Does Online Dispute Resolution Need Governmental Intervention ? The Case for Architectures of Control and Trust

Schultz, Thomas

How to cite

SCHULTZ, Thomas. Does Online Dispute Resolution Need Governmental Intervention ? The Case for Architectures of Control and Trust. In: North Carolina journal of law & technology, 2004, vol. 6, n° 1, p. 71–106.

This publication URL: https://archive-ouverte.unige.ch/unige:168118

NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
VOLUME 6, ISSUE 1: FALL 2004

Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust

Thomas Schultz[1]

Liberty in cyberspace will not come from the absence of the state. Liberty there, as anywhere, will come from a state of a certain kind . . . we build a world where freedom can flourish by setting it in place where a particular kind of self-conscious control survives.[2]

. . . ODR, like all of e-commerce, needs to have mechanisms to build consumer trust in the goods or services—here legal services in the form of dispute resolution—and to ensure consumer protection. The regulation of legal services, including dispute resolution, need not be delegated wholly to the professional organizations that incorporate a degree of self-interest.[3]

I. Introduction

Many believe that cyberspace was born out of a world of no regulation.

[1] Junior research fellow, University of Geneva, (www.online-adr.org), member of the U.N. Online Dispute Resolution Expert Working Group. Thanks to Derek McKinley for helpful comments on an earlier draft of this article. Thanks also to Christopher Jackson and the rest of the editorial board at the North Carolina Journal of Law and Technology. I expand many of the arguments developed here in a forthcoming book, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International), co-authored with Gabrielle Kaufmann-Kohler. This article was written as part of a research project financed by a grant of the Swiss National Research Fund.

[2] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 5 (1999).

[3] Louise E. Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FORDHAM L. REV. 985, 1010 (2001).

And many believe that the future of dispute resolution lies in the absence of the state. The general view of online dispute resolution ("ODR") follows from these beliefs: it is a new and promising form of dispute resolution, and it takes place in cyberspace; consequently it should be left to self-regulation. It is this view that I want to challenge.

I contend that ODR requires governmental intervention to develop fully, to lessen the gap between its potential and its actual use—a gap that is huge. The argument for this assertion follows a simple path: ODR is in need of trust, trust can be provided through architectures of control, and such control should be in the hands of government in order to induce trust.

My article moves in two parts, the first descriptive, the second prescriptive. Part I provides that confidence is hardly present in the absence of control. I begin with an examination of the confidence problem ODR faces. I then propose a solution to that problem: control. The lack of control induces a lack of confidence in ODR. Control of ODR needs to be established. This entails setting in place an architecture of control of ODR in order to increase confidence. Only then will it be utilized on a large scale. Part II maintains that this control should be in the hands of the government. People will trust ODR only if the government controls it. My claim does not follow the ethical argument that only the government provides a real guarantee of certain fundamental values or that government intervention would make ODR fairer. Although I believe such an argument is true, I rather take a realist approach and argue that government intervention simply would be the best way to increase confidence in ODR. Part III finally illustrates how the government could construct an architecture of control for ODR. This shows, incidentally, from a structural perspective, how the government could regulate ODR.

Before these issues are addressed, it is helpful to reflect on what ODR actually consists of: a dispute resolution process that operates mainly online. This encompasses both online versions of alternative dispute resolution ("ADR") and cybercourts, the former being dominant. In other words, ODR relates to negotiation, mediation, arbitration, and court proceedings, whose proceedings

are conducted online.[4] Disputes submitted to ODR are mainly, but not exclusively, e-commerce business-to-consumer ("B2C") disputes.[5]

---

[4] A short review of ODR literature reveals that at least the following types of procedures have been considered to be within the field of ODR: blind bidding, automated negotiation, automated settlement systems, assisted negotiation, mediation, online consumer advocacy and complaint, complaint assistance, software-based or automated mediation, facilitative mediation, conciliation, consumer schemes, consumer complaint boards, ombudsmen, med-arb for consumers, jury proceedings, arbitration, non-binding evaluation, non-binding arbitration, automated arbitration, mock trials, and credit-card charge backs. *See, e.g.*, Arnold Vahrenwald, *Out-of-court Dispute Settlement Systems for E-commerce: Report on Legal Issues*, *Part III: Types of Out-of-Court Dispute Settlement*, report to the European Commission (May 29, 2000), *available at* http://www.vahrenwald.com/doc/part3.pdf, at 6–12 (on file with the North Carolina Journal of Law & Technology); International Chamber of Commerce, *Business-to-Consumer and Consumer-to-Consumer Alternative Dispute Resolution (ADR) Inventory Project Summary Report* (July 18, 2002), *available at* http://www.iccwbo.org/home/ADR/ADR%20PROJECT%20REPORT%20final.pdf (on file with the North Carolina Journal of Law & Technology); Julia Hörnle, *Online Dispute Resolution in Business to Consumer E-commerce Transactions*, 2002 J.L. & INFO. TECH., *available at* http://elj.warwick.ac.uk/jilt/02-2/hornle.html (on file with the North Carolina Journal of Law & Technology); Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55 (2001); Isabelle de Lamberterie, *The Online Settlement of Small Consumer Disputes* (Nov. 2001), *at* http://droit-internet-2001.univ-paris1.fr/pdf/ve/Lamberterie_EN.pdf (on file with the North Carolina Journal of Law & Technology).

[5] ODR is not limited to e-commerce disputes. ODR is particularly useful for all forms of disputes that involve small amounts of money and large distances. In this sense, ODR is an answer to some effects of globalization. Indeed, as globalization shrinks the world by lowering travel and communication costs, small contracts over large distances increase. Such contracts, and the related disputes, can be entered into offline (because of the lowering of travel costs) or online (because of the lowering of communication costs and the Internet). *See* Lesley Caplin, *Resolving Consumer Disputes Online: A Review of Consumer ODR*, 10 C.L.P. 207 (2003). Mr. Caplin argues that we are currently in the second phase of globalization. Globalization I took place at the end of the 19th century and lasted until World War I. It was based on the minimization of travel costs. It mainly shaped demographics. Globalization II began after the end of the Cold War, in the early nineties. This second round of globalization is based

In online negotiation, the parties communicate bilaterally—or multilaterally if there are more than two parties to the dispute—over the Internet to reach a settlement using email or other more sophisticated communication technologies. When such sophisticated technologies are used, online negotiation is sometimes called assisted negotiation, mediated negotiation, or more aptly, technology-facilitated negotiation. A computer assists the negotiation, just as a person assists the negotiation in offline mediation. The computer's assistance can include setting up the communication, engaging in productive discussions, identifying and assessing potential solutions, or helping to draft settlement agreements. There are currently more than twenty providers of online negotiation. The most successful is SquareTrade, which has handled some 1,500,000 disputes in four years; and now oversees approximately 700,000 cases per year.[6]

Online mediation strongly resembles offline mediation, the principal difference lying in the conduct of the proceedings. Communications in online mediation are mainly textual and asynchronous because high quality videoconferencing systems are not yet easily affordable. The principal means of communication used in online mediation are thus email and web-based communications, i.e. chat rooms and bulletin boards. Statistics are difficult to establish because mediation is fundamentally a confidential process, allowing an open discussion between the parties and the mediator. More than twenty-five providers of online mediation exist, but the number of cases they actually resolve is unclear.

---

on the minimization of communication costs. With long-distance communications as inexpensive as they are nowadays, information began to circulate much more rapidly. The development of the Internet then acted as a catalyst for the global movement of information. For a little over ten years now, low communication costs have been shaping the global flow of knowledge and information, and thereby global commerce. *Id.* *See also* THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (2000).

[6] *See* Square Trade Services, *at* http://www.squaretrade.com/cnt/jsp/abt/aboutus.jsp;jsessionid=23s2ss7tx5?vhostid=chipotle&stmp=squaretrade&cntid=23s2ss7tx5 (last visited Nov. 8, 2004) (on file with the North Carolina Journal of Law & Technology).

Online arbitration is the most powerful method of ODR. It has the greatest potential, but it also raises the most issues. Offline arbitration is often considered to be the most achieved form of ADR because of its judicial nature, the strict conditions of due process that are applicable, the binding character and enforceability of its awards, and the assistance that courts are legally required to provide in arbitral procedures.

