Technology and Dispute Resolution of the University of Massachusetts is currently finalising “The Third Party”, a suite of software applications that will enhance the ability of parties and mediators to interact online.⁴² Parties that wish to avail themselves of online mediation need a computer with Internet access. The mediation system and the file are located on a server that can only be accessed by authorised parties. The system is provided by the mediator or in most case the mediation organisation.⁴³

³⁷ www.e-mediation.nl and <http://www.consensus.uk.com/e-mediator.html> .

³⁸ www.ebay.com .

³⁹ E. Katsh, J. Rifkin and A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of “eBay Law”*, draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, see <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm> , p. 3.

⁴⁰ *Ibid*, p.3.

⁴¹ <http://www.consensus.uk.com/e-mediator.html>.

⁴² <http://aaron.sbs.umass.edu/center/projects.html> .

⁴³ <http://www.juramail.de/hausarbeiten/brauns.html> , see chapter II.

The online mediation process does not differ very much from the offline process, except for the fact that other forms of communication are used than in a face-to-face procedure. The first step in the online mediation process is the filing of a dispute on the website of the online mediator or mediation organisation. The next step is taken by the mediation organisation; they will contact the other party to find out whether they are willing to participate in an online mediation procedure. If this is indeed the case, a mediator is either chosen by the parties or in other cases assigned. Both parties need to be informed of the rules of mediation, usually this is achieved through a link on the relevant website. The mediator will introduce himself and will explain the process to the parties. In some cases a mediation agreement will be signed, indicating that parties intend to solve their problem through mediation.⁴⁴ In the US this usually does not happen.⁴⁵ The online mediation will start and if successful will result in a settlement agreement. In the US parties have to decide whether or not this agreement will be legally enforceable, in the Netherlands this is automatically the case.⁴⁶

Online mediation is currently being offered by several organisations. In the US Online Mediators⁴⁷ is a website that offers online mediation directly through their website or through their affiliate program. Squaretrade, the company that resulted from the University of Massachusetts research project, offers online mediation to people and companies that come to their site through an affiliate program. Strictly speaking, Squaretrade does not only offer online mediation. Squaretrade will make disputing parties try and resolve the problem through conciliation first. The next step is online mediation. If that does not lead to a satisfactory result, parties can ask the mediator to recommend a solution. This means the mediator no longer mediates, but steps into the role of arbitrator.⁴⁸

An affiliate program seems a logical way to ensure compliance of companies. If a company displays an online seal from either Squaretrade or Online Mediators, this implies that in the case of an e-dispute the company displaying the seal will agree to online mediation if the consumer wishes to mediate. The fact that a company takes part in such an affiliate program will also ensure their compliance to the outcome of the mediation process. If they do not comply they will no longer be allowed to display the seal on their website.

⁴⁴ www.e-mediation.nl .

⁴⁵ www.squaretrade.com and www.onlinemediators.com .

⁴⁶ www.onlinemediators.com/howitworks.htm and <http://www.e-mediation.nl/english.shtml> under steps, step 6.

⁴⁷ <http://www.onlinemediators.com> .

⁴⁸ http://www.squaretrade.com/learnmore/learnmore_processon.cfm .

Chapter 4: Key Issues for Online Mediation

After having described the various forms of ODR in chapter 3, I will restrict myself to online mediation in this chapter. I will make an inventory of the most important issues of online mediation and will describe how these issues have been or can be dealt with.

It is often thought that one of the most important reasons mediation can be successful is a result of face-to-face contact between parties and the mediator. Mediators are supposedly experts at reading body language. With online mediation there is no face-to-face contact, so the mediator obviously needs other skills besides being able to read body language. Offline mediators are trained to help people tell their stories and to manage the conversational process of mediation sessions. They are trained to remain impartial, to summarize and reframe. They use techniques of active listening and are experts in agreement writing.⁴⁹ Not all of these skills are equally suitable to online mediation. With online mediation there are other things that are essential. In the following paragraphs I will try to identify the key issues for online mediation.

4.1 Trust

An essential aspect of mediation, whether online or offline is trust. It is essential for a good mediator to be able to establish trust between himself and the disputing parties. In face-to-face mediation this trust is established during the mediation sessions. Where online mediation is concerned it seems far more difficult, though no less important, to establish and maintain trust. Offline mediation often takes place between parties that have an ongoing relationship and history together. Their common goal is to reach a solution that will be acceptable to both parties and will damage the relationship as little as possible, so that future relations will not be endangered. This is important to both of them and the mediator can use information about their history.

