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The subject of this article—online dispute resolution or 'ODR'—might be thought an unusual choice for expressing my admiration for and gratitude to Robert Briner for all he has done to promote the development of arbitration around the world and for his distinctly pragmatic and relentless efforts to improve the practice of arbitration for the benefit of its users. However, to those of us who understand the impact Robert Briner has had on international arbitration, it will not seem at all unusual.

In just a few years the picture has changed dramatically. Each year close to a million disputes are resolved online and over a hundred online dispute resolution providers offer their services worldwide. From a technology gadget, ODR has become a major phenomenon in dispute settlement. Admittedly, it may appear to lack any connection with international commercial arbitration, the main area of activity of the recipient of this volume, yet the day-to-day operation of commercial arbitration cannot remain unaffected by such a vast phenomenon. Well aware of these realities, ICC, whose International Court of Arbitration is chaired by Robert Briner, has launched several projects in the area of IT. These include issuing guidelines on the use of IT in arbitration,[1] devising a web-based system for conducting and managing arbitration proceedings,[2] and setting up an online clearinghouse system for small claims.[3]

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1 See 'Operating Standards for Using IT in International Arbitration ("The Standards")' in *Using Technology to Resolve Business Disputes*, ICC ICArb. Bull. Special Supplement (ICC Publishing, 2004) 75.

2 See M. Philippe, 'NetCase: A New ICC Arbitration Facility' in *Using Technology to Resolve Business Disputes*, ICC ICArb. Bull. Special Supplement (ICC Publishing, 2004) 53.

3 ICC is working towards the creation of a global business-to-consumer online dispute resolution clearinghouse. The clearinghouse is to be a worldwide central filing platform for business-to-consumer complaints, which would receive consumer disputes and refer them to appropriate ODR providers; see C. Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (San Francisco: Jossey-Bass, 2002) at 115.

With a view to providing an overall picture of this new phenomenon and its potential impact on international arbitration, this article will: (1) review the present-day reality of online justice; (2) examine certain specific issues relating to the implementation, quality and effectiveness of ODR; and (3) explore what the future may hold in store for ODR.

1. Present-day reality of online justice

A surf on the Web reveals that there are currently over a hundred institutions offering dispute resolution services and an additional fifteen to twenty new providers emerge each year.[4] What strikes the observer first and foremost is the multifarious nature of the offer and the diversity of the methods. In an attempt to put some order into this diversity, one can distinguish three traditional methods of dispute settlement—negotiation, mediation and arbitration—plus a number of other methods such as dispute assessment, mock trials and prevention mechanisms.

1.1 Automated and assisted negotiation

There are two main forms of negotiation available for settling disputes on the Internet: automated and assisted negotiation. Automated negotiation is particularly interesting because it is a product of the medium. There are about twenty dispute resolution providers active in this field, some of which administer up to three thousand disputes per month. In a little over five years, some one hundred thousand disputes have been solved with settlements totalling around seven hundred and fifty million dollars.[5] Automated negotiation is a process of blind bidding. First, the parties jointly determine the range or spread within which they agree to settle. For instance, they say they will settle if their offers are within 10 per cent of each other.[6] Each party then makes an offer, unaware

4 For a list of existing (and former) ODR providers and further global statistics, see M. Conley Tyler, '115 and Counting: The State of ODR 2004' in M. Conley Tyler, E. Katsh & D. Choi, eds., *Proceedings of the Third Annual Forum on Online Dispute Resolution*, <www.odr.info/unforum2004/>. For a description of the most significant ODR providers, based on empirical research and interviews with representatives of these institutions, see G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004) at 249–76.

5 See Cybersettle press release 'Cybersettle® handles 100,000th transaction', 2 December 2004, <www.cybersettle.com/news/companynews/20041129claim100k.asp?sourceid=29>. [All URLs mentioned herein are correct as of 5 April 2005.]

6 This range varies, depending on the dispute resolution provider and the preference of the parties, between 5 and 30 per cent, or it could be a predetermined amount of money. See further G. Kaufmann-Kohler & T. Schultz, *supra* note 4 at 17–21.

of its opponent's offer. If the offer is within the agreed spread, the computer calculates the mean value and the dispute is settled for that amount. If the offers are outside the spread, then no settlement is reached and the computer invites the parties to proceed to a new round of blind bids. The process is simple and efficient, but very basic. Indeed, it is limited to disputes where liability is undisputed and the only issue is to determine the amount to be paid.

By contrast, assisted negotiation is more sophisticated because it can handle all types of settlement terms and conditions and is not restricted to payment. It is widely used. At the time of writing, the most active centre, Squaretrade, had administered approximately two million disputes since mid-2000. The number has grown exponentially, with more than eight hundred thousand disputes handled in 2004. Of these, 75 per cent were resolved by assisted negotiation usually within less than two weeks and at a success rate of 75 per cent. The remaining 25 per cent were settled by mediation with an 80 per cent success rate. The amounts in dispute range from one dollar to one million dollars, with most being below five hundred dollars. Assisted negotiation is essentially negotiation between two parties without the involvement of a third neutral, but with the assistance of a computer. The ODR provider makes available a web communication platform, guidelines, advice to parties on how to proceed, standard forms and such like.[7]

1.2 Mediation

Mediation is less popular on the Web. Essentially, the procedure is the same as offline, except that the facilitative and evaluative techniques are here combined with IT. There is generally one chat room for joint sessions, one for caucuses and a place for filing and storing documents. Using a chat room is not very different from a telephone conversation: one simply types on a keyboard instead of speaking, and reads on a screen instead of listening.

