

GETTING TO YES....ONLINE: A LOOK AT THE HISTORY, CONCEPTS, ISSUES AND PROSPECTS OF ONLINE DISPUTE RESOLUTION SYSTEMS (ODRS)*

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I. INTRODUCTION

In traditional commercial transactions, disputes over commercial contracts and agreements are resolved by resorting to the judicial machinery. However, the unnecessary expenses and delays involved in settling controversies through this mode of dispute resolution have been felt by litigants, hence the emergence of the trend towards resorting to “alternative” modes of dispute resolution or more commonly known as “ADR”. ADR was thus seen as a remedy to the problem of clogged court dockets, which caused the delay in dispute resolution through litigation.

ADR is actually not a very new concept; it has in fact been around in the United States since 1920.¹ It gave parties the flexibility to choose the dispute resolution procedure that seems most appropriate given the nature of their relationship, the subject matter of the dispute, and their specific needs, which may include confidentiality and cost-effectiveness among others.² It is generally informal, less adversarial, and solution-oriented as opposed to blame-oriented. It likewise avoids procedural and jurisdictional hindrances.³ The rationale behind using ADR includes the reduction of the caseloads of overburdened courts,⁴ the reduction of expenses and delays from traditional litigation⁵ and the provision of an alternative means of

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¹ *Past, Present & Future: Building on 70 Years of Innovation—The AAA Looks to the 21st Century*, 51 Disp. Resol. J. 109, 110 (1996).

² Claro V. Parlate, *Challenges to ODR Implementation in a Developing Country*. Proceedings of the UNECE Forum on ODR (2003) at <http://www.odr.info/unece2003>.

³ *Id.*

⁴ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 Ohio St. J. on Disp. Resol. 264 (1996).

⁵ *Id.* at 275.

dispute resolution to those disillusioned with the adversarial mode of litigation.⁶

For a time, ADR has been hailed as the answer long sought after by the merchants who are searching for not only a just and fair resolution to their commercial disputes but also a solution that will not involve too much time and unnecessary expenditure on their part.

The ADR solution was however, at best, short-lived. The growth and evolution of the Internet has been amazing. What was once conceptualized as a means and venue for sharing of information was transformed almost overnight into a means of communication and correspondence, which further evolved into a medium where trade and business can be conducted online. With the continuing expansion and increase in complexity of online business transactions, disputes over such transactions are definitely inevitable. The advent of electronic commerce brought to the fore a host of problems and issues, which may not adequately be addressed by the traditional ADR mechanisms people have been used to.

Indeed, resolving disputes that arise from online transactions may be difficult in that unlike the "real world", cyberspace has no established legal framework to address "virtual" disputes.⁷ A host of behaviors and attitudes not present in the "real world" exist online.⁸ These differences prompted the need to reexamine the ADR mechanisms we have been used to and signaled the need to develop an alternative form of dispute resolution solely for cyberspace.⁹ Hence, the emergence of online dispute resolution systems or more commonly known as "ODR" systems.

Online Dispute Resolution (ODR) shall be the focus of this paper. The paper shall first discuss online dispute resolution systems in general, giving the reader a bird's eye view on the subject matter. It shall then delve into the specific kinds of ODR mechanisms available in the Net today, namely Online Negotiation, Online Mediation and Online Arbitration. Three different sections of the paper will be devoted to give an in-depth discussion on these areas of ODR. These sections shall first describe the procedures involved, thereby giving the reader a feel on how the system

⁶ *Id.* at 277.

⁷ Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems and a Proposal*, 3 Harv. Negotiation L. Rev. 175, 176 (1998).

⁸ M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 Conn. L. Rev. 955 (1996).

⁹ *Id.*

works, it shall then point out issues and problems faced by the ODR mechanism under discussion, and it shall also give an update on the current status of the mechanism discussed.

The paper shall then proceed to situate the previous discussions on ADR and ODR development abroad in the Philippine setting. In this section, the reader shall be given a short history as well as an update on the status of ADR and ODR implementation in the Philippines. The various legal issues facing this emerging field shall be discussed as well. This section shall also highlight the first ever Philippine online dispute resolution website and introduce its functions and procedures. The paper shall then proceed to discuss the various advantages and disadvantages of ODR as well as point out the pertinent legal issues and problems faced by ODR toady with the aim of giving the reader a more holistic and objective view on the subject matter. Finally, the paper shall conclude by enumerating future trends and possible areas for development in this emerging field.