In the online mediation process, parties often do not know each other and do not have an ongoing virtual or real-time relationship of any kind. The parties are involved in an electronic commerce transaction in a consumer/merchant relationship (onlinemediators.com) or a consumer/consumer relationship (eBay.com). In most cases these parties have not had dealing with one another before the dispute arises.⁵⁰ The mediator can not draw on the relationship or ask about the background of the dispute in relation to earlier interactions between parties, because there have not been any. The fact that there is no face-to-face contact but communication takes place via e-mail or real-time online, makes it

⁴⁹ E. Katsh, J. Rifkin and A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law"*, draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, see <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm> , p. 6.

⁵⁰ D. Mednicoff, *Bidding for Community on the Internet*, ADR ONLINE MONTHLY, April 1999, <http://128.119.199.27/center/mednicoff.htm> .

difficult for the mediator to manage or temper the tone of the interactions or use his skills in reading body language.⁵¹ It is therefore far more difficult to establish and maintain trust.

4.1.1 Identity and digital signatures

There are several trust-related problems where online transactions and online mediation is concerned. First of all, the identity of the person you are dealing with is not always clear. How can one be sure that the person one is dealing with is who he claims to be? Here digital signatures can play an important part. There is already EU legislation in the form of a directive⁵², which has to be implemented in all EU member states in the year 2001. In the US, on June 30, 2000, president Clinton signed into law the 'Electronic Signatures in Global and National Commerce Act', which will be active on October 1, 2000.⁵³ This act gives a signature or record sent through cyberspace the same legal validity as a pen-and-paper document. The fact that a digital signature and digital records have the same legal validity as written documents, makes it far easier to check someone's digital identity. In fact, it might well prove more difficult to falsify digital signatures than written signatures. A digital signature is an authentication method that uses public-key cryptography.⁵⁴ The digital signature plays an important part in ensuring the authenticity, integrity and non-repudiation of data communication, thus enhancing trust.

Closely linked with the problem of identity on the Internet are the problems of data security and confidentiality.

4.1.2 Data security and Confidentiality

How can one be sure that the data sent and received have not been tampered with and how can you be sure that no unauthorized third parties have access to the information?

Here again, encryption plays an important part in ensuring confidentiality and data security. Encryption makes it possible for the mediator and the parties to communicate without the risk of unauthorized third parties having access to their communication, thus creating secure data communication.⁵⁵

⁵¹ E. Katsh, J. Rifkin and A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law"*, draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, see <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm> , p. 6

⁵² Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. Official Journal L 013 , 19/01/2000 p. 12-20. Also see <http://www.ispo.cec.be/e-commerce/legal/digital.html>

⁵³ <http://www.mbc.com/e-commerce/legis/congress.html#hb1714>

⁵⁴ For an extensive description of cryptography and encryption see: B.J. Koops, *The Crypto Controversy, A Key Conflict in the Information Society*, 1999, 1st edition, The Hague/London/Boston, chapter 3.

⁵⁵ Ibid, p.35.

For a mediation procedure to be successful, confidentiality is essential. In an offline mediation procedure confidentiality is not really a problem. Most communication is oral; transcripts of conversations are usually not made. Any written documents that do exist only circulate in a very small group of people. This is different with online communication. First of all, the communication takes place in written form over insecure networks. To transfer the data over the Internet there are numerous temporary copies made along the way. This is inherent to the nature of the Internet.

It is necessary to make copies on the routers when transferring data from one computer to another, to make copies when downloading or uploading information.⁵⁶ In Cyberspace communication takes place through constant copying. This is something the mediator has to be aware of. He must take all possible precautions to make sure that (automatic) backups are kept no longer than necessary and are not accessible to unauthorized third parties. These precautions do not guarantee complete confidentiality.

The only way to protect data and to guarantee confidentiality is through encryption. Encryption is the automated process of making data inaccessible to unauthorized people by means of an algorithm and a key. Decryption is the reverse process. A popular method to guarantee confidentiality is the so-called asymmetric crypto system: this system uses two different keys (a public and a private key) for encryption and decryption of data.⁵⁷ This means that without the right key no one can read the message. The key, needed to read the message, is sent to the recipient separately from the message and reaches him by another route than the message itself.

When the confidentiality has been guaranteed by means of encryption, the fact that the Internet is built up from copies also has its advantages. The complete written file is accessible to both parties and the mediator at all times to check certain details or to see how things are. It is not necessary to take notes because everything is already written down.⁵⁸

4.2 Privacy

Another important issue that has to be addressed when setting up an online mediation procedure, is privacy. Where privacy is concerned, parties should be made aware of the ways in which their privacy is protected and in what ways personal information is stored or used by the mediator or mediation company. It is imperative that the mediator or the mediation firm should have a privacy policy, which addresses a number of issues. Any dispute that they receive via a website must be treated in accordance with rules of confidentiality. The disputes

⁵⁶ M. Vermeer, in: F.W. Grosheide (red), *Hoofdstukken Communicatie en Mediarecht*, 1st edition, Ars Aequi Libri 2000, Chapter V, *Internet*, p. 204.