At first sight, the online environment would not seem conducive to successful mediation. Offline, the human element and the personal authority of the mediator whom the parties trust are keys to the success of the process. Surprisingly, a survey conducted among both online mediation practitioners and mediators without any online experience showed the latter to be sceptical while the former

7 This has led some authors to consider the computer as a kind of 'alternate third party', referred to as the 'fourth party': E. Katsh & J. Rifkin, *Online Dispute Resolution. Resolving Disputes in Cyberspace* (San Francisco: Jossey-Bass, 2001) at 93–116.

were convinced of the benefits of the process and witnessed high settlement rates online.[8] The main reasons for the positive assessment of online mediation lie in the advantages gained from asynchronous communication that allows time to reflect before reacting to a proposal from the other side or from the mediator. Other benefits are significant savings in cost and time, and convenience.[9] On the basis of this survey, online mediation could well develop and deliver beyond initial expectations, provided potential users abandon their perception of this method as unsuited to electronic means of communication.

1.3 Arbitration

The methods discussed above are all non-binding in that they do not result in enforceable decisions but in settlements or, in the event of failure, in nothing at all. The only binding method available on the Internet is arbitration. Ironically, however, the arbitration generally used in an electronic environment is so-called 'non-binding arbitration'. This may seem a contradiction in terms. An out-of-court dispute resolution process is either binding—in which case it is arbitration—or non-binding—in which case it is not arbitration.[10] Irrespective of its legal characterization (which will be discussed below), a method that providers and users call non-binding arbitration does in fact prosper on the Web.

When referring to non-binding arbitration, one needs to specify in what respect it is not binding. There are two possibilities: the process can be non-binding at the outset or at the end. Either recourse to arbitration is optional, i.e. the arbitration agreement is not binding; or the outcome of the arbitration can be accepted or rejected, i.e. the award is not binding. On the Internet both features

8 L. Meylan, 'Online Mediation: The Practitioners' Point of View' [publication forthcoming 2005].

9 *Ibid.*; L.J. Gibbons, R.M. Kennedy & J.M. Gibbs, 'Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message' (2002) 32 *New Mexico Law Review* 27 at 42–43 and passim.

10 Note, however, that some US court decisions have found the Federal Arbitration Act applicable to 'arbitral' processes that do not result in a binding outcome: *AMF Inc.* v. *Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985); *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 Fed. 3d 1205 (9th Cir. 1998); *Kelley* v. *Benchmark Homes, Inc.*, 550 N.W. 2d 640 (Neb. 1996). Conversely, other US cases have held that the non-binding character of the outcome means that the process cannot be characterized as arbitration: *Schmidt* v. *Midwest Family Mutual Ins. Co.*, 426 N.W. 2d 870 (Minn. 1988); *Huizar* v. *Allstate Ins. Co.*, 952 P. 2d 342 (Colo. 1998); *Hanover Insurance Co.* v. *Losquadro*, 157 Misc. 2d 1014, 600 N.Y.S.2d 419 (N.Y. 1993); *Schaefer* v. *Allstate Ins. Co.*, 63 Ohio St. 3d 708, 590 N.E.2d 1242 (Ohio 1992); *Field* v. *Liberty Mutual Ins. Co.*, 769 F. Supp. 1135 (D. Hawaii 1991); *Pepin* v. *American Universal Ins. Co.*, 540 A. 2d 21 (R.I. 1988); *Goulart* v. *Crum & Forster Personal Ins. Co.*, 222 Cal. App. 3d 527, 271 Cal. Rptr. 627 (Cal. App. 4th Dist. 1990). See also A.S. Rau, 'Contracting Out Of The Arbitration Act' (1997) 8 *The American Review of International Arbitration* 225 at 239ff. (favouring recognition of the outcome as an arbitral award); A.S. Rau & C. Pédamon, 'La contractualisation de l'arbitrage: le modèle américain' Rev. arb. 2001.453.

are sometimes combined.[11] Also, sometimes the arbitration—be it the agreement, the award, or both—is binding on one party and optional for the other, which makes it a unilaterally binding process.

FordJourney, an online motor vehicle sales dispute resolution programme managed for Ford by the Chartered Institute of Arbitrators in London, provides a good illustration of a unilaterally binding mechanism. On the FordJourney site, one reads: 'The Claimant [customer] has a choice of taking advantage of the Service or using the courts instead'. The respondent, however, has no choice. Hence, the process is unilaterally binding at the outset. It is also unilaterally binding at the end: 'The Parties will be bound by the Arbitrator's decision subject to either Party's right of appeal under the Arbitration Act, 1996, *and* also the Claimant's right to reject the award by pursuing the claim afresh in the courts.'[12]

The ICANN system for disputes over domain name registrations under the Uniform Dispute Resolution Policy (UDRP), which is administered by a number of ODR providers including WIPO, adopts a somewhat different approach. The submission to arbitration is binding on the respondent (the domain name holder), whilst the outcome is binding on neither party. Each is free to start a court action at any time.[13]

Apart from these non-binding mechanisms, one also finds binding or 'true' arbitration on the Internet. The AAA, for instance, will administer arbitrations conducted exclusively online under its Supplementary Rules for Online Arbitrations. However, statistics show that although parties increasingly file their cases online, they are loath to engage in proceedings conducted exclusively via the Internet.[14]

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11 See e.g. the Rules of the Independent Arbitration Scheme for the Travel Industry, administered by the Chartered Institute of Arbitrators.

12 Rules 1.2 of the Rules of the Independent Dispute Resolution Service for Purchasers from Ford Journey, <www.arbitrators.org/fordjourney/Index.htm>. On the admissibility of this kind of procedure under English law, see section 58.1 of the English Arbitration Act 1996 (emphasis added): '*Unless otherwise agreed by the parties*, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.'

13 Article 4(k) UDRP provides that a UDRP proceeding 'shall not prevent either [the respondent] or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution'. See e.g. *Michel Le P.* v. *Société Miss France*, Paris Court of Appeal, 17 June 2004; *Broadbridge Media LLC* v. *HyperCD.com*, 106 F. Supp. 2d 505 (S.D.N.Y. 2000); *Parisi* v. *NetLearning*, Inc., 139 F Supp. 2d 745 (ED Va. 2001); *Weber-Stephen Prods Co.* v. *Armitage Hardware & Bldg Supply*, 54 U.S.P.Q. 2d 1766 (N.D. Ill 2000); and *Heathmount* v. *Technodome.com*, 106 F Supp. 2d 860 (E.D. Va. 2000).