II. ONLINE DISPUTE RESOLUTION (ODR)

A. INADEQUACY OF ADR

At first blush, it may observed that use of ADR as a mode of dispute resolution may not exactly fit the peculiar requirements of cyberspace. For one, ADR is vested with social values and concerns that may not be possible or practical to retain in an electronic medium.¹⁰ Electronic commerce (e-commerce) for instance involves a convergence of various individuals or institutions that come from varied and diverse real world cultures.¹¹ But does this mean that ADR as a mode of dispute resolution has to be altogether jettisoned in favor of a totally different mode of dispute resolution tailor-made for the peculiar needs of cyberspace?

Definitely not. Various commentators have posited the view that disputes in cyberspace do not require the creation of a new sui generic institution exclusively to resolve cyberspace disputes.¹² Rather, existing institutional alternative non-judicial dispute resolution procedures may be used in new and creative ways that synergistically couple the efficiency and flexibility of traditional alternative dispute resolution with the technological

¹⁰ Llewellyn Joseph Gibbons, *No Regulation, Government Regulation or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 Cornell J. L. & Pub. Policy 492 (1997).

¹¹ *Id.*

¹² William J. Clinton, A Framework for Global Electronic Commerce, 11 (July 1, 1997, available at <http://www.ecommerce.gov/framework.htm>).

and communicative nature of cyberspace. In other words, what is called for is not the total abandonment of ADR but rather the use of ADR techniques and processes online.¹³

Hence we see the emergence of a variant of ADR, one which, on the one hand retains the basic principles and procedures of ADR but with an added twist--the incorporation of online Internet technology into the traditional ADR mechanism. What thus emerged is an ADR mechanism, which can be used in cyberspace to resolve either or both online and offline disputes—ODRS or online dispute resolution systems.

B. THE EMERGENCE OF ODR

“ODR” refers to the use of the Internet and other web-based technologies to facilitate traditional Alternative Dispute Resolution (ADR).¹⁴ It may also refer to the adaptation of ADR techniques to the online environment.¹⁵ It may cover mechanisms for dispute prevention, ombudsman programs, conflict management, assisted negotiation, early neutral evaluation and assessment and consumer programs.¹⁶ It not only provides access to justice where there was practically none before, it also provides such access 24 hours a day, 7 days a week unbound by time and physical constraints. It also eliminates the “posturings and gamesmanship” that characterize and prolongs offline negotiations.¹⁷

Thus, the use of ADR to ease the burden of the courts was even more enhanced with the use of ODR technology. No wonder, ODR is heralded as the computer mediated communication equivalent of ADR.¹⁸ Moreover, it functions not only as a digital communication channel; it has the additional capability of information processing as well.¹⁹ It was even observed that ODR technology may be so influential on mediation as to almost become the “fourth party” to the mediation.²⁰

¹³ Peter H. Ney, *The Internet Offers Alternative Dispute Resolution Options*, 75 Colo. Law. May 29, 2000.

¹⁴ American Bar Association Task Force on E-commerce & Alternative Dispute Resolution at <http://www.law.washington.edu/ADA-eADR>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ <http://www.webmediate.com/intro>. The site explains that experienced mediators and litigators attest that there is no greater obstacle to achieving rapid, mutually agreeable settlements in the offline world than the posturing and “reactive devaluation” of claims by disputing parties.

¹⁸ ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION*, 93-116 (2001).

¹⁹ *Id.*

²⁰ *Id.*

ODR can take place either entirely or partly online and may involve either those that arise in cyberspace or those that arise offline.²¹ Offline disputes can be addressed with traditional dispute resolution mechanisms supplemented with online technologies.²² Moreover, ODR greatly aids mediators regardless of whether he uses “interest-based” or “rights-based” approaches or whether he employs “facilitative” or “evaluative” methods.²³

ODR ranges from mediation, which aims at encouraging the parties to reach an amicable voluntary resolution of their disagreement, to binding arbitration that imposes on the parties a legally enforceable arbitral award through the reasoned decision of an arbitrator, who applies private law created by the parties to the dispute.²⁴ These ODR mechanisms shall be discussed in greater detail in the succeeding parts of this paper.