⁵⁷ B.J. Kooops, *The Crypto Controversy, A Key Conflict in the Information Society*, 1999, 1st edition, The Hague/London/Boston, p.35.

⁵⁸ <http://www.juramail.de/hausarbeiten/brauns.html> .

must only be known to the parties involved in the dispute, including the mediator. All personal data must be recorded and used with great care. By making strategic use of security possibilities, it is possible to guarantee that the right of respect for personal privacy of all parties involved in an online mediation procedure is respected. Here again encryption plays a key role.

In a privacy policy, parties must also be made aware of the fact that the mediation site will probably make use of cookie technology. They need to be told that if they do not want any cookies to remain on their hard disk, they can use their browser options to switch off the cookie technology. There are several privacy policy generators to be found on the Internet that can help the mediation organisation to make its own privacy policy.⁵⁹ Since August 2000 the OECD Privacy Policy Statement Generator has been made available.⁶⁰

4.3 In The Shadow of the Law

Another important aspect of offline mediation, and indeed for ADR in general, is the fact that it always takes place ‘in the shadow of the law’.⁶¹ This means that the disputing parties that are trying to find a solution through alternative dispute resolution are aware of the legal rules governing the area of their dispute. The outcome that the law will impose if no agreement is reached gives each party a reasonably good idea of its bargaining position. Parties will take the law into consideration when setting out a strategy in the ADR procedure.⁶² For e-disputes there is the problem that it is not obvious what law applies, especially with cross-border e-disputes.

In his article ‘Governing Cyberspace’⁶³, David Post writes:

“There are, appropriately enough given the binary nature of the information travelling in cyberspace, two radically different processes through which order can emerge in this environment. (...). [One] involves an increasing degree of centralization of control, achieved by means of increasing international coordination among existing sovereigns, through multi-lateral treaties and/or the creation of new international governing bodies along the lines of the World Trade Organization, the World Intellectual Property Organization, and the like. If choice of law is hopelessly confused, in other words, we can eliminate the choice by imposing a single, uniform legal standard worldwide.

⁵⁹ <http://www.the-dma.org/policy.html#form> or

⁶⁰ <http://cs3-hq.oecd.org/scripts/pwv3/pwhome.htm> .

⁶¹ R. Mnookin and L. Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, in the Yale Law Journal 88:950-997, 1979, Chapters 1 and 2.

⁶² R.Cooter, S. Marks and R. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior* in the Journal of Legal Studies 11:225-51, 1982.

⁶³ D. Post, *Governing Cyberspace*, in the 43 Wayne Law Review 155, 1997, also published online at <http://www.cli.org/DPost/ascl.htm>.

[The other] invokes a radical decentralization of law making, the development of processes that do. Some of these decentralized processes will look familiar to us as a kind of "electronic federalism". In this model, individual network access providers, rather than territorially-based states, become the essential units of governance; users in effect delegate the task of rule-making to them - confer sovereignty on them - and choose among them according to their own individual views of the constituent elements of an ordered society. The "law of the Internet" thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join. Mobility - our ability to move unhindered into and out of these individual networks with their distinct rule-sets - is a powerful guarantee that the resulting distribution of rules is a just one; indeed, our very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice. "

In the eBay project, that I will describe, the researchers of the University of Massachusetts came to the conclusion that the context of the dispute resolution system provides the relevant "law" that will encourage parties to participate in online mediation and makes sure they comply with the outcome of the procedure. This is consistent with the second process that Post describes.

4.3.1 The eBay ODR Experiment and the Shadow of eBay Law

At the end of 1998, eBay, the largest auction site in the US, approached the researchers of the University of Massachusetts to conduct a pilot project in order to find out whether online dispute resolution could be a useful means of solving problems that occurred on their site. The researchers began their project in 1999, choosing mediation over arbitration, because of the voluntary nature of mediation. The researchers wanted to ascertain how effective an online mediator could be when interaction occurred without face-to-face meetings.

The eBay experiment showed that the number of disputants willing to participate in online mediation was 75% whereas in other experiments with offline mediation the number of participants willing to participate was around 50%. In all instances mediation was explained to be a voluntary process.