14 See interview with Debi Miller-Moore, Vice-President of AAA's eCommerce Services, in G. Kaufmann-Kohler & T. Schultz, *supra* note 4 at 278ff.

1.4 Legal characterization

How should these various methods be characterized legally? For mediation and negotiation, the answer is easy: they are purely contractual mechanisms. The answer is also easy for binding arbitration: as true arbitration it is subject to the relevant arbitration law.

Things are more difficult when it comes to non-binding arbitration. The binding character of the arbitration agreement does not appear relevant for the purpose of characterization.[15] What matters is the outcome. Whenever the parties intend the outcome to be binding for both of them—binding like a judgment rather than a contract—the process can be regarded as arbitration. Whenever the outcome is optional for both parties, the process cannot be regarded as arbitration, but is merely subject to contract law and to the rules of the ODR centre managing the dispute resolution, which are incorporated into the contract by reference.

Unilaterally binding arbitration is more difficult to characterize. Whether a process produces a binding result depends on the parties' intent. In this kind of arbitration, the intention is that one party be bound by the forthcoming outcome from the outset while the other be given the option until the end of the proceedings. At first sight this would thus appear to be a contractual setup. Upon further reflection, however, one may ask whether the expression of the party's intention to be bound may not be staggered, with one party expressing its intention when entering into the dispute resolution agreement and the other at the end of the dispute resolution process. The result would be that the process qualifies as true arbitration whenever the party that is given the option chooses to be bound.

There are obvious advantages to such a characterization. First, it better protects the interests of the weaker party, which will generally be the creditor, who, if the process qualifies as arbitration, may enforce the outcome as an award if not

15 Unilaterally binding arbitration agreements are generally considered admissible; see e.g. L. Idot, 'Arbitrage et droit communautaire' (1996) 7 IBLJ/RDAI 561 at 582; P. Fouchard, 'Clauses abusives en matière d'arbitrage' Rev. arb. 1995.147 at 148–49. Certain US cases have held that unilaterally binding clauses are unenforceable, on the grounds of the doctrines of mutuality and consideration; see e.g. *Hull* v. *Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985) and *Stirlen* v. *Supercuts*, 60 Cal. Rptr. 2d 138 (Cal. App. Ct. 1997). For cases *contra*, see *Sablosky* v. *Gordon Co.*, 73 N.Y. 2d 133 (1989) and *Becker Autoradio U.S.A., Inc.* v. *Becker Autoradiowerk GmbH*, 585 F.2d 39, 46 (3rd Cir. 1978). The difference in bargaining powers usually present in situations where ODR is used should, however, compensate for a lack of mutuality; see generally L.A. Niddam, 'Unilateral Arbitration Clauses in Commercial Arbitration' (1996) 5 *Arbitration & Dispute Resolution Law Journal* 147; W.W. Park, 'Making Sense of Financial Arbitration' in *Arbitration, Finance and Insurance*, ICC ICArb. Bull. Special Supplement (ICC Publishing, 2000) 7 at 12.

voluntarily performed. If, on the other hand, the process were regarded as contractual, the creditor would need to file a court action for specific performance, which it is unlikely to do due to the additional cost and delay.

Second, characterization as true arbitration would also be in the public interest. It would be inefficient and a waste of public resources to start a court action on a matter already resolved in a process chosen by the parties and conducted in conformity with the procedural guarantees applicable to arbitration.

Although objections may be raised against characterization as true arbitration, they do not seem to withstand scrutiny.[16] It could be argued that the uncertainty over the legal nature of the process during the entire procedure is unacceptable because it makes it impossible for the arbitrator to know which procedural standards must be met and for the courts at the seat of the arbitration to determine whether or not they have jurisdiction over applications for assistance. This objection appears largely academic, for it is not particularly burdensome for arbitrators to meet the procedural standards applicable to arbitration whatever the nature of the process, and, given that online arbitration is always institutional, institutions will perform the tasks that local courts would otherwise perform.

Another objection is the potential uncertainty over the moment when the award becomes *res iudicata* and the time allowed for filing an action to set aside starts to run. To answer this objection, the parties may specifically agree on the moment when the intent to be bound becomes effective. Accordingly, they may provide that the outcome of a unilaterally binding process becomes an award (i) upon expiry of the reflection period when there has been no rejection, or (ii) upon express acceptance during such reflection period. Such a provision may be included in the rules of the ODR centre and, to avoid any doubt, may be expressly restated by the parties at the start of the proceedings.

2. Implementation, quality and effectiveness

Consideration will be given here to three issues. First, how is ODR implemented, or how is consent to ODR achieved? Second, what quality standards must ODR meet, or what procedural rules must it apply? Third, how effective are ODR outcomes, or how are they enforced?

16 For a more detailed analysis of these objections (and other, less important, ones), see G. Kaufmann-Kohler & T. Schultz, *supra* note 4 at 162–64; T. Schultz, *Réguler le commerce électronique par la résolution des litiges en ligne* (Brussels: Bruylant, 2005).

2.1 Implementation or consent

Unlike mediation and negotiation, arbitration is subject to mandatory requirements, some of which may cause difficulties in an electronic environment. This is particularly true of admissibility, the writing requirement and incorporation of the arbitration agreement by reference.

First, arbitration must be admissible. This requirement is undoubtedly met for business-to-business (B2B) disputes. Consequently, the focus here will be on business-to-consumer (B2C) matters, where the position is more complex. The issue is not *whether* consumer disputes are arbitrable in the technical sense of objective arbitrability, i.e. due to their subject matter.[17] Consumer disputes are arbitrable as a matter of principle. However, their arbitrability may be subject to restrictions. Hence, the question is what restrictions apply to arbitrability? There are generally restrictions on the validity of pre-dispute arbitration agreements.