Arbitration from afar has also been experimented with offline: Documents-only arbitration is often used for B2C disputes. Providing arbitration online raises new issues, however, due to the electronic form of the communications. In arbitration, the parties give up rights, and consequently legislation sets strict conditions that the arbitration agreement and the award be binding. Electronic documents and electronic communications often do not satisfy—or at least do not clearly meet—these conditions in the current state of legislation. Much work is being done to address these shortcomings, but it will take time to pass legislation clarifying the binding character of online arbitration and the enforceability of arbitral awards.[7] Hence, the statistics for online arbitration show that although there are more than twenty-five providers of online arbitration, most of them have difficulty getting cases. The most successful provider of online binding arbitration seems to be the Chartered Institute of Arbitrators in London, which has handled approximately 400 cases, primarily in the field of B2C. In non-binding online arbitration, the caseloads are generally not much higher, except for the providers applying the Uniform Domain Name Dispute Resolution Policy ("UDRP"), under which approximately 10,000 cases have been resolved.

II. Confidence Requires Control

This Part analyzes the aspects of cyberspace that generate its notorious confidence problem. My assertion is that the same

[7] *See, e.g.*, Julia Hörnle, *Online Dispute Resolution*, *in* BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 787–805 (John Tackaberry and Arthur Marriott eds., 2003). *See also* Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 5217.

problems also affect ODR because it takes place in the same context. This argument suggests that the bedrock of the confidence problem is control—this is because people interacting in cyberspace are (or appear) less controllable, and as such it may be difficult to place confidence in them.

A. Architectures of Confidence in Cyberspace

Lack of confidence is one of the overarching features of cyberspace. It is a notorious problem, and over time it has become one of the prime concerns about the Internet, particularly in the field of e-commerce, where it has been one of the main priorities of stakeholders for a number of years.[8]

---

[8] For years, inducing confidence in the electronic environment has been the major priority of the e-commerce sector, governments, consumer associations and civil society in general. *See, e.g.*, *A European Initiative in Electronic Commerce, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, COM(97)157 final at para. (35), *available at* http://www.cordis.lu/esprit/src/ecomcom.htm (on file with the North Carolina Journal of Law & Technology).

> The first objective is to build trust and confidence. For electronic commerce to develop, both consumers and businesses must be confident that their transaction will not be intercepted or modified, that the seller and the buyer are who they say they are, and that transaction mechanisms are available, legal and secure.

Id. *See also* The National Advisory Council on Consumer Affairs, Australia, *Consumer Protection in Electronic Commerce* (April 1998) (on file with author); Global Business Dialogue on Electronic Commerce ("GBDe"), *The Paris Recommendations* (September 1999), *available at* http://www.gbde.org/recommendations/paris99.pdf, at 6 (on file with the North Carolina Journal of Law & Technology) ("The GBDe believes that building consumer confidence is a key issue for the development of electronic commerce, and that both business and governments have a responsibility to foster it."); Organisation for Economic Co-operation and Development, *Forum on Electronic Commerce: Report on the Forum*, SG/EC(99)12, at 6 (October 1999) (on file with author) ("Users must gain confidence in the digital marketplace. National regulatory frameworks and safeguards that provide such confidence in the physical marketplace must be adjusted, where necessary, to help ensure continued confidence in the context of global networks."); Organisation for Economic Co-operation and Development, *Privacy Online: Policy and*

This lack of confidence has one major cause: the absence of the traditional points of reference by which we assess the trustworthiness of an offline situation.

When we consider engaging in a relationship, be it personal or commercial, we use points of reference or indicators of trust to assess the risks related to the relationship. For instance, when we intend to make a commercial transaction, we assess the risks of this transaction by examining the other party, the community in which the transaction is to take place, and what can be done if a problem occurs. We then engage in the transaction if we have confidence in it; this means that we either trust the other party to abide by the terms or rely on a third party to intervene should things go wrong.[9]

Practical Guidance (January 2003), *at* DSTI/ICCP/REG(2002)3/final, at 7 (on file with the North Carolina Journal of Law & Technology) (aiming at building trust in B2C e-commerce through the adoption of privacy policies; online notification of privacy policies to users; enforcement and redress mechanisms; promoting user education and awareness; means of protecting privacy; the use of privacy enhancing technologies; and the use and development of contractual solutions for online trans-border data flows); Consumers International, *Consumers@shopping: An international comparative study of electronic commerce* (September 1999), *available at* http://www.consumersinternational.org/document_store/Doc28.pdf, at 7 (on file with the North Carolina Journal of Law & Technology) ("If consumers are to take full advantage of the global shopping mall theoretically offered by the internet, they must feel confident of receiving a consistent standard of consumer protection wherever they shop."); American Bar Association Task Force on E-Commerce and ADR, *Addressing Disputes in Electronic Commerce: Final Report and Recommendations*, (October 2002), *available at* http://www.law.washington.edu/ABA%2DeADR/documentation/docs/FinalReport102802.pdf, at 2 (on file with the North Carolina Journal of Law & Technology) (considering in-house complaint mechanisms, ODR, and trustmarks as confidence promoters).

[9] I use the word "confidence" in the sense that it has two components: trust and reliance. Trust is bilateral. It concerns an expectation: you trust your transaction partner because you made a positive prediction about his behavior; you trust him to do what he says. Reliance is triangular. It concerns an expectation of being able to work out a potential problem: you have confidence in the transaction because you rely on a third party to step in if a problem occurs. *See* Rufus Pichler, *Trust and Reliance—Enforcement and Compliance: Enhancing Consumer Confidence in the Electronic Marketplace* (2000), *available at* http://www.oecd.org/dataoecd/0/18/1879122.pdf, at 34–35 (on file with the North Carolina Journal of Law & Technology). Pichler states,

We have confidence in a given situation if the actors are within an architecture of confidence, an architecture that allows mutual trust between parties or mutual reliance on a third party.

We find it easy to have confidence in local stores because they are within such an architecture, and we find it more difficult to trust web traders because they are not. In cyberspace, most points of reference that usually allow us to do that have disappeared. That makes this environment unpredictable, and it hampers confidence. In cyberspace, such an architecture or such points of reference must be created to allow people to have confidence.[10]

> These two expectations—expecting to get it, and expecting to being able to fix it if one doesn't get it—need to be clearly distinguished. They can both be put under the generic expression 'consumer confidence' but it is important to realize that they are two separate elements. They differ in the basis they are grounded on, they differ in the addressees of the consumer's respective expectations, they differ in the way they are affected by the characteristics of online transactions, and they differ in regard to the means that can be employed to enhance them. [They] together form consumer confidence as trust and reliance: Trust, if the consumer believes things will go alright, reliance if she believes thinks might go wrong but can be cured if they do.

Id.

[10] *See* Ethan Katsh, *Adding Trust Systems to Transaction Systems: The Role of Online Dispute Resolution*, First UN Economic Commission for Europe Forum on Online Dispute Resolution (June 2002), *available at* http://www.ombuds.org/un/unece_june2002.doc, at 4 (on file with the North Carolina Journal of Law & Technology). Katsh states,

> Signs of trust that had been understood implicitly before or had been fashioned over time as a result of experience, now need to be created, or recreated, out of code. Just as there are new opportunities for bringing people together online, there are opportunities for addressing the sense of risk that people feel in a novel environment. We need new structures and systems to replace traditional trust-enhancing models, such as the law, which may not have as influential role to play in cyberspace.

Id. See also Lessig, *supra* note 2, at 41 ("[Real-space] architectures of trust become invisible to us, but they are obviously constructs . . . if e-commerce is to develop, we must erect equivalent architectures in cyberspace.").

The same problem exists with ODR. As Louise Teitz writes:

> The users of ODR, be they consumer or business, have none of the normal channels to guarantee integrity and minimum standards of performance in the virtual world of ODR. If one hires a lawyer to resolve a dispute, one deals with a real person or a real office or a license—there is something connected to a physical existence.[11]

Additionally, if one does not trust normal e-commerce services, how can one trust ODR, where even greater rights are at stake than with traditional online services? When people on the Internet are deceitful, which is likely to have been the case when parties are faced with a dispute, this only serves to make further confidence in cyberspace more difficult. Even governments usually do not trust ODR, and this is one reason why there are no large-scale government-related campaigns informing people that ODR is available and should be utilized.