The reason why so many eBay users were willing to participate was not so much the wish to reach a mutually acceptable outcome, but rather the wish to keep on using the eBay site in the future. The eBay site is a virtual market place where buyers and sellers meet. Public safety is therefore very important and this is achieved through several means, among which a 'feedback rating system' is the most important. After any transaction is completed, buyers and sellers can post feedback as to the conduct of the buyer or seller. If you wish to buy an item you can easily check the feedback rating of the seller before you bid on an item. If you have found a possible buyer you can check his rating also. It is therefore very important to eBay users to acquire a positive feedback rating if they wish to remain active on the eBay site. Taking part in a voluntary dispute resolution

service can help both buyers and seller to keep a good rating. This means their future in the eBay marketplace will be safe, which is important to them.

The Massachusetts researchers state that the mediation on the eBay site takes place in the 'shadow of eBay law'.⁶⁴ The 'eBay law' is the 'law of the Internet' that Post mentions. It emerged as the aggregate of the choices made by eBay as the individual system operator about what rules to impose, and by the eBay-users in choosing to join the eBay community.⁶⁵

4.4 Compliance

Another important issue for online mediation, and one closely linked with the concept of the shadow of the law is compliance. How can you be sure the other party will comply with the outcome of the dispute resolution process? With offline mediation compliance is high, because the mediation agreement that is usually the outcome of the process, can be made legally binding according to the applicable law.

As the researchers found out in the eBay project, compliance with the result of an online mediation procedure was high as a result of 'eBay Law'. The party that 'lost' did not want to jeopardize his or her position in the eBay community and was therefore willing to comply with the outcome.

The researcher also noted that if a virtual marketplace would choose online arbitration or some other form of binding rulings, compliance could be achieved by using the threat of exclusion from the virtual marketplace.⁶⁶ This of course would be another form of the 'law of the Internet', and would also assure compliance with the outcome of the dispute resolution procedure. Where binding advice is used in offline consumer complaint resolution, the same mechanism of the threat of expulsion is used to achieve compliance from companies.

In the eBay experiment, it proved not necessary to obtain a writ of execution to achieve compliance. The Squartrade initiative, which resulted from the eBay experiment, uses the same basis of people not wishing to jeopardize their position in the eBay society. With the online mediator initiative, that is not restricted to e-commerce transactions, parties can either accept the outcome as it is, or assure compliance by making the outcome legally binding in a contract.

⁶⁴ E. Katsh, J. Rifkin and A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law"*, draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, see <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm>, p. 5 and p. 15-16.

⁶⁵ D. Post, *Governing Cyberspace*, in the 43 Wayne Law Review 155, (1997), also published online at <http://www.cli.org/DPost/ascl.htm>.

⁶⁶ E. Katsh, J. Rifkin and A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law"*, draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, see <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm>, p. 5 and, p. 17.

Chapter 5: Basic Conditions for Successful Online Mediation

In the light of the issues discussed in chapter 4, I want to distill the basic conditions that have to be fulfilled to make online mediation a useful alternative to litigation in solving cross border e-disputes in the EU. I want to find out whether legislation is necessary or if participation and compliance can be realized in another way. As I have described in the first part of my thesis, online mediation has a lot of advantages to offer: low or no cost dispute resolution, no legal hassle, equality of arms etc. There are, however some serious obstacles to overcome before online mediation, or indeed any other form of ODR, will become a serious alternative to litigation or offline ADR.

5.1 Creating ODR Awareness and Trust

The biggest obstacle at this point in time for the EU is the fact that online dispute resolution is a phenomenon that is not yet very well known to the legal profession and I think it is safe to say that it is as yet completely unknown to the general public.

Where offline ADR is concerned, most lawyers have become aware of the existence of offline mediation over the last ten years. The same however, can not yet be said for online forms of ADR and mediation. It might take another decade for online mediation and other forms of ODR to become accepted as fully fledged forms of dispute resolution.

As far as the general public is concerned; if they have heard of mediation, it is usually in the context of divorce proceedings and they are often under the misapprehension that mediation is some form of marriage counseling. Awareness of the existence of offline ADR or mediation is for the most part non-existent. This may well prove to be the biggest hurdle that online mediation has to overcome to become a serious alternative to litigation or even offline ADR.

The first step towards the acceptance of Online Dispute Resolution, is making the public aware of offline ADR. The Dutch government is creating awareness for ADR as part of the modernization of the judicial system. ADR is promoted for a number of reasons, the most important one being the fact that successful ADR will help to alleviate the pressure on the judicial system, thus lowering the caseload for the courts and at the same time raising the 'quality' level of the cases that do go to court.⁶⁷ There have been a number of experiments with court-related mediation. Mrs. Pel, a judge in the Arnhem court has played an important role in this. This was mostly in the field of family law. Just recently several courts, among them courts in Amsterdam and Utrecht, have started mediation projects for criminal law. There are also experiments in other legal fields. But on the whole mediation is still in its infancy in the Netherlands. The same is true for most other EU countries.