Under the EC Directive on Unfair Terms in Consumer Contracts, unfair clauses in consumer contracts do not bind the consumer.[18] Such unfair clauses include, in particular, those that have the effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions'.[19] In *Océano* v. *Rocio Murciano Quintero*, the European Court of Justice applied this provision to a choice-of-court clause and held such a clause to be unfair 'in so far as it causes . . . a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of

17 In support of the arbitrability of consumer disputes see, for France, P. Delebecque, 'Arbitrage et droit de la consommation', *Droit & Patrimoine* n° 104, May 2002, 46; for Germany, J. Samtleben, 'Zur Wirksamkeit von Schiedsklauseln bei grenzüberschreitenden Börsentermingeschäften', *Zeitschrift für Europäisches Privatrecht* 1999, 974 at 977; for Portugal, I.M. Cabeçadas, 'Le centre d'arbitrage des litiges de la consommation de Lisbonne' (1999) *Revue européenne de droit de la consummation* (REDC) 1999, 391; for Spain, M.A. López & M. Orero Núñez, 'Le système espagnol d'arbitrage des litiges de consommation' REDC 1996, 120 ; for the UK, the English Consumer Arbitration Agreements Act 1988, which restricts the validity of pre-dispute consumer arbitration clauses, but admits post-dispute clauses; for Italy, V. Vigoriti, 'Note su arbitrato e tutela di interessi minori nell'esperienza italiana e comparativa' (1998) 8 *Rivista dell'arbitrato* 366; for Switzerland, F. Vischer, ad Article 177 in D. Girsberger *et al.*, eds., *Züricher Kommentar zum IPRG*, 2d ed. (Zurich: Schulthess, 2004) at § 13; J.-F. Poudret & S. Besson, *Droit comparé de l'arbitrage international* (Brussels: Bruylant, 2002) at 333.

18 Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

19 Para. 1(q) of the Annex to Directive 93/13/EEC.

the consumer'.[20] The same test can certainly be applied to arbitration clauses, including clauses providing for online arbitration. If the online arbitration procedure is inexpensive and does not require particular computer skills, there is no reason why it should cause any imbalance to the detriment of the consumer. Quite the contrary, it makes justice more easily accessible to the consumer.

In EU member States, restrictions on consumer arbitration may in addition arise from national law. In France, for example, pre-dispute consumer arbitration clauses are invalid in domestic matters.[21] In international arbitration, however, the validity is disputed. The French Court of Cassation has on two occasions held that pre-dispute consumer arbitration agreements are valid in international contracts, because French consumer protection law concerning jurisdiction (French Civil Code, Art. 2061 and French Consumer Code, Art. L. 132(2)) does not apply to international situations.[22] These decisions have been criticized by French commentators, arguing that consumers deserve the same protection in international and domestic situations.[23]

In the United States, generally much more in favour of consumer arbitration,[24] recent decisions have revealed the emergence of an 'excessive costs test'. In a few cases contract defences—mainly unconscionability—have been applied

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20 European Court of Justice, judgment of 27 June 2000, joined cases C-240/98 to C-244/98, reported in [2000] ECR I 4941 at para. 24: 'where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier . . . and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.

21 Under Article 2061 of the French Civil Code, pre-dispute arbitration agreements are only valid if entered into in the context of a professional activity, which by definition excludes consumers. See also P. Delebecque, *supra* note 17 at 47; E. Loquin, 'L'arbitrage des litiges du droit de la consommation' in F. Osman, ed., *Vers un code européen de la consommation* (Brussels: Bruylant, 1998) 359 at 361. See also L. Degos, 'Les nouvelles dispositions de la loi française relative à la clause compromissoire' (2001) 12 IBLJ/RDAI 653 ; P. Fouchard, *supra* note 15 at 147.

22 Cass. civ. 1re, 21 May 1997, *Meglio* v. *V2000*, Rev. cri. dr. internat. privé 1998.87 (Annot. V. Heuzé) ; Cass. civ. 1re, 21 May 1997, *Renault* v. *V2000,* Rev. arb. 1997, 1997.537 (Annot. E. Gaillard). See also Paris Court of Appeal, 7 Dec. 1994, Rev. arb. 1996.245 (Annot. C. Jarrosson).

23 P. Delebecque, *supra* note 17 at 50; E. Loquin, *supra* note 21 at 370.

24 See in general R.S. Haydock & J.D. Henderson, 'Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 141.

to invalidate arbitration clauses in adhesion contracts,[25] with the result that pre-dispute arbitration clauses incorporated into general terms of contract may in particular be deemed unconscionable if they impose excessive costs on the consumer, thus precluding him or her from seeking relief. For instance, in *Green Tree Financial Corp.* v. *Randolph*, the Supreme Court held that prohibitive costs may justify the invalidation of a pre-dispute arbitration agreement, but that the plaintiff had not shown 'the likelihood of incurring such costs'.[26] In *Cole* v. *Burns International Security Services*, the Court of Appeals of the District of Columbia found that the arbitration costs were indeed prohibitive and held that they should be borne by the employer alone.[27] In *Gutierrez* v. *Autowest*, the California Court of Appeal stated that 'consumers may challenge a predispute arbitration clause as unconscionable if the fees required to initiate the process are unaffordable, and the agreement fails to provide the consumer an effective opportunity to seek a fee waiver'.[28] Based on the same concern about costs, the Ninth Circuit Court of Appeals held in *Ting* v. *AT&T* that arbitration clauses were unconscionable because they prevented consumers from filing a class action in a State where such a right existed.[29]

On balance, one can conclude that under both US and EU law pre-dispute arbitration agreements providing for easily accessible and inexpensive arbitral procedures in B2C contracts are valid. In spite of this conclusion and in view of partly stronger requirements in national laws, some uncertainty remains

25 See *Brower* v. *Gateway 2000 Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998), (1999) 24 Y.B. Comm. Arb. 343 (providing that absence of choice due to the presence of an arbitration clause in an adhesion contract is not sufficient to make a pre-dispute consumer agreement unenforceable); *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (in an employment case, stressing the fact that the arbitration clause was a requirement for employment). On *Brower* v. *Gateway* and the unconscionability doctrine, see H. Smit, 'May an Arbitration Agreement Calling for Institutional Arbitration be Denied Enforcement Because of the Costs Involved?' (1997) 8 *The American Review of International Arbitration* 167. See also R.M. Alderman, 'Consumer Arbitration in the United States: A System in Need of Reform' (2002) 3 *Revista Latinoamericana de Mediación y Arbitraje* 118 at 126 ('only a handful of cases have found pre-dispute mandatory arbitration clauses, presented on a take-it-or-leave-it basis, to be unenforceable').