Online dispute resolution needs an architecture of confidence. But before we establish that, we need to analyze what exactly constitutes such an architecture. What follows is an analysis of the features of cyberspace that have generally destroyed the points of reference for confidence we are used to; these features help us see the components of an architecture of trust. It is my opinion that the problems of cyberspace with regard to confidence are (1) a lack of tangible cues, (2) a lack of social contexts, and (3) a lack of predictable remedies in case a problem occurs.

1. A Lack of Tangible Features

In 1852, a young French entrepreneur named Aristide Boucicaut founded the second-oldest department store in the world (and the first in France), called *Le Bon Marché*. It became an immediate success and a veritable icon of Paris's seventh *arrondissement* due to its founder's revolutionary ideas. One of

[11] Teitz, *supra* note 3, at 1014.

these ideas was that people could walk into the store, see the merchandise, touch it, try it, smell it if they wanted, and then take it along. Before that time, customers could only be presented sample goods, and they had to order a copy manufactured especially for them. This new physical contact with the merchandise largely helped create one basic requirement of commerce: trust. By being able to touch and inspect an object and immediately take it along, this store decreased the customers' fear of ending up with something undesirable, be it defective or simply something unwanted. Prior to this they could only inspect it at home, after the purchase. Customers now had tangible cues that what they were about to buy was indeed what they wanted and how they wanted it.

In the offline world, when we walk into a shop, a bank, or any other place that expects us to enter into a relationship requiring some degree of trust, we should be impressed by how hard these places try to inspire trust in us. It is only because we are so used to it that we do not notice it. Expensive buildings and furniture, for instance, are clear signs of credibility. They signal that the company is "well capitalized, has an established clientele, and is likely to stand by its products."[12] These are only a few examples of the many material cues that customers use offline to assess the trustworthiness of a trader, but these cues are obviously not present

---

[12] Janice Nadler, *Electronically-Mediated Dispute Resolution and E-Commerce*, 17 NEGOTIATION JOURNAL 333, 334 (2001). Nadler states,

> Websites lack many of the features that people typically rely on when making a judgment about whether a company is reputable. Physical storefronts allow customers to see, hear, smell, and touch products. Moreover, physical spaces have other cues that signal credibility. A fancy office with a plush reception area could signal that the company is well capitalized, has an established clientele, and is likely to stand by its products or services. Furthermore, face-to-face meetings between company employees and customers can function to build confidence and resolve any problems that might arise.

Id.

online.[13] The material environment that is necessary for trust to develop is missing.

Something must take the place of this material environment; some mechanism must be built that can perform the same trust-inducing functions already present in the offline world.[14] In the field of e-commerce, this has already begun; it started as soon as the Internet became commercial in 1991. Safeguards emerged, including the development of digital signatures, which provide authentication, integrity of a message, and non-repudiation of sending, and trustmarks, which provide identification of the web trader, connection to a redress mechanism, verification of its business practice record, and coercion of the web trader by the redress mechanism.[15] The same kind of connection to the physical world or an equivalent must be created for ODR.

2. A Lack of Social Contexts and Reputation

The second problem with cyberspace activities, especially in e-commerce and thus also in ODR, is that they do not take place

---

[13] In a survey conducted by Harris Interactive in August 2000, 57% of the consumers were concerned about the abuse of their personal information if provided online, 38% expressed their worries about fraudulent transactions, 37% were not sure about the reliability of the sellers, and 47% wanted to see the product in person to avoid fraud. *See* Harris Interactive Poll, *E-Consumer Confidence Study* (August 2000), *available at* http://www.nclnet.org/downloads/results.pdf (on file with the North Carolina Journal of Law & Technology) (quoted by Mohammed Wahab, *Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12(1) INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY 123, 142 (2004)). A very comprehensive model of factors of trust in a web merchant has been developed by Sirkka L. Jarvenpaa and Noam Tractinsky, *Consumer Trust in an Internet Store: A Cross-Cultural Validation*, 5 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION (1999), *available at* http://www.ascusc.org/jcmc/vol5/issue2/jarvenpaa.html (on file with the North Carolina Journal of Law & Technology).

[14] Katsh, *supra* note 10, at 3 ("The systems that bring buyers and sellers together so that it is possible for transactions to occur need to be joined by systems that allow buyers to feel comfortable and confident in engaging in the transaction. For this to occur, transaction systems must be joined by trust systems.").

[15] *See generally* Lessig, *supra* note 2, at 30–42.

within an established community.[16] A commercial activity usually takes places within a specific social context: There are other customers, there is a network of business partners and cooperation with other companies, and there is reputation and word-of-mouth.

The clientele of a supplier or vendor has a strong effect on the trust that members of this clientele and potential new customers have. Customers talk to each other and to other members of their community. Word-of-mouth conveys information within a community that strongly contributes to establishing a reputation. Blocks, neighborhoods, areas, and regions form communities. Some of them are stronger communities than others, and the stronger the community the more likely a reputation will be enhanced through word-of-mouth. However, they all carry information about their members, especially about recurrent commercial partners such as shops, or important actors of a community such as dispute resolvers.

Within a community, reputation is a strong factor of trust. The fact that critical information is available within a community about one of its members allows this community to develop a form of social trust, which Francis Fukuyama defines as an "expectation that arises within a community of regular, honest, and cooperative behavior."[17] Put differently, the simple fact of community membership creates trust because membership creates expectations of behavior according to the community's norms.[18]

But the problem with communities, traders, and cyberspace is the geographical distribution of the customers of a web trader. Customers of the same web trader potentially have very different cultural backgrounds and thus different expectations and different

---

[16] *See, e.g.*, Ethan Katsh, Janet Rifkin and Alan Gaitenby, *E-Commerce, E-Dispute, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 728–29 (2000) (providing that trust is an issue for eBay because of uncertain seller identities and lack of seller reputation which creates a high risk and low trust environment).

[17] FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26 –28 (1995) (stressing the primary importance of social trust for the economic well-being of a community).

[18] *See* KENNETH ARROW, THE LIMITS OF ORGANIZATION (1974) (providing that reputation is an invisible institution that sets the limits of cooperation and defines the behavior of actors in a specific field).

behaviors.[19] More important, it is difficult to trust a web trader because we do not know his commercial reputation, and we have nobody to ask for the information. Indeed, most people probably know very little about a small- or medium-sized web trader even if he has a reasonable number of customers because these customers are likely to be more widely dispersed geographically. In addition, one is much less likely to stumble upon another customer of the same web trader in cyberspace than one would in a physical store.[20]

Trust in cyberspace requires some kind of link, some connection between the new person or entity asking to be trusted and other established people or entities. In other words, there must be a social context.[21] One part of the creation of a social context is the improvement of communication about experiences. As Colin Rule writes,

> A logical way to build trust-in-transactions is to connect buyers and sellers to some sort of system that keeps track of their transaction history. Every time a business takes part in a transaction, for example, the system could invite the other side to offer their perspective on how well the business

[19] Social trust, which essentially is trust generated by social contexts, depends to a large extent on implicit social norms, which are determined by culture. These norms are clashing in a poly-cultural environment like cyberspace. *See* Romain Laufer, *Confiance, esthétique et légitimité*, *in* LA CONFIANCE EN QUESTION 204 (Romain Laufer and Magali Orillard eds, 2000); Gilles van Wijk, *Confiance et structure*, *in id.* at 265.

[20] Nadler, *supra* note 12, at 335. Nadler states,

> [T]he global nature of the online marketplace is unlike the off-line local community market in that one's next-door neighbor would not necessarily know, for example, the reputation of any given on-line company. If consumers were dissatisfied with an on-line company's service, other consumers would not easily find out about it.

Id.

[21] On building social relationships and networks as a fundamental need of e-commerce, *see* Francis Fukuyama, *The Virtual Handshake: eCommerce and the Challenge of Trust*, Merrill Lynch Forum (1998), at 6 (on file with author) (providing the trust that holds social—and, therefore, digital—networks together will itself become a new and highly important value-added service, one that will be critical to realizing the potential that a wired world presents).