A problem, when trying to create ADR awareness, is the fact that ADR is based on confidentiality. Success stories can not be publicized or used as examples to try and persuade potential users to try alternative dispute resolution. The mediation process is unfamiliar to most people and as it is a voluntary process, it is not likely many people will volunteer to take part in a process they do not know and do not understand.⁶⁸ Online Dispute Resolution is even less well known to the general public.

Another obstacle on the road to accepting Online Dispute Resolution is the fact that there is still a large group of people who are not yet used to the Internet. This is not an obstacle to people with an e-dispute, because they are Internet users by nature, but it may initially be a problem that will hinder the widespread acceptance of online dispute resolution as a fully-fledged alternative to ADR and litigation. The combination of two relatively new phenomena will in all likelihood meet with resistance from different sides. Therefore it is essential to create trust in ODR, not only as a means of getting ODR accepted by the general public, but also to enhance trust in e-commerce itself. By creating an online form of dispute resolution, e.g. online mediation, that takes issues like data security and privacy seriously, uses encryption techniques and digital signatures this trust can be created right from the start.

Lessons can be learned from the experiences in related fields, like setting up Certification Service Providers (CSP's). ODR seals can be a way of advertising the fact that a company is willing to settle e-disputes online. I imagine there will be a different seal for different forms of ODR. In the US there are seals from 'Online Mediators' and 'Squaretrade' and 'BBBOnline' and various others. It is very important when introducing seals like these to make sure that companies do not

⁶⁷ http://www.minjust.nl/a_beleid/thema/modro

⁶⁸ C. Hart, *Online Dispute Resolution and Avoidance In Electronic Commerce*, an article submitted for the Uniform Law Conference of Canada, August 1999, located at <http://www.law.ualberta.ca/alri/ulc/current/hart.htm> .

use these seals as a mere marketing mechanism, but follow the rules.⁶⁹ Control is necessary. The *BBBOnLine Reliability Program* for instance, will immediately take away the seal if a company does not comply with the outcome of an *BBBOnLine* procedure.⁷⁰

Another problem with seals is the fact that there seems to be an ever-growing number of seals of different kinds. In the end this may create the undesired effect that people will not know the value of any seal. This is something we in Europe can prevent by trying to create one European standard right from the start, for instance by incorporating the online dispute resolution seal in an existing seal like the Webtrader seal.⁷¹ This has the extra advantage of hooking up with an existing strong network of European Consumer Organizations, thus adding to the credibility of the seal. This could be done in a way similar to the *BBBOnLine Reliability Program*, a trustmark program on the Internet.⁷² This would mean that companies, displaying the Webtrader seal would have to commit to a set of standards, which would include the requirement that the company will agree to solve any dispute involving consumer products and services by online dispute resolution if the consumer should wish to do so. By leaving the choice with the consumer, companies will avoid the risk of having an unfair contract term in their consumer contracts, because the consumers are free to opt for litigation, if they should wish to so.⁷³

5.2 Self regulation

I think it is still far too early to start worrying about whether legislation is necessary to regulate ODR for cross-border e-dispute and if so, whether this ought to be co-regulation or detailed regulation. The way I see it, with the American and Canadian examples in mind, it seems very logical to leave the initiative with self-regulation. Indeed this is the view that the European

⁶⁹ S. van der Hof, *De internationale on-line consumentenovereenkomst*, an article written for the spring meeting of the Netherlands Association for Information Technology and Law on 11 May 2000, p. 11. Temporarily available at the <http://www.nvvir.nl> site.

⁷⁰ C.I. Underhill, S.J. Cole and A. Cohen, *CBBB and BBBOnLine, Alternative Dispute Resolution for Consumer Transactions in the Borderless Society*, Arlington, March 21, 2000, p. 12. (<http://www.ftc.gov/bcp/altdisresolution/comments> , see Cohen or Cole).

⁷¹ <http://www.consumentenbond.nl/webtrader> .

⁷² C.I. Underhill, S.J. Cole and A. Cohen, *CBBB and BBBOnLine, Alternative Dispute Resolution for Consumer Transactions in the Borderless Society*, Arlington, March 21, 2000, p. 8. (<http://www.ftc.gov/bcp/altdisresolution/comments> , see Cohen or Cole). Also see: <http://www.bbbonline.org/businesses/reliability/standards.html> .