26 *Green Tree Financial Corp.* v. *Randolph*, 531 U.S. 79 (2000).

27 *Supra* note 25

28 *Gutierrez* v. *Autowest, Inc.*, 2003 Cal. App. LEXIS 1817 (Ct. App. 2003).

29 *Ting* v. *AT&T*, 319 F.3d 1126, p. 1150 (9th Cir. Cal. 2003); *Ingle* v. *Circuit City Stores*, 328 F.3d 1165 at 1175–76 (9th Cir. 2003); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862 at 867–68 (Ct. App. 2002). See also 'The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: C. Federal Arbitration Act' (2003) 117 *Harvard Law Review* 410. Since *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), which accepted class actions in arbitration, this aspect should create fewer problems.

about the admissibility of binding consumer arbitration. This may well be the reason why non-binding arbitration largely prevails on the Internet.[30]

As an additional requirement, many national laws and international conventions require that an arbitration agreement be made in writing. Can electronic communications be considered as being in writing? By now it is well established that data messages meet the writing requirement, provided they are accessible for later reference. One of the seminal texts in this field is Article 6.1 of the UNCITRAL Model Law on Electronic Commerce, which is based on the principle of functional equivalence.[31] Functional equivalence advocates media neutrality when electronic documents fulfil the same function as paper communications.[32]

Wording identical or similar to that of Article 6 of the UNCITRAL Model Law on Electronic Commerce has been introduced into a number of other instruments, such as the US Uniform Computer Information Transactions Act (UCITA),[33] the US Uniform Electronic Transactions Act (UETA),[34] the UNIDROIT Principles

30 For an analysis of how non-binding arbitration may circumvent legal obstacles and still be effective, see T. Schultz, 'Online arbitration: Binding or Non-binding?' *ADROnline Monthly* (November 2002) <www.ombuds.org/center/adr2002-11-schultz.html>.

31 Article 6(1) of the UNCITRAL Model Law on Electronic Commerce provides: 'Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.' According to the Guide to Enactment of the Model Law on Electronic Commerce, § 50: 'The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained.'

32 On the concept of 'functional equivalence', see especially Article 5 of the UNCITRAL Model Law on Electronic Commerce: 'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message'. See also Article 9(1) of the European Directive on electronic commerce (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market), which provides: 'Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.'

33 Article 102(a)(55) provides that '"record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form', while Article 107(a) states that: '[a] record or authentication may not be denied legal effect or enforceability solely because it is in electronic form'

34 Article 7: '(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law.' Article 8(a): 'If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.'

of International Commercial Contracts,[35] and the Brussels I Regulation.[36] A number of existing provisions are couched in terms broad enough to cover data messages.[37] Some other texts, drafted at a time when writing necessarily meant ink on paper and not bytes on a hard disk, may need to be construed evolutively to arrive at the same result.[38] At the time of writing, the UNCITRAL Working Groups on Arbitration and on Electronic Commerce are considering including a reference to the New York Convention in the future Convention on Electronic Contracting, which would mean that the latter would apply to the former and, more specifically, that the written requirement in Article II of the New York Convention would be met by electronic communications accessible for further reference.[39]

The third requirement for a valid arbitration clause that may give rise to difficulties in an electronic environment is incorporation by reference. On the Internet, practically all arbitration clauses are contained in general conditions, and not on the order form on which the customer clicks.[40] If the order form makes specific reference to the arbitration clause, then the incorporation is undoubtedly

35 Article 1.11 defines the written form as 'any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form'.

36 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 23(2) of which states: 'Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".'

37 e.g. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; § 1031(1) of the German *Zivilprozessordnung*; section 5(6) of the English Arbitration Act 1996; Article 178(1) of the Swiss Private International Law Act; Article 2 of the US Federal Arbitration Act.

38 On the writing requirement set by various texts on arbitration, see J.-F. Poudret & S. Besson, *supra* note 17 at 150–89. On the need for evolutive interpretation, see G. Kaufmann-Kohler, 'Arbitration Agreements in Online Business to Business Transactions' in *Law of International Business and Dispute Settlement in the 21st Century. Liber Amicorum Karl-Heinz Böckstiegel* (Cologne: Heymanns, 2001) 355 at 360 ff.; R.A. Horning, 'The Use of New Means of Communication in Aid of Acceleration of International Arbitration' in *Improving International Arbitration: The Need for Speed and Trust. Liber Amicorum Michel Gaudet* (Paris: ICC Publishing, 1998) 79; A.J. van den Berg, 'The 1958 New York Arbitration Convention Revisited' in *Arbitral Tribunals or State Courts: Who must defer to whom?* ASA Special Series No. 15 (2001) 125; K.P. Berger, *International Economic Arbitration* (Deventer: Kluwer, 1993) at 137.

39 Article 9(2) of the current UNCITRAL Draft Convention on the use of electronic communications in international contracts provides that the writing requirement 'is met by an electronic communication if information contained therein is accessible for further reference', Doc. A/CN.9/WG.IV/WP.110, 18 May 2004.