> performed. Over time a comprehensive history of the business's transaction would develop, a history that new customers could consult before they decided to buy or sell something with that business.[22]

Even if one does not stumble upon other customers, there are still ways to convey sufficient information about past experiences to establish a reputation. Offline, mass media perform this role of reputation management. Online, as we will see, such mechanisms can also be constructed.

3. A Lack of Predictable Remedies

A large number of the disputes resulting from e-commerce are not likely to be resolved in court.[23] Rather, extra-judicial dispute resolution processes will become the primary dispute resolvers, which has lead some authors to define online ADR as online *appropriate* dispute resolution instead of online *alternative* dispute resolution.[24]

Courts are not likely to be the primary resolvers of most small- and medium-sized disputes occurring in cyberspace—which are the majority of e-commerce disputes involving ODR providers—because courts are too slow and expensive. This is a general problem caused by the ubiquity of cyberspace, which clashes with the territoriality of jurisdiction and judicial authorities. There is no reason this should be any different with disputes arising out of ODR outcomes—either disputes left unresolved, or parties disputing the findings of the ODR

---

[22] COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 105 (2002).

[23] In other contexts, similar phenomena are called "dejudicialization." *See, e.g.*, Harriet Sachs, *The Dejudicialization of Family Law: Mediation and Assessments?*, *in* FAMILY LAW IN CANADA: NEW DIRECTIONS 85 (Elizabeth Sloss ed., 1985).

[24] *See* Jeffrey S. Wolfe, *Across the Ripple of Time: The Future of Alternative (or, is it "Appropriate?") Dispute Resolution*, 36 TULSA L.J. 785 (2001).

provider.[25] Put differently, the only real resolvers of disputes arising out of ODR—and these disputes will inevitably come—are likely to be other ODR providers.

The trouble with this is that courts do not have the same functions and regulatory effects as ODR, except cybercourts, which form part of the ODR movement but are set aside now for the sake of clarity. Courts and extra-judicial ODR both exist to resolve disputes. But courts go further; they provide legal certainty and have the power to create rules, features that extra-judicial ODR does not have.

The issue of legal certainty connects to our present problem because legal certainty is about predictability and expectations. Predictability and expectations constitute the bedrock of confidence.[26] This implies that, among dispute resolvers, only courts are able to increase predictability and thus confidence in a field they have jurisdiction over because they establish precedents that others and they themselves will follow. By setting rules, they increase their own predictability and thus the confidence in them, and they increase predictability in a given field and thus the confidence in this field.[27]

---

[25] *See* Teitz, *supra* note 3, at 1014 (focusing on the issue of localization and thus of jurisdiction). Teitz states,

> In cyberspace, one has no idea who or what is at the other end. In fact, on many ODR sites, one searches in vain to determine the physical location of the provider or its owners/members, let alone what kind of training they have had. If you want to sue your ODR provider, on whom do you serve a summons and where? A virtual summons in a virtual world, while coming in the future, is not effective today in most systems.

Id.

[26] Cynthia Hardy, et al., *Distinguishing Trust and Power in Interorganizational Relations: Forms and Facades of Trust*, *in* TRUST WITHIN AND BETWEEN ORGANIZATIONS: CONCEPTUAL ISSUES AND EMPIRICAL APPLICATIONS 64 (Christel Lane and Rheinhard Bachman eds., 1998). Predictability and trust is further discussed in Pichler, *supra* note 9, at 37–42.

[27] For a study on the sociology of case law, based largely on how legal certainty is achieved, see KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA (Paul Gewirtz ed., 1989). Legal certainty (*i.e.* being able to predict the legal solution to a problem) is one of the fundamental roles of law, and it is provided through the application of law by courts. *See* Gunther Teubner, *Un droit*

Consequently, something must be done to increase confidence in ODR by increasing the ability of parties to rely on a third party to intervene should things go wrong. This third party should preferably provide as much legal certainty as possible.

B. The Need for an Architecture of Control

My argument thus far has taken a simple path. Drawing on theories developed for cyberspace and e-commerce, I have stressed that ODR raises issues of confidence. More specifically, my aim has been to show that this confidence issue has three factors: the lack of tangible cues or features that allow risk assessments; the lack of social contexts that provide for reputation; and the lack of predictable remedies should things go wrong. Now my aim is to show that control is one (and I believe the only) solution to that confidence problem.

The three factors just mentioned form an architecture of trust. The core element behind this architecture is *control*. We have confidence in a situation because we know the person or company we are dealing with can be controlled by someone or something that we trust. Control is the basic element of an architecture of trust.[28]

---

spontané dans la société mondiale?, *in* LE DROIT SAISI PAR LA MONDIALISATION 199 (Charles-Albert Morand ed., 2001) ("The social needs that this self-created law of the world society must fulfill are no longer the political regulation of social interactions, but come from the original legal needs of legal certainty and dispute resolution.") (translated by the author). *See also* Gunther Teubner, *Zur Eigenständigkeit des Rechts in der Weltgesellschaft: Eine Problemskizze*, *in* FESTSCHRIFT FÜR JEAN NICOLAS DRUEY ZUM 145 (Rainer J. Schweizer, Herbert Burkert, and Urs Gasser eds., 2002).

[28] *See* Lessig, *supra* note 2, at 40. Although ODR is a very young field, there have already been a large number of attempts to increase confidence in ODR by adopting principles that should govern ODR. But as long as these principles cannot be enforced, they can hardly induce trust. Trust requires a regulation "with teeth." Providing an architecture of trust for ODR thus entails an exertion of control over ODR providers. Trust requires regulation, and regulation requires control. *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 520 (1999) ("Self-regulation, like state-regulation, depends upon architectures of control. Without those architectures, neither form of regulation is possible.").

Tangible features allow customers to know that the person or company they are dealing with will not disappear tomorrow. They know they can come back if something is wrong. They know that an enforcement agency could actually intervene. Tangible features give the impression that there are reliable means of enforcement available. Tangible features are a basic and obvious element of control. In the second part of this article, I consider trustmarks in accreditation systems and clearinghouses as tangible features that allow exertion of control over ODR providers.

A social context makes trust based on reputation possible, and it creates incentives to perform, which in turn induce trust in the person who is to perform. The problem in cyberspace is that one cannot go to the seller's store or the store's community to create bad publicity as an incentive for the seller to abide by its obligations.[29] Bad publicity and reputation are two ways to control a person or a company.[30] It is the connection with the network

---

[29] A. Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49, 72 (1996) ("The accessibility of the store's physical location also makes it easier for an irate customer to create bad publicity, either in the store itself or in the store's community, further creating an incentive for [the seller] to resolve any difficulty."). In this situation it is the traditional "multilateral reputation mechanisms" that cannot work: "When not only the defrauded individual consumer refrains from repeat transactions with a merchant, but all or at least a large group of consumers boycott that merchant, the threat of the sanction will be considerably more powerful," but this requires information sharing. Pichler, *supra* note 9, at 123. The trouble with information sharing is that

> while mere information retrieval and information sharing has in fact become cheaper and easier in the Internet environment, dealing with the new flood of information, processing, organizing, assessing, analyzing, and verifying it, and picking out the useful pieces from the mass has become much more difficult and time consuming. All this suggests that a multilateral reputation mechanism in business-to-consumer electronic commerce entails enormous transaction costs.

Pichler, *supra* note 9, at 126.

[30] The example of the reputation management system at eBay has illustrated this. *See Feedback Policies: Overview*, *at* http://pages.ebay.com/help/policies/feedback-ov.html (last visited on Nov. 12, 2004) (on file with the North Carolina Journal of Law & Technology) [hereinafter eBay Feedback Policies]. eBay's policy states,

constituted by the social environent (put differently: the embership in this community) that allows this control; being connected to this network ensures that information about behavior is transmitted to other persons accessing the network. In Part III, I consider networks connected to clearinghouses as a form of social context and argue that such networks can provide the same type of control that social contexts usually provide.