⁷³ The European Council Directive on Unfair Contract Terms in the annex sub q) expressly forbids the contractual term that excludes or hinders the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract. See: Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, to be found at: http://europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct01_en.html

Commission takes in the E-Commerce Directive⁷⁴. With this directive the Commission provides a legal framework for electronic commerce, but tries to refrain from introducing new detailed legislation.⁷⁵ Article 16 of the E-commerce directive urges Member States and the Commission to encourage self-regulation.

The Electronic Commerce Platform Nederland (ECP.NL), an association between the business community and the Dutch Ministry of Economic Affairs, has drawn up a model 'Code of Conduct for Electronic Commerce'.⁷⁶ This is not only the first self-regulation initiative in the Netherlands, but also in the whole of Europe. This code of conduct has been presented as a model to various relevant international organizations, like the OECD, the United Nations and the European Commission. It will serve as an example for other (European) initiatives. By nature a Code of Conduct is a means of preventing disputes from occurring.⁷⁷ This is a way to enhance trust in e-commerce. The main flaw in the ECP code of conduct is the fact that it does not address the issue of enforcement. Paragraph 2.5.1 that ought to give a provision for enforcement, has not been filled in. This is all the more strange, because the authors of the code say enforcement is a priority item and the authority of a code of conduct for e-commerce is determined by the level of the enforcement possibilities. In the explanatory note under paragraph 2.5.1 they mention several possible ways to fill in the enforcement issue, among which self-regulatory mechanisms are mentioned also.

The recent Dutch ODR.NL initiative may prove to be a good way to fill in the enforcement gap by using ODR to solve e-disputes. This initiative consists of 3 forms of ODR: e-mediation, e-complaints and e-arbitration. The ODR.NL self regulatory initiative is supported by ECP.NL and is a follow-up to the Dutch e-mediation.nl initiative⁷⁸. ODR.NL is still only in a pilot phase and will in all likelihood be co-funded by grants. A lot will depend on the initial results of this initiative. If ODR.NL takes off successfully, it may well serve as a starting point and an example for other (European) initiatives, like the ECP Code of Conduct. As yet this is not clear, but there seems to be no reason yet to start thinking about specific legislation for solving cross border e-disputes. So far, self regulatory initiatives are there and are being encouraged. This is in line with the E-Commerce Directive.

⁷⁴ <http://www.ispo.cec.be/e-commerce/legal/legal.html#common> .

⁷⁵ M. Vermeer, in: F.W. Grosheide (red), *Hoofdstukken Communicatie en Mediarecht*, 1st edition, Ars Aequi Libri 2000, Chapter V, *Internet*, p. 199.

⁷⁶ <http://www.ecp.nl/english/index.htm> en <http://www.ecp.nl/english/Model3.0ENG.pdf>

⁷⁷ C. Hart, *Online Dispute Resolution and Avoidance In Electronic Commerce*, an article submitted for the Uniform Law Conference of Canada, august 1999, located at <http://www.law.ualberta.ca/alri/ulc/current/hart.htm>

⁷⁸ www.e-mediation.nl .

Chapter 6: Recommendations and Conclusion

I am fully aware of the fact that I have only been able to skim the surface of ODR in relation to cross-border e-disputes. I have identified a number of key issues, but do not claim to have made a complete inventory of issues to be studied.

6.1 ODR as an alternative

Of one thing I am absolutely certain, and that is the fact that even if ODR will prove to be successful, it will never completely replace litigation. At the moment we see numerous cases of domain name disputes in the Netherlands being brought to the ordinary courts. As I described in chapter 3, domain name disputes can be dealt with quite successfully by arbitration, be it offline or online. This is as yet only possible for domain name disputes concerning top-level domain names like **.com**, **.org**, **.net**. When registering such a domain name the holder agrees to be bound by the ICANN rules, that include arbitration rules.⁷⁹ For domain name disputes concerning top-level-country domain names, like **.nl**, **.uk** etc., the option of arbitration is only open when both parties agree to it.⁸⁰ The same would be true for the choice of mediation to solve these kinds of disputes. So far parties do not seem to choose (online) alternative dispute resolution as a means to solve their dispute. Why is this the case? Does it seem likely that in the near future more people will choose (online) alternative dispute resolution?

Ms Hart, one of Canada's leading mediators, arbitrators and dispute process designers seems to think that the main reason for not choosing ADR mechanisms to solve e-disputes is because ADR is voluntary and ADR solutions do not create precedents. E-disputes, like any other dispute, involve people, and people will always choose those mechanisms for resolving their dispute that they feel best serve their interests. She is convinced that in a new field like e-commerce people initially feel a strong need for a public precedent that can serve as a road mark for others. The fact that ADR is private and contractual means that it is not possible to achieve precedents through ADR nor is it possible to force parties to participate in an ADR procedure.