40 For an empirical survey on arbitration clauses entered into online, see T. Schultz, G. Kaufmann-Kohler, D. Langer & V. Bonnet, 'Online Dispute Resolution: The State of the Art and the Issues', Report of the E-Com/E-Law Research Project on ODR of the University of Geneva, December 2001, <www.online-adr.org> at 54–57.

valid.[41] If, however, the order form only contains a global reference to the general conditions without specific reference to arbitration, then the validity of the reference will depend on the national law.[42] There is a general tendency to accept incorporation by reference if the contract partner has the practical means of knowing the content of the arbitration agreement.[43] In an online environment, incorporated documents are more easily accessible than offline: all one needs to do is click on a link or scroll down a field listing the general terms. For this reason, a global reference to arbitration should suffice.

2.2 Quality or procedures

What procedural guarantees are afforded to parties who choose ODR? If they engage in online arbitration, they will benefit from the fundamental guarantees provided by the relevant national *lex arbitri*. This will not be the case, however, if they choose another method of dispute resolution. To ensure procedural fairness in such instances, initiatives have been taken to draft codes of conduct and other guidelines setting out fundamental principles of online justice. Some

41 See G. Kaufmann-Kohler, *supra* note 38 at 364–68.

42 General references are accepted in Belgian, Dutch and German law. The English Arbitration Act 1996 does not deal with the question, but case law indicates that specific references are admissible, whereas the admissibility of global references will depend on the situation. A similar line is taken by Swiss law: general references will in principle be admissible in contexts where arbitration clauses are usual; see the *Stanley Roberts* v. *Fédération Internationale de Basketball*, Swiss Supreme Court, 7 February 2001, *ASA Bulletin* 2001, 523. In French and Italian law, the accent is placed on the parties' awareness of the existence of the arbitration clause and their intent to incorporate it. Under Article II(2) of the New York Convention, the validity of a general reference is uncertain: it is only admissible if the parties have easy access to the clause (which is the case if the clause is on the same paper document or on a separate document that has been communicated to the parties) or are in a business context where recourse to arbitration is common. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that '[t]he reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and that the reference is such as to make that clause part of the contract'. According to background documents, this should be interpreted as allowing general references; see 5th Working Group Report, A/CN.9/246, 6 March 1984, and 7th Secretariat Note, Analytical Commentary on Draft Text, A/CN.9/264, 25 March 1985. For additional references, see G. Kaufmann-Kohler, *supra* note 38 at 364–68.

43 See e.g. Article 13, Variant B, UNCITRAL Draft Convention on Electronic Contracting, *supra* note 39.

of these initiatives are governmental;[44] others have been taken by consumer associations,[45] business organizations,[46] and professional organizations.[47]

From these various initiatives a consensus emerges over five principles. Although these principles are largely in accord with general principles of procedural fairness, online justice calls for some particularization. The principles are as follows:[48]

– *Transparency*: this covers information given to users on the procedural rules and the outcome of the process and is particularly important when dealing with consumers.

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44 See e.g. EC Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial law, COM(2002) 196 final; EC Recommendation 98/257/EC of 30 March 1998 concerning the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes; EC Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes; OECD, 'Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce', 9 December 1999, <www.ftc.gov/opa/1999/12/oecdguide.htm>; idem, Committee on Consumer Policy, 'Consumers in the Online Marketplace: The OECD Guidelines Three Years Later', DSTI/CP/(2002)4/Final, 3 February 2003; US Federal Trade Commission and Department of Commerce, 'Summary of the Public Workshop of 6–7 June 2000', November 2000, <www.ftc.gov/bcp/altdisresolution/summary.htm>; Australian National Alternative Dispute Resolution Advisory Council (NADRAC), 'Online ADR: Background Paper', January 2001, <www.nadrac.gov.au>Publications>; idem, 'Dispute Resolution and Information Technology. Principles for Good Practice (Draft)', March 2002, <www.nadrac.gov.au/adr/DisputeResolutionInformationTechnology.htm>; Canadian Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce', August 1999, <www.cba.ca/en/content/consumer/principles.pdf>; idem, 'Canadian Code of Practice for Consumer Protection in Electronic Commerce', January 2004, <cmcweb.ca>.

45 See e.g. Transatlantic Consumer Dialogue, 'Alternative Dispute Resolution in the Context of Electronic Commerce', Doc. No Ecom-12-00, February 2000; idem, 'Resolution on Protecting Consumers from Fraud and Serious Deception Across Borders', Doc. No Internet-28-02, November 2002, <www.tacd.org/db_files/files/files-243-filetag.doc>; Consumers International, 'Disputes in Cyberspace. Online Dispute Resolution for Consumers in Cross-Border Disputes – An International Survey', December 2000, <www.consumersinternational.org/document_store/Doc29.pdf>; idem, 'Disputes in Cyberspace 2001. Update of Online Dispute Resolution for Consumers in Cross-Border Disputes', November 2001, <www.consumersinternational.org/document_store/Doc517.pdf>; European Consumer's Organization, 'Alternative Dispute Resolution – BEUC's Position on the Commission's Green Paper', BEUC/X/048/2002, 21 November 2001, <www.beuc.org>.

46 See e.g. Alliance for Global Business, 'A Global Action Plan for Electronic Business', 3d ed., July 2002, <www.iccwbo.org/home/e_business/word_documents/3rd%20Edition%20Global%20Action%20Plan.pdf>; Global Business Dialogue on electronic commerce, Consumer Confidence Working Group, 'Alternative Dispute Resolution – The Miami 2000 Recommendations', 26 September 2000, <www.gbde.org/consumerconfidence.html>; idem, 'Alternative Dispute Resolution – The Tokyo 2001 Recommendations', 14 September 2000, <www.gbde.org/consumerconfidence.html>.

47 See e.g. American Bar Association Task Force on E-Commerce and ADR, 'Addressing Disputes in Electronic Commerce. Final Report and Recommendations' (2002) <www.law.washington.edu/ABA-eADR>.

48 For an overview of such core principles, see also K. Benyekhlef & F. Gélinas, *Le règlement en ligne des conflits* (Paris: Romillat, 2003) at 99–104.