Predictable remedies in case of problems are also mechanisms that allow the exertion of control over ODR providers. The easier the access to a third party for intervention in case of disputes, the greater the control that this third party is able to exert. If access to a third party is as complicated, slow, and expensive as the usual access to the judicial system, then the control such a third party can exert is minimal. Limited control creates little predictability and thus low confidence, as I have argued above. This is exactly the problem e-commerce faces, which created the demand for ODR in the first place. But if access to a third party is a simple connection through a few hyperlinks, with low costs and short response times—in other words, if remedies are easily available—then the control exerted can be much more effective. In addition, the more predictable the remedy

---

> Feedback is a valuable indicator of a buyer or seller's reputation on eBay. Your member profile includes a feedback score, as well as comments from other members you've bought from and sold to. As an eBay user, you should use caution and good judgment when leaving feedback for another user. What you write will be a permanent part of that user's record on eBay. eBay's feedback-related policies are designed to encourage open and honest trading. However, to ensure that feedback is used for the proper purpose and not abused, eBay has some basic rules that must be followed.

Id. *See also* Rule, *supra* note 22, at 105. Rule states,

> These feedback ratings are taken very seriously, because future buyers and sellers rely heavily on these numerical ratings to decide who they will and will not buy from and sell to. Therefore, the number-one motivation for participating in a SquareTrade dispute resolution process (i.e. the process for eBay disputes) is to protect against an unfavorable rating from the other side.

Id.

and thus the control, the higher the confidence generated—predictability being the basis of confidence. In the next part of this article, I consider online appeals as the most appropriate remedy for disputes arising out of ODR.

III. Control Requires Government

So far my arguments about control have been about the intrinsic connection between confidence and control. I have argued that ODR needs to be controlled to foster confidence in ODR, and it needs to be controlled in such a way that people can see it is controlled. In this part, my first argument is that government must exert this control because government is the most trusted entity in the field of dispute resolution. Then I show three models of ODR regulation, three ways that government could control ODR, regulate it, and thereby instill confidence in it. Finally, I discuss the courts as an already existing architecture of trust and control that ODR may take advantage of and incorporate.

A. Why People Trust Government in the Field of Dispute Resolution

The judicial system may face many criticisms, but they essentially concern its efficiency and effectiveness, not its legitimacy or the trust that people place in courts. In contrast, consumer arbitration—to take an example where control is essentially private due to the very restrictive grounds for appeal—is not criticized for its efficiency or effectiveness, but for its legitimacy and the trust people have in arbitral tribunals when resolving smaller cases.

Private and state justice do not have the same goals, the same incentives, or the same rationale. People usually think courts are principled in a manner that private dispute resolution is not. As Colin Rule writes,

> To a large extent, government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly. Government is also a good

> host for dispute resolution because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding.[31]

Perhaps such an argument is in reality only wishful thinking. Perhaps state justice is in fact not fairer than private justice, as many proponents of the ADR movement claim. Be that as it may, the quality of justice is not directly at issue here; confidence in these forms of justice is. Additionally, the government is still trusted in the field of dispute resolution in a way that private actors are not.

In the following subsections I single out two reasons for this: the "brand" government has in dispute resolution, addressed using the concept of symbolic capital, and the economic goals and business models that are different in private and state justice.

1. Symbolic Capital

Symbolic capital is "the recognition, institutionalized or not, that [different agents] receive from a group."[32] It is a symbolic wealth that confers authority and charisma. It is based on the recognition by society of a particular status, of prestige, of specific qualities, abilities, or assets. It operates by accessing and mobilizing the symbols and symbolic resources of a culture. A person, a body of persons, or an institution has symbolic capital if it is recognized by society as having characteristics that are valuable in a given field. This capital comes from these persons or institutions using certain symbols that are recognized by society.

Brands, for instance, make use of symbolic capital. Advertising seeks to access and mobilize symbols recognized by society to show that a given product or service has some valuable characteristics that correspond to the symbols in question. When advertising is successful, customers trust a product or service to have the characteristics it claims to have. In this manner, brands induce trust through symbolic capital. People buy products or use

---

[31] *See* Rule, *supra* note 22, at 174.

[32] PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 72 (1993) ("The weight of different agents depends on their symbolic capital, i.e. on the *recognition*, institutionalized or not, that they receive from a group.").

services that have a brand because they trust the brand, and thus the product or the service. The brand is trusted because attached to it are symbols of trustworthiness.

As e-commerce demonstrates, brands—and thus symbolic capital—play a very important role in an environment where confidence is lacking.[33] Companies that have a recognized brand do not generally have confidence problems in their web stores.

Symbolic capital also plays a role in dispute resolution. Dezalay and Garth have used the concept in a famous study of international commercial arbitration where they showed that the social recognition of an arbitrator (i.e. his symbolic capital) is one of the crucial factors for his selection as an arbitrator. The more an arbitrator could demonstrate that symbols made him a more credible and trustworthy dispute resolver, the more frequently he was selected. In other words, they showed how symbolic capital is a condition for the parties to trust a person as a dispute resolver and thus to consent to have their dispute handled by this person.[34]

This indicates there is an equivalent to commercial brands for dispute resolution. Some persons or institutions are more trusted than others to resolve disputes. My view is that this is what government in general, and judges in particular, possess: recognition as trustworthy dispute resolvers. Government and judges have a "brand" that instills trust in dispute resolution; they have symbolic capital in this field, and therefore people trust them.

Over time, judges have acquired a high social esteem, a legitimacy that makes them credible dispute resolvers. They form

---

[33] *See* Fukuyama, *supra* note 21, at 6. Fukuyama states,

> We need to assess the competence, reliability and reputation of the product or service. In other words, what is needed as commerce is extended globally over the Internet is an extension of the branding process for the whole range of services and products that could conceivably be exchanged over digital networks. Separated by even greater distances and cultural barriers, electronic shoppers need the reassurance of brands.

Id.

[34] *See generally* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

an institution that has a certain reputation, a certain social prestige, that private dispute resolvers do not possess. Judges are given status and respect in the context of dispute resolution. They have high symbolic capital. They carry symbols that make them socially recognized dispute resolvers. In other words, they are socially trusted when it comes to dispute resolution, much more so than private dispute resolvers. Judges are "notables of law" as only the grand arbitrators and mediators are. But these grand arbitrators and mediators are not those who will solve small and medium-sized disputes, which are most likely to use ODR.

To summarize, most people think that courts are principled, that government in general is to be trusted in dispute resolution, and that it is sufficiently legitimate to do so. Private dispute resolvers receive this level of recognition much less frequently.

2. Funding

It is has often been asserted ODR will become increasingly expensive as attempts to regulate and enforce standards increase. This might not be so. The government could provide many services, from accreditation to cybercourts, without increasing the cost of dispute resolution services for the parties. Because government intervention does not aim to be economically profitable, government can intervene in dispute resolution and thereby lose money. That is what government does with traditional dispute resolution, where courts are absolutely not profitable, nor is the regulation of lawyers and legal practice.

More specifically, cybercourts have the best possible business model for its independence, accessibility, and feasibility. An ODR provider obviously has to secure some source of funding, and there are basically three models it can follow for that. An ODR provider can charge bilateral user fees, where both parties bear the costs. This is best for independence, but it is not acceptable for disputes taking place on uneven playing fields, such as business-to-consumer disputes, because such procedures become inaccessible for consumers.

Another model is the unilateral user fees model, where the business pays for dispute resolution, either on a case-by-case basis

or by membership fees for a trustmark, for instance. But this can obviously create problems regarding independence, as the ODR provider is economically dependent on one of the parties.

The last funding model is the external funding model. Funds come from sources that are in no way related to the parties. Such funds are typically research grants or government funds. But research grants are always limited in time and it is not their goal to provide a long-lasting dispute resolution mechanism. An obvious way for government to use judicial funds is to extend the services provided by its judicial system to invest in cybercourts.

B. Three Modalities of ODR Regulation

How to create and enforce standards to regulate ODR remains one of the most important questions that stakeholders of ODR are struggling to answer. The goal of such regulation is—in addition to ethical considerations such as the quality of online justice—to provide confidence for users of ODR.[35] In the preceding pages, I argued that the baseline of an answer to this question is an architecture of control. Such an architecture provides confidence by permitting regulation. In the following section, I propose three components of such an architecture, three modalities of regulation for ODR.[36]

---

[35] *See* Teitz, *supra* note 3, at 1011 ("How can we create and enforce standards that will provide trust for users of ODR and the even broader area of on-line legal services? This is the question that intergovernmental, governmental, and private entities have been struggling with as e-commerce has emerged.").