To date, many ODRS web sites are currently operating and each ODRS has its own procedure for resolving disputes. Examples of these websites include: *Virtual Magistrate Project*,²⁵ *Online Ombuds Office*,²⁶ *iLevel*,²⁷ *Better Business Bureau*,²⁸ and *World Intellectual Property Organization*.^{29,30}

III. ONLINE NEGOTIATION

Negotiation is the most common form among all modes of alternative dispute resolution that has led to out-of-court settlement of disputes. With the use of technology, the potential of negotiation is further enhanced by ODR.³¹

²¹ Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 Fordham L. Rev. 985, 990-95 (2001).

²² Richard Birke, Louise Ellen Teitz, *American Law in a Time of Global Interdependence: National Reports to the XVIIth International Congress of Comparative Law: Section II U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 Am. J. Comp. L. 181 at 206-07 (2002).

²³ M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 Conn. L. Rev. 953 (1996).

²⁴ Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* (1994).

²⁵ The VMP website closed after its trial run. Attempts to reach its website have failed.

²⁶ <http://aaron.sbs.umass.edu/center/ombuds/default.htm>.

²⁷ <http://www.ilevel.com>.

²⁸ <http://www.bbb.org>.

²⁹ <http://arbiter.wipo.int/center/index.html>.

³⁰ Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837.

³¹ Claro V. Parlade, *Challenges to ODR Implementation in a Developing Country*. Proceedings of the UNECE Forum on ODR 2003 at <http://www.odr.info/unece2003>.

An online negotiation service does not evaluate the merits of a claim that is submitted to it. Instead, parties submit offers that, if falling within a previously agreed range, will end the dispute, resulting in the parties splitting the difference. Software filters keep confidential the offers that are not within the range. Furthermore, the parties can drop the negotiations at any time. Moreover, fees are usually nominal and low which often ranges from 2 percent to 4 percent, or less, of the disputed amount.³²

A. CYBER NEGOTIATION WEBSITES

In cyber negotiation, an aggrieved individual initiates a claim by logging onto the service's secure website and setting a deadline for resolution, which is typically 30 to 60 days. The service then emails the other party to let him know that a settlement offer has been proposed and to give both parties access to the website. The party can either accept or decline to participate. If they decide to participate, he logs onto the website and submits a demand. The computer software automatically compares the demand with the settlement offer and emails both parties to let them know whether they are within the "range" of settlement or whether there has been any movement towards settlement.³³

Websites like *Cybersettle*,³⁴ *SettlementOnline*,³⁵ and *clickNsettle*,³⁶ are fully automated cyber negotiation websites that offer entirely online services focusing primarily on negotiating monetary settlements.

Cybersettle and *SettlementOnline* allow three rounds of bidding.³⁷ The initiating party enters settlement offers ranked for the first, second, and third rounds as well as expiration dates for those rounds. The computer software then emails the other party explaining that a settlement offer has been made and requests the other party to put forth counteroffers for the first, second, and third rounds. The computer software compares the offers and counteroffers for each round to ascertain whether the parties have reached a

³² Roger LeRoy Miller & Gaylord A. Jentz, *Law for E-Commerce* 69, 71, 73 (2002).

³³ Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, Duke Law & Technology Review at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>.

³⁴ <http://www.cybersettle.com>

³⁵ <http://www.settlementonline.com>

³⁶ <http://www.clicknsettle.com>.

³⁷ Cybersettle Demonstration at http://www.cybersettle.com/demo/demo_pf.asp. Settlement Online Pilot Program Proposal at <http://settlementonline.com/Proposal.html>.

settlement.³⁸ If the software determines that a settlement has not been reached, their offers remain confidential and future bargaining positions are unaffected.³⁹

ClickNsettle on the other hand allows many rounds of offers and counteroffers within a specified period of time.⁴⁰ The parties are required to increase (or decrease) their offer (or counteroffer) by a specified percentage over their previous offer (or counteroffer) to ensure that the negotiations take place in good faith. If a settlement is not reached within the specified time period, the offers expire and the negotiation fails. The parties are free to resubmit their claim or proceed with another mode of dispute resolution (i.e. arbitration or litigation).