- *Accessibility*: also important in a consumer context, this includes the absence of cost barriers. Due to the delocalized nature of the online medium, accessibility is of course one of the main assets of ODR: users can stay at home and dispute resolution is a mere mouse click away.
- *Independence*: this is a traditional requirement and may raise funding issues in an online context.
- *Timeliness*: speed is another of ODR's principal advantages, especially as the slowness of traditional court proceedings has become endemic.
- *Fairness*: with independence, this constitutes the essence of procedural guarantees.

Of these five principles, fairness and independence deserve closer attention, as does the question of quality control.

Fairness must be observed whatever method of dispute resolution is adopted. However, its requirements vary on a sliding scale. At the top of the scale lies arbitration, a binding method where all the guarantees apply. Compliance with due process guarantees may sometimes, especially in evidentiary proceedings, make it necessary for the tribunal to use other than IT means. At the other end of the scale are the 'basic' methods, such as automated negotiation, where procedural guarantees are reduced to the possibility of making an offer and the availability of operational software. Between these extremes are all the other methods, varying in sophistication. Thus, procedural guarantees are not a rigid concept, but comprise an unwaivable core, beyond which their scope depends on the type of justice chosen.

Independence is required irrespective of whether the method is binding or not. Even though mediators do not have the adjudicatory powers of arbitrators, they may greatly influence the outcome and their impartiality is essential to the quality of the process. Our purpose here is not to dwell on independence requirements, which are well known, but rather to consider the specific question of the independence of ODR institutions with regard to their funding.[49] For

49 See e.g. R.C. Bordone, 'Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, And A Proposal' (1998) 3 *Harvard Negotiation Law Review* 175 at 209; A. Cruquenaire & F. de Patoul, 'Le développement des modes alternatifs de règlement des litiges de consommation : Quelques réflexions inspirées par l'expérience ECODIR' (2000) *Lex Electronica* <www.lex-electronica.org/articles/v8-1/cruquenaire-patoul.htm> at § 39; L.M. Ponte, 'Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?' (2001) *Tulane Journal of Technology and Intellectual Property* 55 at 67.

many ODR providers the financial equation is difficult to balance: the initial investment is substantial and the disputes that today give rise to online procedures are small; ODR fees are necessarily modest too and not enough to keep an institution alive, even a virtual one. Hence, apart from automated methods used on a large scale, the provision of ODR services may prove to be non-self-financing, let alone profitable, and outside funds may be required. These funds can be public or private:

- A State-funded ODR site, e.g. for small claims, is quite conceivable. Despite much discussion at government level about the benefits of ODR, no concrete action has so far been taken, apart from the ECODIR site funded by the European Commission and the Irish Government.
- In a largely privatized and unregulated environment like the Internet, private funding is the more likely situation. A single supplier, like Ford with the FordJourney site, or a group of suppliers, may offer their customers access to an ODR process as a kind of after-sales service. Electronic marketplaces, i.e. websites where suppliers and clients, or simply private individuals, meet to conduct business, also offer and finance ODR services, because the presence of an ODR system attracts business to the marketplace.[50]

Does this mean that the party providing the funds—and, incidentally, repeatedly involved as a player—will have a prevailing influence over the dispute resolution process? Not necessarily. However, especially when the ODR operator is economically dependent upon a single supplier, particular attention will need to be given to the structure and the organization of the ODR process and the method of appointing neutrals.

Another relevant question in this connection is who checks whether these guarantees are complied with? Offline, this is a task of the courts when ruling on actions to set aside arbitral awards. Such actions are unlikely online, especially when the stakes are small, as is generally the case. Moreover, such actions would not be available when non-binding methods are used. Hence, another solution needs to be found, unless quality control is abandoned altogether. One possibility is to provide for trustmarks, which are a kind of certification and already widespread on commercial sites but not yet used on

50 See e.g., on SquareTrade, the online dispute resolution provider for eBay, S. Abernethy, 'Building Large-Scale Online Dispute Resolution & Trustmark Systems' in E. Katsh & D. Choi, eds., *Online Dispute Resolution (ODR): Technology as the "Fourth Party"* (Amherst, Mass.: UN and University of Massachusetts, 2003) 70 at 85.

ODR sites. An ODR trustmark would certify that the site complies with due process. Regular controls would monitor the continuity of compliance and, in the event of non-compliance, the trustmark would be withdrawn in the hope that withdrawal would lower the standing of the site in users' eyes. It then remains to decide who would award the trustmarks and whether a private institution should control the controller.[51] Although the questions remain open, these are certainly avenues to be explored.

2.3 Effectiveness or enforcement of decisions

The fabulous advantage of online disputes is that distances are abolished. A dispute is resolved in the same manner as the contract was entered into—and performed, if it was performed by downloading software. As a general rule, an efficient dispute resolution method is one that has a conceptual affinity with the activities that gave rise to the dispute. This, however, is a broader topic that extends far beyond ODR. As far as online justice is concerned, if the competent court is located far away from the claimant's home, ODR will guarantee access to justice that might otherwise be impracticable. This is all the more necessary as on the Internet people and businesses whose paths would never have crossed offline now enter into contracts with each other.

The advantage of ODR in overcoming geographical limitations holds true until it comes to enforcing the outcome of the ODR procedure. If the outcome is a binding award, the winner will have to apply for an exequatur, possibly on the other side of the globe, as online award enforcement is still far away. If the outcome is a settlement that is not being performed, then the situation is even more problematic, as the creditor will have to start a new court action, not simply enforcement proceedings.

This is hardly satisfactory.[52] For the full potential of ODR, in particular of its accessibility, to be realized, other means of enforcement without recourse to the courts must be found. Many ideas have been put forward,[53] some of which

51 On these issues in general, see M. Philippe, 'Where is everyone going with online dispute resolution (ODR)?' (2002) 13 IBLJ/RDAI 167 at 183–184; American Bar Association Task Force on E-Commerce and ADR, *supra* note 47. On who should exert control over ODR and how, see T. Schultz, 'Does online dispute resolution need governmental intervention? The case for architectures of control and trust' (2004) 6 *North Carolina Journal of Law & Technology* 71, who concludes that the State should be the main controller of ODR.