Another problem with ADR is that an ADR body does not have the power to deprive anyone of their freedom. Courts on the other hand, do have that power. Ms Hart also mentions another important fact, that ought not to be forgotten when discussing ODR. She mentions that even if there is ODR awareness and acceptance, it may not always be in the best interest of everyone to choose to participate. Sometimes it may be to someone's advantage to delay resolution.⁸¹

⁷⁹ http://www.eresolution.ca/services/dnd/p_r/ICANNrules.htm

⁸⁰ J. Bedaux and R. Hermans, *Arbitrageprocedure loont bij domeinnaamgeschillen*, in: 'De Automatiseringsgids', 23 June 2000, nr. 25, p. 17.

⁸¹ C. Hart, *Online Dispute Resolution and Avoidance In Electronic Commerce*, an article submitted for the Uniform Law Conference of Canada, august 1999, located at <http://www.law.ualberta.ca/alri/ulc/current/hart.htm>

The fact that ODR is voluntary, means they can not be forced to participate. This may be a reason for the other party to opt for litigation.

I agree with ms Hart that for all these reasons it seems highly unlikely that ADR or ODR will ever come to replace the courts.⁸² They will always be an alternative and in all likelihood they will become more important than they are now for reasons of speed, cost-efficiency and cross-border issues. The very fact that ADR is private and contractual, which at first may be an obstacle, could in many cases become more of an advantage than a problem, because it also means there will be no publicity if you should be found to be in the wrong. However, in the end ADR and its online counterparts will remain just what they are by nature: an alternative way of dispute resolution, be it online or offline.

All in all, I predict that ODR mechanisms will come to play an important role in cross-border e-disputes in the EU and worldwide. So far only the first steps have been taken. ODR should be studied extensively at an early stage, because I am convinced that ODR will become more important as more people start using the Internet and become involved in electronic transactions.

6.2 Recommendations

If ODR is to be in any way successful, a number of issues will have to be addressed. I will give a few recommendations in this paragraph.

6.2.1 Setting up a study project

I recommend that the possibilities of online mediation (and other forms of ODR) be studied in a pilot project like the eBay project the researcher from the University of Massachusetts set up in the US. It would be a very good idea, especially with cost efficiency and timeliness in mind, to study the possibilities of online mediation for cross-border e-disputes in the EU, to find out whether it does indeed provide an acceptable alternative to litigation or offline ADR.

The main object of such a study should be to find out whether compliance is as high as it was in the eBay project, when the dispute in question is a cross-border dispute. An auction site would be the logical starting point for a research project, but this may not be easy, because as yet there is no European auction site. However, with the introduction of the “.eu” extension in the near future e-commerce may well be on the way to a real European Market. I expect it will only be a matter of time before an EU-auction site will be set up.

Before the EU starts thinking about detailed legislation, research ought to be done, to find out whether a form of ‘European Auction Law’ will emerge, casting its shadow over online dispute resolution mechanisms to ensure compliance. If

⁸² C. Hart, *Online Dispute Resolution and Avoidance In Electronic Commerce*, an article submitted for the Uniform Law Conference of Canada, august 1999, located at <http://www.law.ualberta.ca/alri/ulc/current/hart.htm>

this is indeed the case, self-regulation where enforcement is concerned, will have proven its worth in an e-commerce environment, but as yet all predictions about the future of online mediation are a form of educated guesswork. The reality is as yet far from clear.

6.2.2 Creating ODR Awareness and Trust

People will need to be made aware of the existence of online dispute resolution mechanisms. Creating ODR awareness has priority and I recommend that it be a joint undertaking of the EU, national governments and the business community, to ensure that not only awareness will grow, but trust will grow with it from the start. It is imperative that issues like data security and privacy are taken seriously. Encryption techniques and digital signatures must be used by all ODR websites. Essential requirements for successful ODR ought to include the fundamental fairness principles that the American Better Business Bureaus promotes, including visibility, ready access, timeliness and low or no cost of online dispute resolution.⁸³

Attention should also be given to the seven principles that the European Commission mentions in the Recommendation on ‘The out of court settlement of Consumer Disputes’⁸⁴. These principles are minimum guarantees that out of court settlement bodies should offer their users. The guarantees are: independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation.⁸⁵ The application of the principles in the EU Communication is limited to dispute resolution forms where a third party decides, like arbitration and consumer complaints procedures, but they should be taken into account when setting up any form of ODR.

⁸³ C.I. Underhill, S.J. Cole and A. Cohen, *CBBB and BBBOnLine, Alternative Dispute Resolution for Consumer Transactions in the Borderless Society*, Arlington, March 21, 2000, p.8-10. (<http://www.ftc.gov/bcp/altdisresolution/comments> , see Cohen or Cole).