[36] I do not address the content of regulation, *i.e.* which principles ODR providers should abide by, because a fair number of institutions private and public have produced a fair number of rules and principles that cannot reasonably be presented in such a limited article. On substantial aspects of the regulation of ODR, *see*, *e.g.*, Alan Wiener, *Regulations and Standards for Online Dispute Resolution: A Primer for Policymakers and Stakeholders* (February 2001), *available at* http://www.mediate.com/articles/awiener2.cfm (on file with the North Carolina Journal of Law & Technology); Thomas Schultz et al., *Online Dispute Resolution: The State of the Art and the Issues* (December 2001), *available at* http://www.online-adr.org/reports/TheBlueBook-2001.pdf, at 78–91 (on file with the North Carolina Journal of Law & Technology); GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION (forthcoming 2004).

The modalities I envision will control information about ODR providers, control access to such providers, and control the provider's work on a case-by-case basis.[37] These modalities, I must add, are applicable in regimes of both self-regulation and state regulation.

1. Accreditation

Accreditation is essentially an information service. A central body—which I shall refer to as an information center—provides information on accredited bodies to a group of users. Information of different origins can be provided in different ways, and thus there are different forms of accreditation. An information center can play the roles of a directory, providing only contact details;[38] a guide, providing a more complete description of claims, including provider claims to meet certain standards;[39] an evaluator, providing an assessment of ODR providers;[40] or a certifier,

---

[37] These modalities of regulation are inspired by the "checking functions" discussed in Lawrence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 199–213 (2001) (discussing creational checking functions, which intervene when the documents authorizing private decision-making are drafted; internal checking functions, which relate to self-restraint and the culture of the decision makers; and external checking functions, which involve a review of the decisions by appellate bodies, judicial or otherwise).

[38] *See* Mirèze Philippe, *Where is everyone going with online dispute resolution (ODR)?*, 2002 INT'L BUS. LAW J. 167, 183, *available at* http://www.ombuds.org/cyberweek2002/ARTICLE%20ODR1.pdf, (on file with the North Carolina Journal of Law and Technology) (stating that the directory "communicates" to users the addresses of ODR providers together with hyperlinks).

[39] *See id.* The guide "sets up a list of addresses and details about the services offered by ODR providers, allowing a well-informed consumer to make a choice." *Id.* at 183. The claim to meet certain standards is a process of self-certification, which is for instance envisioned by the American Bar Association Task Force on E-Commerce and ADR, *supra* note 8, at 36 (contemplating, among other solutions, an "informational entity" that provides "lists for consumers ODR providers that self-certify that they meet [certain] standards").

[40] *See* Philippe, *supra* note 38, at 183. The information center provides "an evaluation of the ODR providers based on investigations and on users'

certifying through a trustmark that an ODR provider meets certain standards.[41] In the following, I shall only consider the information center's role as a certifier, as it is the most achieved form of accreditation because of the strength of the quality control it yields.

A certification process uses information as a control lever. This lever allows the certifier to regulate the certified bodies. Information is a control lever because it is a valuable resource. It is a valuable resource because it allows for informed choices by users, thereby determining which ODR provider gets the case. The control of a valuable resource allows provision of incentives, which in turn permits regulation.[42]

Information about ODR providers can be easily controlled because it is currently nonexistent[43]—any trusted source would be

---

appreciation." *Id.* at 183. *See also* American Bar Association Task Force on E-Commerce and ADR, *supra* note 8, at 34. The Task Force concluded,

> Another possible function that the iADR Center could serve is to provide feedback to the public on the quality of service offered by various ODR Service Providers. This could be done through providing a mechanism for filing a complaint with the relevant provider. Alternatively, a chatroom or bulletin board could be created where users could post their feedback.

Id.

[41] *See* American Bar Association Task Force on E-Commerce and ADR, *supra* note 8, at 30 (contemplating an "informational entity" that "issues and administers a formal ODR trustmark system with auditing and enforcement powers."). *See also* Philippe, *supra* note 38, at 184. These four modalities of accreditation are addressed in further details in Kaufmann-Kohler & Schultz, *supra* note 36.

[42] On the control of a valuable resource as a source of private regulation, *see* Henry H. Perritt, *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 237. For a discussion more closely related to ODR see Thomas Schultz, *Online dispute resolution (ODR): résolution des litiges et ius numericum*, 48 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 153, 196 (2002).

[43] *See* American Bar Association Task Force on E-Commerce and ADR, *supra* note 8, at 27. When the ABA Task Force on E-Commerce and ADR considered the problem of enforcing global standards of conduct for ODR provider, it first brought about the view that "one of the largest problems is the absence of many structures pursuant to which consumers and businesspersons can obtain the information necessary to make informed choices about e-commerce and ODR." *Id.*

able to exert global control on such information. If a trusted institution provides information about ODR providers, then the users provided with this information are likely to trust and choose the provider that is recommended by the institution, rather than another ODR provider. That information enables users to make an informed choice.

Put into context, this means that if the ODR provider does not comply with the information controller's requirements, the information controller can stop providing information concerning the ODR provider's activities, reducing the ODR provider's chances of referrals.

A trustmark is a form of recommendation to use the trustmarked providers. During a certification process, the information expressed by the trustmark is a tangible cue or feature that provides for confidence.[44] It allows for "judging among ODR providers."[45] Furthermore, it permits regulation: The regulatory framework of a trustmark is made up of the conditions for granting it, and these conditions can be easily connected to a set of substantive rules.

But using information as a control lever requires that those seeking the information trust its provider. The trust in the information is what makes it a valuable resource. It seems likely that the provider of information that is most likely to be trusted in the field of dispute resolution—especially by normal consumers who know nothing about dispute resolution—is a government.

It is often argued that accreditation using a trustmark, especially if provided by the government, would be "too much too early."[46] Perhaps this is too radical a view. It all depends on how

---

[44] *See, e.g.*, Fridolin Walter, *E-Confidence in E-Commerce durch Alternative Dispute Resolution*, 2001 AKTUELLE JURISTISCHE PRAXIS 755.

[45] Teitz, *supra* note 3, at 1014 ("A trustmark system, like the Good Housekeeping seal of approval or the Underwriters Laboratory seal, would provide some mechanism for judging among ODR providers and would assure compliance with certain minimum standards. It has the potential to cut across geographic boundaries and provider categories.").

[46] *See, e.g.*, Melissa Conley Tyler and D. Bretherton, *Research into Online Alternative Dispute Resolution: Exploration Report Prepared for the Department of Justice Victoria*, International Conflict Resolution Centre, University of Melbourne (March 2003), *available at*

precise or detailed the regulation enforced by the trustmark is. State regulation ensuring that only a bottom-line quality of justice is provided should not be an impediment to the development of ODR. On the contrary, it should provide confidence. The goal in this respect is to find a balance between control, in order to provide confidence, and flexibility, in order to avoid unnecessary obstacles.

2. Clearinghouses

A second modality of ODR regulation is control of access to ODR providers. I contend that this modality permits the regulation of ODR in different formats because it allows the control of different aspects of access to ODR providers. It is also my view that the best controller of such access is a clearinghouse.

A clearinghouse is a form of "accreditation plus." It is a source of information about ODR providers, just like an accreditation body, and it is also a portal to such providers. A clearinghouse acts as a go-between for users and providers of ODR. It can be a go-between in different ways, and there are different forms of clearinghouses. I consider one that offers three services: It provides information about the accredited providers and helps choose an appropriate provider; it offers filing forms to

---

http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Reseach_ADR_Exploration_Report_03.pdf, at 49 (on file with the North Carolina Journal of Law & Technology) ("Creating a certification process for online ADR . . . appears premature given the nascent stage of the industry in Australia. This remains an option for the future when needed."). The American Bar Association Task Force on E-Commerce and ADR considered the following main options involving a trustmark: (1) a Global Online Standards Commission that would "operate on a worldwide basis and issue binding ODR standards. The enforcement of binding standards might involve a trustmark program"; (2) an ODR Trustmark Entity that would "establish ODR Guidelines and issue and administer an ODR trustmark program for ODR Providers. The entity would have the authority to 'pull' the trustmark in appropriate cases and would thus have a certification, auditing and enforcement role over ODR Providers;" and (3) an ODR Trade Association that would "establish industry-approved ODR guidelines and administer the ODR trustmark to member companies." The Task Force, however, considered that a trustmark would be too strong of an intervention in the current state of affairs. American Bar Association Task Force on E-Commerce and ADR, *supra* note 8, at 27–31.

facilitate filing; and it provides a history of a provider's dispute resolution activities and feedback from users.