IV. ONLINE MEDIATION

Mediation is the process whereby a disinterested third party or "neutral" assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior.⁴¹ Mediation proceedings are informal and inexpensive. Moreover, a mediator may not make any binding decision although he may suggest possible solutions.⁴² There are two principal models or styles of mediation--the facilitative style and the evaluative style.⁴³

In facilitative mediation, the mediator facilitates communication between the parties and in a non-directive way helps them reach a mutually satisfactory solution.⁴⁴ In evaluative mediation on the other hand, the mediator plays an active role in helping the parties to accurately assess the strengths and weaknesses of their respective cases, and to predict what a likely result of an adjudication of the matter might be.⁴⁵ Often, the parties

³⁸ In Cybersettle, a settlement is reached if there is less than 20% between the offers in any of the rounds, and then the claim will settle for the average of the two amounts. SettlementOnline on the other hand allows the parties to set their own settlement range for each individual case.

³⁹ Cybersettle Claim Resolution Services at <http://www.cybersettle.com/products/claimresolution.asp> and SettlementOnline Illustrating the Automated Negotiation at <http://settlementonline/Proposal3.html>.

⁴⁰ Lucille M. Ponte, *Boasting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 Alb. L. J. Sci. & Tech. 441, 442-44 (2002).

⁴¹ JOHN W. COOLEY, *MEDIATION ADVOCACY* 2 (1996).

⁴² George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 Hastings Comm. & Ent. L. J. 712 (1997).

⁴³ See note 41, *supra* at 18-20.

⁴⁴ *Id.* at 18.

⁴⁵ *Id.* at 18-19.

request the evaluative mediator to provide them with an opinion of the fair settlement value of the case or with a recommended solution.⁴⁶

Regardless of the model used, for mediation to be most effective, the parties must perceive the mediator to be impartial, perceptive, persuasive, trustworthy, interested, innovative and prepared.⁴⁷ The parties must enter into mediation with good faith⁴⁸ and with the intent to resolve the dispute.⁴⁹

At a minimum, online mediation is feasible only if the technology permits it, the laws allows for it, there is a need for it, and it can satisfy this need. Mediators must understand the technology that created the environment that nurtured the commercial relationship.⁵⁰ Disputes arising from complex relationships require either sophisticated communications media or simple communications media used in sophisticated ways over a period of time by the parties to build the relationship. In either case, the same media should be sufficient to resolve e-commerce disputes. Online mediation will therefore be adequate in most situations to resolve e-commerce disputes.⁵¹

There are various websites that provide mediation services.⁵² The most salient difference between these websites is in their level of automation.⁵³ Some websites are fully automated and require little human intervention, while others involve a neutral third party as facilitator.

A. ONLINE MEDIATION PROGRAMS

There are many online mediation programs.⁵⁴ These programs fall into three primary classifications. First are the programs that use computer-mediated communication merely to facilitate the administration of physical-

⁴⁶ *Id.* at 18.

⁴⁷ Robert S. Greenbaum, "R" Is for Resolution: ADR in the Commercial Law Setting, New Jersey Law., Aug-Sept. 1993 at 27, 29.

⁴⁸ Kim Kovacs, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith in Mediation*, Disp. Resol. Mag. 9-13 Winter 1997 at 9.

⁴⁹ Judith P. Meyer, *The Pros and Cons of Mediation*, 52 Disp. Resol. J., Summer 1997, at 8, 15.

⁵⁰ Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L.Rev. 27.

⁵¹ *Id.*

⁵² Lucille M. Ponte, *Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 Alb. L. J. Sci. & Tech. 441, 442-44 (2002).

⁵³ Louse Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 Fordham L. Rev. 999 (2001).

⁵⁴ <http://aaron.sbs.umass.edu/center/onlineadr.htm>.

presence mediation. Many online mediation services do not actually mediate online but rather provide information online or allow parties to complete forms or complete other administrative tasks online. The actual mediation takes place in the physical presence of the mediator and the parties.⁵⁵

Second are the so-called “hybrid-mediation” programs, those in which the mediator may use virtual-presence, physical presence, or some mixture of the two during the course of the mediation. Hybrid-mediation projects use both face-to-face (physical presence) and online (virtual presence) mediation techniques. The mediator may start the mediation in person, allowing the parties to develop an impression of each other, and then proceed online to work through the issues, but at any point in the mediation process where a face-to-face meeting would be helpful, the mediator may again bring the parties together.⁵⁶