⁸⁴ Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE), see http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398X0257.html or http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html

⁸⁵ For the applicability of these principles in an e-commerce environment see the thesis on “Dispute Resolution Mechanisms and the Internet” (Geschillenbeslechtsmechanismen en Internet), written by Sara Liesker to round of her law study at the University of Tilburg (KUB), August 2000. Chapter V gives a description of the the principles in relation to ODR.

6.3 Conclusion

This short thesis was written as an introduction to ODR. Several key issues have been defined, some recommendations have been made. All as a first step on the road to successful ODR. After the recommended initial studies will have been concluded, there will in all likelihood arise numerous points that need to be studied further, among which the IPR aspects of ODR and the need for EU legislation. My guess is there will be enough material for one, and probably more, PhD dissertations in both the legal and sociological field. I expect a lot more will be written on ODR in the (near) future and I hope to be able to take part in future research projects.

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R.Cooter, S. Marks and R. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior* in the Journal of Legal Studies 11:225-51, 1982.

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Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. Official Journal L 013, 19/01/2000 p. 0012 – 0020. Also see <http://www.ispo.cec.be/ecommerce/legal/digital.html>.

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(<http://www.ftc.gov/bcp/altdisresolution/comments> , see Cohen or Cole).

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Relevant links, used in the footnotes:

These links were checked at the beginning of August 2000 and were active at that time. I can not guarantee that all these links will still work in the future.

<http://www.ispo.cec.be/ecommerce/legal/legal.html#common>
"Directive on electronic commerce".

<http://www.ftc.gov/bcp/altdisresolution> information about the joint workshop on Alternative Dispute Resolution for Online Consumer Transactions, organised by the US Federal Trade Commission in June 2000.

<http://www.ca-adr.com/faqs.htm> Background info on ADR.

<http://www.nmi-mediation.nl> Background information about the Dutch mediation Institute, Mediation and Mediation Rules.

http://europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_nl_cb1_en.html Background Information on Consumer Protection from the European Commission.

<http://www.eresolution.ca> Online Dispute Resolution of Domain Name Disputes.

<http://www.icann.org/udrp/udrp-policy-24oct99.htm> and
http://www.eresolution.ca/services/dnd/p_r/icannpolicy.htm ICANN Uniform Domain Name Dispute Resolution Policy.

http://www.eresolution.ca/services/dnd/p_r/ICANNrules.htm ICANN Rules.

http://www.eresolution.ca/services/dnd/p_r/supprules.htm eResolution Supplemental Rules Preliminary Provisions.

<http://www.eresolution.ca/pr/eresinnews.htm> Background Info, e.g. the article in the Montreal Gazette dated the 4th May 2000.

www.clicknsettle.com online settlement of financial disputes.

www.cybersettle.com online settlement of insurance claims.

<http://www.ussettle.com> online settlement of financial disputes.

www.e-mediation.nl Dutch online mediation initiative.

<http://www.consensus.uk.com/e-mediator.html> UK online mediation initiative.

www.ebay.com US Auction Site that offers online dispute resolution to its users.

<http://aaron.sbs.umass.edu/center/projects.html> Centre for Information Technology and Dispute Resolution at the University of Massachusetts.

<http://www.juramail.de/hausarbeiten/brauns.html> German article on Online Mediation for all types of disputes, online and offline, written by Hendrik Brauns, student at the University of Tuebingen in Germany in August 1999.

www.squaretrade.com Online Dispute Resolution Organisation, resulting from the eBay experiment from the University of Massachusetts.

www.onlinemediators.com US online mediation initiative.

<http://www.mbc.com/ecommerce/legis/congress.html#hb1714> The US Bill on Electronic Signatures.

<http://www.the-dma.org/policy.html#form> or <http://cs3-hq.oecd.org/scripts/pwv3/pwhome.htm> Examples of Privacy Policy Generators.

http://www.minjust.nl/a_beleid/thema/modro Information from the Dutch Ministry of Justice about the Reforms of the Legal Organization in the Netherlands.

<http://www.consumentenbond.nl/webtrader> Information on the Webtrader Initiative of the Dutch Consumer Organization 'De Consumentenbond'.

<http://www.bbbonline.org/businesses/reliability/standards.html> TheBBB*OnLine* Reliability Standards.

http://europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct01_en.html The Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

<http://www.ecp.nl/english/index.htm> en <http://www.ecp.nl/english/Model3.0ENG.pdf> The Dutch Electronic Commerce Platforms Code of Conduct for E-commerce Transactions.