52 For further discussions of these issues, see L.M. Ponte, *supra* note 49 at 69; H.H. Perritt, 'Will the Judgment-Proof Own Cyberspace ?' (1998) 32 *International Lawyer* 1121 at 1123.

53 See G. Kaufmann-Kohler & T. Schultz, *supra* note 4 at 223ff.

have partly come to fruition. In essence, there are three methods of enforcing the outcome of ODR proceedings without going to court. The first is based on money, the second on technical control and the third on reputation:

- Methods of enforcement relying on money include financial guarantees, escrow accounts, insurance and charge-back agreements with credit card companies. An alternative might be for business suppliers joining an ODR site to set up a 'judgment fund' to cover the outcome of ODR proceedings
- In very specific situations, technical control may be used to make ODR decisions self-enforcing. The UDRP procedure for domain name disputes is a good example. Ten days after the decision by the panel of experts, the domain name is either cancelled or transferred to the winning party, depending on the panel's decision and provided the loser has not furnished evidence of having started a court action to challenge the decision. The decision is implemented by the registrar that registered the domain name and exercises technical control over the registration.[54]
- Reputation may provide leverage causing businesses to voluntarily comply with ODR decisions. Imagine a business site is granted a trustmark certifying that it complies with a certain code of conduct that provides for ODR and for compliance with the resulting decisions. Failure to comply would lead to the suspension or removal of the trustmark, which would damage the trustmark holder's reputation and—it is hoped—deter potential clients from using the site. To avoid losing business, the trustmark holder will therefore endeavour to comply with the ODR decisions.[55]

Such methods, often called self-enforcement or built-in enforcement, respond to a real need and deserve to be further developed.

3. What is the future of ODR?

Although the initial euphoria has subsided, turnover on the Internet continues to increase. In 2004, the turnover in B2B electronic commerce amounted to six

54 On the power bestowed by technical control, see E.G. Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution' (2000) 34 *University of California Davis Law Review* 151 at 197.

55 On trustmarks and regulation through trustmarks, see S. Louveaux, A. Salaün, & Y. Poullet, 'Protection in Cyberspace, Some Recommendations' (1999) 1 *Info* 521 at 532–34. On the use of trustmarks by ODR providers, see A. Cruquenaire & F. de Patoul, *supra* note 49 at §§ 40–41; B. Yunis, 'Rechtsfragen der Online-Mediation' in O. Märker & M. Trénel, *Online-Mediation. Neue Medien in der Konfliktvermittlung – Mit Beispielen aus Politik und Wirtschaft* (Berlin: Sigma, 2003) 201 at 219–20; American Bar Association Task Force on E-Commerce and ADR, *supra* note 47 at 38.

trillion dollars worldwide[56] and for B2C transactions to forty billion euros in Europe. It is estimated that in 2009 online retailing may amount to 8 per cent of all sales, for a total of one hundred and sixty seven billion euros in Europe.[57]

These figures mean that the number of disputes arising out of electronic commerce will necessarily increase in the coming years. They also show that the Internet is part of our daily lives. Taking these two observations together, there is no doubt that ODR has a growing role to play. This role will depend on the type of dispute and the method of dispute resolution.

Disputes arising out of large international commercial transactions, which constitute the major part of the traditional arbitration caseload, are unlikely to be referred to ODR. These disputes will progressively assimilate IT techniques as a means of improving the management of the arbitration, but will never be entirely online. The amounts at stake will not act as an incentive to replace live hearings with e-mails and chat rooms.

By contrast, small and medium-sized disputes, including B2B disputes, can very effectively be resolved by way of ODR. There is no reason to restrict ODR to contracts entered into electronically and no reason to limit ODR to disputes submitted to private justice. Some courts already accept online filing and some plan to allow proceedings to be conducted exclusively online.[58]

It is likely that non-binding methods of dispute resolution will continue to be prevalent in ODR—a reflection of what the French legal philosopher Mireille Delmas-Marty calls 'véritable triomphe du mou, du flou, du doux' (blandly, 'the true victory of soft law').[59] This is a general trend in contemporary law and one of the explanations for the success of ADR, which is certainly a reaction to the inefficiencies of traditional justice, classical arbitration included. But it

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56 Gartner Groupe, 'Worldwide B2B eCommerce Market, 2000 – 2004', summary available at <www.epaynews.com/statistics/transactions.html#25>.

57 Forrester Research, 'Europe's eCommerce: The Next Five Years Forecast: Europe's Online Retail Sales, 2004 To 2009', March 2004.

58 e.g. the cybercourt of the State of Michigan; see L.M. Ponte, 'The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse' (2002) 4 *North Carolina Journal of Law & Technology* 51 at 58–67; L.M. Ponte & Th.D. Cavenagh, *Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce* (New Jersey: Prentice Hall, 2004) at 110–11. For latest news, see <www.michigancybercourt.net>.

59 On this line of thought, see M. Delmas-Marty, *Le flou du droit. Du code pénal aux droits de l'homme* (Paris: PUF, 2004).

is at the same time also a reflection of a change in the function of the judge or of any adjudicator, who is increasingly called upon to assess, counsel, conciliate and not only to make decisions.[60]

Does that mean that arbitration—true arbitration—has no future on the Internet? The answer is surely no: for small and medium enterprises, especially when they are far apart or depend on quick decisions, binding online arbitration may present major advantages.

60 On these shifts, see e.g. F. Ost, 'Jupiter, Hercule, Hermès : trois modèles du juge' in P. Bouretz, ed., *La force du droit* (Paris: Esprit, 1991) 241 ; idem, 'Le rôle du juge. Vers de nouvelles loyautés' in *Le rôle du juge dans la cité* (Brussels: Bruylant, 2002) 15.