Third are the virtual-mediation programs, which exists entirely online and rely solely on virtual presence during the course of the mediation. One of the variant of this type of program is those, which use technology as an aid to a human mediator. This variant is also called “human adjunct programs”. Here, the mediator does not meet with the parties face-to-face, rather, the mediator selects from a variety of options depending on the nature of the dispute, the technology available to the parties, and the relationship between the parties.⁵⁷

Another variant is one, which relies on the “software-as-mediator” to bring resolution to the dispute. The role of the mediator in setting the agenda and facilitating the process is vested entirely in the code of the software used by the project. These programs work well in cases wherein the economic value of the dispute is easily quantifiable, where the parties do not seek personal reconciliation, and where there are opportunities for mutually beneficial exchange. They do not however work well when the issues are not readily reducible, or where repeat players require an adjustment to their relationship.⁵⁸

⁵⁵James Melamed, *Integrating the Internet into your Mediation Practice*, at <http://www.mediate.com/articles/melamed8.cfm>

⁵⁶Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L.Rev. 27.

⁵⁷*Id.*

⁵⁸*Id.*

B. ONLINE MEDIATION WEBSITES

Websites offering interest-based negotiations are now available. This is made possible by using an innovative process and a powerful computer software program as well as with the assistance of a facilitator.⁵⁹ *OneAccord*⁶⁰ is one of the websites offering such services.

In this type of website, a third party facilitator initially works with the parties either in person or over the Internet to help them express their interests and to identify issues. The said facilitator is an attorney who has completed a special 30-hour online training course. He helps the parties model a negotiation problem and complete a "single negotiation form" which outlines the underlying agreement and leaves blanks for unresolved issues. The facilitator then works with each party individually to elicit their own initial confidential preferences among each of the issues and possible outcomes. Once the data is entered into the website, the website software uses it to develop settlement packages for the parties' consideration. The facilitator works continuously with the parties, helping them evaluate the settlement packages and to refine their preferences. Once a party wishes to terminate the negotiation, a final written agreement is drafted with the current solution signed by all the parties.⁶¹

A variation of this process is seen in cases of traditional mediation firms, which have established websites to facilitate the resolution of disputes. These websites include *InternetNeutral*,⁶² *SquareTrade*,⁶³ and *WebMediate*.⁶⁴

In these websites, a party typically contacts the service and fills out an online form that identifies the problem and possible resolutions. A mediator reviews the form and contacts the other party to see if they will participate in the mediation. If the other party agrees to participate, they can fill out their own form or respond to the initial form through email. This initial exchange helps the parties to understand the dispute better and possibly to reach an agreement. If the dispute remains unresolved, the

⁵⁹ Ernest M. Thiessen & Joseph McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 Ohio St. J. on Disp. Resol. 643 (2000).

⁶⁰ <http://www.oneaccordinc.com>

⁶¹ Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*. Duke Law & Technology Review at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>.

⁶² <http://www.internetneutral.com>

⁶³ <http://www.squaretrade.com>

⁶⁴ <http://www.webmediate.com>

mediator will work with the parties to help determine issues, articulate interests, and evaluate potential solutions.⁶⁵

C. ADVANTAGES OF CYBERMEDIATION

Cost savings, convenience, and avoidance of jurisdictional issues are among the advantages of resort to cyber mediation.

Parties may be able to save a lot of money in cybermediation since hiring a lawyer is often unnecessary.⁶⁶ For example, if the parties have determined liability and their dispute is solely over the amount of a monetary settlement, then a fully automated cyber-mediation website may be sufficient to resolve their dispute.⁶⁷

The most recognized benefit of online mediation is the fact that the disputants do not have to travel lengthy distances to negotiate.⁶⁸ Since parties can participate in cyber-mediation from their respective business locations or residences, this may lead to reduced costs and the expenditure of less time. Also, since many of the cyber mediation websites are available all day, every day of the year, emails, listservs, and web postings can be written, posted and responded to at any time.⁶⁹ Disputants can therefore proceed to negotiate the settlement of disputes expeditiously instead of waiting lengthy periods to go to trial.⁷⁰ Parties are able to participate in the negotiation when they are ready and at convenient times unlike in traditional mediation where there are scheduling difficulties that arise and where it is necessary to arrange the times and places for meetings.⁷¹ The mediator can meet with either of them or both of the parties privately, without affecting the flow of the mediation.⁷²

It has also been pointed out that asynchronous Internet communications have the advantage of being the “best” communications by the fact of its capability of being “edited” in contrast to the “first” and often

⁶⁵ See note 61, *supra*.