Such a clearinghouse would be able to regulate in three ways: (1) by controlling information about ODR providers, (2) by controlling filing, and (3) by reputation set against the rules of the clearinghouse.

A clearinghouse's form of regulation through the control of information is similar to the way a simple accreditation process regulates, as described above. The clearinghouse selects the providers that it judges to be in compliance with its standards. In addition, the clearinghouse interacts with the users to provide advice concerning the suitability of a provider for a specific dispute, which necessarily involves a supplementary assessment of the provider. The choice of the clearinghouse to recommend one provider rather than another is one way to regulate these providers.

Controlling the filing of a dispute is a first step in the resolution of the dispute. It characterizes the dispute, presents facts, provides the allegations of the claimant, and thereby channels some of the future work of an ODR provider. Put differently, this is a light form of legal counsel. It is obviously a limited form of regulation, but it contributes to the global architecture that constrains the ODR provider, thus controlling and regulating it. In addition, this regulatory power of filing forms becomes stronger if the clearinghouse also acts as a payment intermediary between a user and a provider of ODR.

Reputation of ODR providers can be built and used by a clearinghouse if it connects users and providers of ODR to a system that keeps track of their dispute resolution history. Over time a comprehensive history of the ODR provider could develop, creating a reputation for the provider. A clearinghouse could in other words be used as a reputation management system for ODR providers. Just as it is generally accepted that such a system builds trust in e-commerce transactions,[47] it seems common sense that a system of reputation would build trust in the e-commerce service that is ODR.

---

[47] *See* Fukayama, *supra* note 21.

This example of a reputation management system is drawn from eBay,[48] which also plays the role of a clearinghouse for transactions. It is a portal that provides information and access to buyers and sellers. eBay built its community of buyers and sellers through its portal and reputation system. This community considers, as the study by Katsh et al. indicates,[49] that it is regulated by "eBay law," which is the relevant social context. In the same manner, it might be possible to develop a community of users and providers of ODR who understand that it is regulated by the rules adopted by the clearinghouse. It would be the relevant social context because the clearinghouse could build the relevant reputation that could affect the future economic well-being of an ODR provider.

Projects of clearinghouses already exist, but none of them to my knowledge are governmental.[50] In the terms that I have suggested, I believe normal consumers would trust a service related to dispute resolution provided by government.

---

[48] *See* eBay Feedback Policies, *supra* note 30.

[49] Katsh, et al., *supra* note 10, at 728. Katsh states,

> As we encountered disputants and observed them as they participated in our [ODR] process . . . we became persuaded that disputants were, indeed, participating as if they were 'in the shadow of the law.' The law whose shadow was affecting them, however, was eBay's law rather than the shadow of any other law. . . eBay was important to them, and eBay ran its site in such a way that a user's eBay future could be affected by disputes that arose. If they ignored eBay law, they did so at some risk to their future online life and even to their economic wellbeing.

Id.

[50] The most important existing project is the International Chamber of Commerce's project of a "dispute resolution clearing house" which aims at both informing consumers and businesses about existing business to consumer ADR and ODR schemes and actively assisting the parties to choose the best such scheme for their needs. The goal of the DCH is to allow ADR and ODR providers to access larger markets while helping consumers cross linguistic and cultural borders.

3. Online Appeals

The third modality of ODR provider regulation is control of the providers work on a case-by-case basis. As I have contended in the first part of this article, the outcomes of ODR procedures often cannot be reviewed in court, for exactly the same reasons that make courts an unrealistic option for most disputes handled by ODR providers—they are too distant, they are too expensive, and they are too slow. Offline appeals are often not feasible. Put differently, there is a lack of predictable remedies for parties to ODR procedures who are dissatisfied with the outcome.

There could, however, be online appeals through the addition of a second layer of ODR. A second "layer" of online proceedings would allow a review of the decision without losing the benefits of ODR; it would provide an immediate and accessible opportunity to correct erroneous decisions.[51]

Online appeals processes have been proposed, such as the UDRP by the World Intellectual Property Organization.[52] Such proposals usually face criticism based on perceived delays and expenses,[53] ease of abuse, and lack of finality or certainty.[54]

These criticisms are not entirely justified. First, there must obviously be some kind of review of ODR outcomes, and an online appeals process could reduce expense and time and provide a more

---

[51] *See, e.g.*, Helfer & Dinwoodie, *supra* note 37, at 251; Philippe, *supra* note 38, at 188. The authors state, "Decisions of third parties [in non-binding arbitration] are of [a particular nature] and are not awards. They may be accepted or contested by consumers. What happens in this latter situation and what remedy can be offered in order not to lose the benefits of the out-of-court settlement?" The authors then advocate an online appellate body. *Id.*

[52] A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"-Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605, 638 (2002).

[53] *See, e.g.*, Milton Muller, *Rough Justice: An Analysis of ICANN's Dispute Resolution Policy*, at 19 (Nov. 2000), *available at* http://dcc.syr.edu/miscarticles/roughjustice.pdf (on file with the North Carolina Journal of Law & Technology) (arguing that an appellate procedure "would add to the expense and delay of resolving disputes through the UDRP").

[54] This is one of the reasons leading international commercial arbitration institutions to eschew appellate mechanisms. *See* Helfer & Dinwoodie, *supra* note 37, at 252.

meaningful review of decisions than judicial review.[55] Second, the risk of abuse could be limited by providing for a *certiorari* jurisdiction—the appeal body's acceptance of a case would be at its discretion, similar to the jurisdiction of the United States Supreme Court.[56] Third, finality and certainty of ODR decisions is exactly what users of ODR who have difficulties trusting the system do not want, which explains why online binding arbitration, as opposed to mediation or non-binding arbitration, struggles so much.

In addition, an online appeals process would increase the uniformity and predictability of the entire system by harmonizing views of the different dispute resolvers involved and providing a more consistent practice.[57] Put differently, it would make the

---

[55] *See* Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL AND EMERGING BUS. L. 191, 224 (2002). Thornburg states,

> Although theoretically a party disappointed with the result of the UDRP process can file a lawsuit to try to change the result, it is not an appeal but a de novo process. It is also likely to be characterized by the problems of cost and delay that the UDRP was adopted to prevent. There have been more than three thousand ICANN proceedings disposed of by decision, and only about twenty five lawsuits filed to challenge the result. While this could reflect total happiness with the process, it seems more likely that it is at least in part due to the unrealistically short deadline and the probable expense of the process. An internal appeal, particularly one in which the appellate panel was as balanced as possible, could add less cost for both parties and provide a more meaningful check on erroneous decisions.

Id.

[56] Proposed for the UDRP by Michael Donahey. *See* Michael S. Donahey *A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy*, 18(1) J. INT'L ARB. 131, 132 (2002).

[57] *See id*. *See also* Michael S. Donahey, *Divergence in the UDRP and the Need for Appellate Review*, (5)11 J. INTERNET L. 1 (2002) ("Is the UDRP a system of law, or only of the luck of the draw? The UDRP lacks an appellate review which can provide uniformity to the process."). Predictability, or course, comes at the expense of flexibility. Having an appellate body will certainly drive the panelists to focus on making their decisions "appeal-proof" and therefore they will have less room for maneuver and less flexibility in their argumentation. But ODR is in need of trust and confidence more than anything else, and

practice of those ODR providers that are connected to a common appeals process resemble a legal system or a consistent regulation.[58] This is a source of predictability. Finally, an appeals process might highlight problematic issues for user awareness and subsequent political review.[59]

Predictability, as I have argued in the first part of this article, is a *sine qua non* for confidence in ODR. If this second layer of ODR could be a cybercourt or another ODR process tightly controlled by government and if the parties can access state justice after the first ODR procedure, then it is likely that they will be confident with the first ODR procedure.

C. Cybercourts: Integrating ODR into an Already Existing Architecture of Confidence

In the preceding pages, I have proposed three modalities of ODR regulation that constitute elements of an architecture of confidence. These three modalities pose a solution to the overarching characteristics of the confidence problem in cyberspace, namely the lack of tangible features, the lack of social contexts, and the lack of predictable remedies.