⁶⁶ Ian Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837, 855 (2001).

⁶⁷ *Id.*

⁶⁸ Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems and a Proposal*, 3 Harv. Negotiation L. Rev. 175, 176 (1998).

⁶⁹ George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 Hastings Comm. & Ent. L. J. 712 (1997).

⁷⁰ See note 66 *supra*.

⁷¹ Jim Melamed & John Helie, *The World Wide Web Main Street of the Future is Here Today*, at <http://www.mediate.com/articles/jimmjohn.cfm>.

⁷² Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L.Rev. 42.

impulsive responses that take place in real time face to face mediation discussions.⁷³

Resolution of disputes through cyber mediation also avoids the issue of jurisdiction of particular courts over the dispute.⁷⁴ Since the disputants can bind themselves to resolution through an agreement, jurisdictional issues can thus be avoided altogether.⁷⁵

D. DISADVANTAGES OF CYBER MEDIATION

Among the issues raised against cyber mediation are issues on its limited capability, impersonality, and confidentiality.

Most fully automated cyber-mediation websites can only be used to resolve specific types of disputes wherein the only unresolved issue is the amount of the settlement. In most instances, involving fully automated cyber-mediation, it would seem that the parties would need to have undertaken initial discussions, agreed to the basic facts surrounding the dispute and have determined that one of the parties is responsible for damages.⁷⁶ Limiting the final stages of negotiations to determining the amount of compensation leaves out the possibility of innovative, interest based negotiation.⁷⁷

Joel Eisen argues that “the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact.”⁷⁸ Negotiations are more effective when the parties are able to communicate with one another freely. This involves helping parties to listen and understand concerns, empathize with each other, vent feelings and confront emotions.⁷⁹ For many participants, mediation is about venting of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to communicate

⁷³ Jim Melamed, *The Internet and Divorce Mediation*, at <http://www.mediate.com/articles/melamed9.cfm>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, Duke Law & Technology Review at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>.

⁷⁷ *Id.*

⁷⁸ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1310 (1998).

⁷⁹ *Id.* at 1323, 1325.

one's version of the case directly to the opposite party and to express accompanying emotions can be cathartic for participants in mediation.⁸⁰

Cybermediation loses the dynamics of traditional mediation because it takes place at a distance and in front of computer screens rather than with face-to-face communications.⁸¹ There is also the lack of an established relationship or personal connection. There is typically no prior connection or any personal contact between the parties, they generally do not have an ongoing relationship, nor is there hope of a future relationship since cyber disputes involves more often than not a "one shot transaction", they in fact, often know little about one another.⁸²

Protection of confidential material in ODR is also an issue.⁸³ Whereas traditional mediation does not create a physical record, online mediation creates an electronic record.⁸⁴ This could enable a party to print out and distribute email communications easily and without the knowledge of the other party.⁸⁵ This potentially hinders the development of open and honest exchanges in cyber-mediation.⁸⁶

V. ONLINE ARBITRATION

Arbitration is the "submission of disputes to one or more impartial persons ("neutrals") for final and binding determination."⁸⁷ It is consensual between parties, involves non-government decision makers, and results in definitive and binding decisions.⁸⁸

In arbitration, one or more neutrals render a decision after hearing arguments and reviewing evidence.⁸⁹ By pre-arrangement, the neutral's decision may either be binding or non-binding.⁹⁰ If such decision is agreed upon to be binding, the neutral's decision shall be final, and the winning party may enforce it against the losing party.⁹¹ However, if the parties agree

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 Conn. L. Rev. 953, 971 (1996).

⁸⁴ *Id.*

⁸⁵ *Id.* at 971-972.

⁸⁶ *Id.* at 971.

⁸⁷ George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 Hastings Comm. & Ent. L. J., 695 (1997).

⁸⁸ Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforcing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace*, 24 Ohio N. U. L. Rev. 769, 772 (1998).

⁸⁹ JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* 2 (1997).

⁹⁰ *Id.*

⁹¹ *Id.*

that the decision shall be non-binding, the neutral's decision shall merely be advisory and shall be used in aid of settlement.⁹² More often than not, however, parties involved in an arbitration proceeding, unlike mediation, agree to bind themselves to the arbitrator's decision.⁹³

Arbitration agreements are severable from the underlying contract on which it may be written.⁹⁴ The arbitration agreement is an independent and separate agreement supported by independent and separate consideration, therefore, challenges to the existence, validity, and enforceability of the underlying contract have no effect on the validity of the arbitration agreement.⁹⁵

When international commerce went online, international commercial arbitration followed. Traditional off-line international arbitration centers likewise launched their own websites.⁹⁶ In addition, new online or virtual centers and new groups of traders emerged to facilitate the new economy as well as to reduce costs and time spent on dispute resolution.

The term "cyber-arbitration" can however be confusing as well as misleading.⁹⁷ It can be confusing because the reference to "cyberspace" may lead one to conclude that either the dispute resolution proceedings are conducted through the means of the Internet or similar communication means, or that the proceedings are conducted offline, but deal with disputes which are based upon an online contract, or both.⁹⁸ It can on the other hand be misleading because the term refers to "arbitration", a legal term that is traditionally reserved for a dispute resolution mechanism based on due process guarantees and leading to a binding decision that is equally enforceable as a judicial decision.⁹⁹

Thus most authors use the term "Online Dispute Resolution (ODR)" to refer generally to online arbitration or "cyber-arbitration". This

⁹² *Id.*

⁹³ *Id.*

⁹⁴ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 5 (1996).

⁹⁵ *Id.*

⁹⁶ Rosabel E. Goodman-Everard, *Directory of Arbitration Websites and Information on Arbitration at* http://www.arbitration-icca.org/directory_of_website.htm.

⁹⁷ Daniel Girsberger & Dorothee Schramm, *Cyber-Arbitration*, 3 *European Business Organization Law Review* 605-622 (2002).

⁹⁸ *Id.*

⁹⁹ E. Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International § 1 N 14-15 (1999).

however creates another problem in that it is still unclear whether the term ODR encompasses only adversarial proceedings, which are binding on both or only one of the parties, or whether it also includes automatic or assisted negotiation and mediation over the Internet.¹⁰⁰

In general, online arbitration requires less complex communication than online mediation but the same technological tools available to online mediation may be used for online arbitration to expedite dispute resolution.¹⁰¹ A number of companies offer online arbitration programs and a majority of the conflicts that these firms arbitrate are those dealing with domain name disputes.¹⁰²

A. DOMAIN NAME DISPUTES

Disputes that have arisen over the use of the same or similar domain names have become very common. Disputes of this nature usually involves parties who attempt to profit from the goodwill of a competitor, parties who offer for sale another party's domain name, or parties who infringe on other's trademarks.¹⁰³

Disputes of this nature usually involve issues as to who between the parties has the right to use a particular domain name. The problem faced by litigating this type of dispute is its being cumbersome and costly due to the fact that cyberspace is international in scope. New ways of settling such disputes have been devised and are being implemented. At the forefront of domain name dispute resolution is the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁰⁴

B. ICANN

The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit corporation that the US Federal Government set up to oversee the distribution of domain names. Whereas before, to obtain relief from a party engaged in a trademark infringement, a mark's owner was

¹⁰⁰ T. Schultz, G. Kaufmann-Kohler, D. Langer, & V. Bonnet, *Online Dispute Resolution: The States of the Art and the Issues*, available at <http://www.online-adr.org/TheBlueBook-2001.pdf>.

¹⁰¹ Claro V. Parlade, *Challenges to ODR Implementation in a Developing Country*. Proceedings of the UNECE Forum on ODR (2003) available at <http://www.odr.info/unece2003>.

¹⁰² *Id.*

¹⁰³ ROGER LEROY MILLER & GAYLORD A. JENTZ, *LAW FOR E-COMMERCE* 69, 71, 73 (2002).

¹⁰⁴ *Id.*

only limited primarily to filing a suit in a court with appropriate jurisdiction, another option is now available to domain name owners.

ICANN began operating an online arbitration system on January 1, 2000, to resolve domain name disputes. Thus, if a trademark infringement involves a domain name, a party may submit a complaint to an ICANN-approved dispute resolution provider instead of or in addition to filing a suit.¹⁰⁵

To initiate a dispute resolution proceeding (referred to by ICANN as “administrative proceedings”), the complainant chooses from among the four services that ICANN has approved: the National Arbitration Forum, eResolution, the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center) or the CPR Institute for Dispute Resolution. Each service appoints its own arbitrators to a panel. The panelists include former judges, law professors, lawyers, as well as nonlawyers.¹⁰⁶

ICANN’s Uniform Domain Name Dispute Resolution Policy requires that three elements that must be proven to have a domain name transferred or cancelled. These elements are, firstly, that the challenged domain name must be identical or confusingly similar to a trademark or service mark in which the complainant has rights. Secondly, that the party against whom the complaint is made must have no rights or legitimate interests in the domain name. And finally, that the challenged domain name must be registered and be used in bad faith¹⁰⁷.