These three modalities are constructs that aim at building an architecture of confidence that already exists elsewhere. The judicial system is such an architecture, and it begins to be available for cyberspace through cybercourts.

Cybercourts are national courts that provide dispute resolution services, both litigation and court-based ADR, using electronic communication.[60] They are integrated into such an

---

predictability is one major factor of trust and confidence. For arguments against an appellate body, *See* Daniel Lametti, *The Form and Substance of Domain Name Arbitration*, 7(2) LEX ELECTRONICA (Spring 2002), *available at* http://www.lex-electronica.org/articles/v7-2/lametti.htm (on file with the North Carolina Journal of Law & Technology) (arguing against an appellate body because "[a]rbitration is meant to be primarily party-focused and fact-driven, and not worried so much about the greater coherence of the whole system").

[58] *See* Muller, *supra* note 53, at 19.

[59] *See* Helfer & Dinwoodie, *supra* note 37, at 251.

[60] *See* Kaufmann-Kohler & Schultz, *supra* note 36 (discussing the current state of affairs in the field of cybercourts).

architecture of confidence because (1) they have tangible features—such a court would be held in a building that has a history and that provides many points of reference indicating that this court can be trusted; (2) courts are very well integrated in many social contexts and judges have a reputation, be it only as an institution as I argued in connection with symbolic capital; and (3) courts are the prime example of predictable remedies. Courts are a reference in society because they are integrated into a well-established architecture of confidence. For the government, resolving disputes through cybercourts is the easiest way to use an architecture of confidence; it requires the addition of very few elements to the already existing architecture of confidence for offline courts. In addition, cybercourts have specific advantages over extra-judicial forms of dispute resolution. These advantages, which mainly concern confidence,[61] are set out as follows.

First, national courts provide binding decisions that are appealable, whether after litigation or in an extra-judicial ADR process. Binding decisions are more effective than the contractual outcomes of extra-judicial negotiation and mediation because they

---

[61] *See* Thomas Schultz, *An Essay on the Role of Government for ODR. Theoretical considerations about the future of ODR*, *in Online Dispute Resolution (ODR): Technology as the "Fourth Party*," PAPERS AND PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR 5 (Ethan Katsh & Daewon Choi eds., 2003), *available at* http://www.odr.info/unece2003/pdf/Schultz.pdf (on file with the North Carolina Journal of Law & Technology). *See also* Anita Ramasastry, *Government-To-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 168 (2004). Schultz asserts that the future of ODR lies with government-to-citizen disputes because "[m]any reasons for the lack of ODR deployment in the private sector may be eliminated when ODR is deployed in the public sector." *Id.* The author, however, alleges that

> [a]t present, it may be premature to advocate full-blown court-based adjudication that is conducted solely in cyberspace. Although there have been some moves to create online courts (at least in the civil context), there are much greater considerations at stake with respect to transferring litigation proceedings, which involve complex issues relating to documentary evidence, witnesses, and the role of counsel, for example, into the online context.

Id. But as the author implicitly admits, these obstacles are only temporary.

are easier to enforce. Extra-judicial mediated settlements, for instance, are in most countries difficult to enforce because they only qualify as contracts;[62] their enforcement takes time and produces costs and thus does away with the advantages gained by ODR in the first place. Judicially mediated settlements are much easier to enforce because they qualify as "consent judgments" or as another form of enforceable instrument.[63] In addition, if one starts a court proceeding, one knows that it will result in either a decision or a settlement. In any case, one's dispute will be resolved. But judgments can be appealed on extensive grounds—they are easier to appeal than arbitration awards. This appealable character of judgment makes courts less efficient than arbitration because the procedures become longer and more expensive, but it induces more trust.

Second, courts have the advantage of publicity and the democratic accountability of judges, implied by the fact that the latter are public servants. Publicity and published decisions are the primary mechanisms by which judges are held to account to the public. In addition, when one knows that a judgment is likely to be scrutinized and discussed by a large number of persons, then one believes that the decision-maker will be more careful than in a situation where no one save the parties will see the decision, as is

---

[62] *See, e.g.*, ALAN S. RAU, EDWARD F. SHERMAN AND SCOTT R. PEPPER, MEDIATION AND OTHER NON-BINDING ADR PROCESSES 193 (2nd ed., 2002) (providing for U.S. law). *See also* Case 414/92 *Solo Kleinmotoren GmbH* v. *Emilio Boch*, 1999 E.C.R. I-2237 (1999) (providing for E.U. law).

[63] Domestically, mediated settlements are often considered consent judgments, which are enforceable following the same procedure as any other judgment. *See, e.g.*, IOWA CODE ANN. § 216.15A (2004) (providing that the state attorney general's office may file a civil action for enforcement of a breached mediation agreement in the context of housing discrimination) In Europe, judicial settlements can easily be recognized and enforced abroad under Article 58 Brussels I Regulation and Article 51 Lugano Convention, which provide that "a settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments." The enforcement procedure for authentic instruments is very similar to the enforcement of judgments abroad). *See also* the French Supreme Court decision of 12 June 1991 (*Cassation civile*, 2nd court) and comments Durieux in 1992 DROITS 320.

usually the case in arbitration. This democratic accountability and the publicity it includes induce trust.

Third, judges as an institution have great symbolic capital in the field of dispute resolution; they have a high overall social esteem and a legitimacy that makes them credible. They inspire trust in disputing parties. In an environment that does not inspire confidence, such as the electronic environment, the selection of a dispute resolution provider will be based on the provider's ability to inspire confidence more than its merit. Consequently, cybercourts must be promoted, not necessarily because they provide the best services, but because they inspire trust, whether they work well or not.

Finally, cybercourts, as representatives of the state, have much greater authority to place blame upon a business. Parties sometimes want more than a solution to their dispute; sometimes they want the business that has cheated them to be labeled a social opprobrium. They want an authoritative figure to say that the business was wrong and they were right. It is a large part of what we call catharsis, and thus justice. Judges can do that much better than private dispute resolvers.

IV. Conclusion

Trust, control, and government: These are the three components that are essential for the development of ODR.

Trust is a general problem for almost all online activities. The higher the stakes that people have in an online activity, the more they will need to trust the activity before they engage in it. In ODR, the stakes are relatively high. They are not only financial. They are also emotional and structural, in the sense that availability and effectiveness of remedies are part of the worldview people have of cyberspace. The solution to such problems is an architecture of trust, a built environment composed of features that provide for trust: tangible cues, social contexts, and predictable remedies. These features have one aspect in common: They are based on control of the different actors in the field. ODR providers must be controllable.

At least three modalities exist for control of ODR providers. They can be controlled by information provided through an accreditation process involving a trustmark. Their access allows a second modality of control, exerted through clearinghouses. Access has three components that can all be controlled: information about providers, regulation of case filing, and establishment of their reputation. Their work can be reviewed on a case-by-case basis through online appeals. Control, however, only provides trust in the controlled entity if the controller is itself trusted. The most trusted controller in the field of dispute resolution is the government.

Government is trusted because it has symbolic capital in the field of dispute resolution; judges, for instance, have status, respect, and legitimacy in dispute resolution. Government is also trusted because it has an incentive to keep society functioning. Its dispute resolution services do not seek to be profitable, which allows it to have business models that exclude all structural risk of dependence and inaccessibility.

In the field of ODR, such discourse advocating control, government intervention, and regulation is often rejected because it is thought to create obstacles to the development of ODR. Those opposed to control often adopt a cyber-libertarian approach, which is a remnant of the earlier days of cyberspace ideology: The best regulation is no regulation, or at best pure self-regulation.

This kind of approach is too radical. First, regulation is a sliding scale; it is not a case of extremes (i.e. no regulation or full-blown oppressive regulation). There are varying levels of regulation. The best regulation for ODR is, in my view, minimal regulation which is strictly and publicly enforced; it provides for trust and at the same time it leaves room for development. In the end, we should simply remember Lawrence Lessig's words about cyberspace in general: "We should resist simpleton distinctions—the choice has never been between anarchy and totalitarianism, or between freedom and [total] control."[64]

[64] *See* Lessig, *supra* note 2, at 544.