The steps in the ICANN dispute resolution proceeding may be outlined as follows: First, a dispute arises over a domain name, a party then files a complaint with an ICANN-approved dispute-resolution service provider, and a panel is chosen to decide the dispute. The opposing party is then contacted by the panel and given the opportunity to file a response. The panel then considers the parties’ arguments, and may request for further statements or documents. It then issues a decision. After the decision is rendered, a party may file an appeal in court. Alternatively, steps may be taken to implement the decision.¹⁰⁸

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ ICANN’s Uniform Domain Name Dispute Resolution Policy Rule 4(a).

¹⁰⁸ ROGER LEROY MILLER & GAYLORD A. JENTZ, LAW FOR E-COMMERCE 69, 71, 73 (2002).

C. WIPO

The World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center) is part of the International Bureau of the World Intellectual Property Organization. It has arbitrated and mediated international commercial disputes between private parties since 1994 and it focuses particularly on the resolution of disputes involving cyberspace and e-commerce. This includes disputes that arise from the use of domain names and other conflicts involving intellectual property.¹⁰⁹

The WIPO Center offers four dispute-resolution services namely, arbitration, expedited arbitration, mediation, and mediation-arbitration.¹¹⁰ In arbitration, the outcome of arbitration is binding on the parties. Thus once a party agrees to arbitration, he cannot unilaterally withdraw. There may be one arbitrator or a team of arbitrators. In expedited arbitration, only a single arbitrator is selected and it involves more condensed proceedings. In mediation, a neutral third party who helps the disputing parties resolve their differences is chosen. The mediator however may not impose a settlement and any party may withdraw anytime. Finally, in mediation-arbitration, the parties go through mediation within a certain time. If no settlement is reached however, either party can refer the dispute to arbitration for a binding decision. The reverse may also occur as well, with the parties starting with arbitration and moving to mediation.¹¹¹ The mediator can serve as the arbitrator and vice versa.¹¹²

Referral to the WIPO dispute resolution procedures is consensual. To facilitate party agreement, the WIPO Center provides recommended contract clauses for the submission of future disputes under a particular contract and submission agreements for existing disputes. WIPO clauses can thus be found in a wide variety of contracts involving intellectual property, know how and software licenses, franchises, trademark coexistence agreements, distribution contracts, joint ventures, research & development contracts, technology-sensitive employment contracts, mergers and acquisitions with important intellectual property aspects, sports marketing agreements, and publishing, music and film contracts. WIPO

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ ICANN UDRP Rule 4(a).

¹¹² *Id.*

clauses are found most frequently in licensing agreements entered into by parties from different jurisdictions.¹¹³

The WIPO Center can also assist the parties in adapting the model clauses to the circumstances of their contractual relationship. Special clauses for example can be drafted for commercial situations in which a limited number of companies are frequently involved in disputes with each other that concern overlapping intellectual property rights. Thus because of the general commercial scope of the WIPO Rules, the WIPO clauses are suitable for inclusion in contracts and disputes that do not involve intellectual property.¹¹⁴

D. DOMAIN NAMES UNDER THE UDRP: A SUCCESS STORY

A specific dispute resolution mechanism was developed under the auspices of the Internet Corporation for Assigned Names and Numbers (ICANN) in the area of cyber-squatting. ICANN has adopted the "Uniform Domain Name Dispute Resolution Policy" in October 1999.¹¹⁵ The Policy contains guidelines for conducting the specific proceedings which has been adopted by all accredited registrars of certain top-level domain (TLD) names. The Policy has been supplemented by additional rules, the "Rules for Uniform Domain Name Dispute Resolution Policy"¹¹⁶ for those organizations accredited by ICANN to organize the dispute resolution proceedings. The ODR mechanism of the UDRP has turned out to be a great success. Well over 3, 000 cases have been concluded in the first 2-1/2 years of its existence.¹¹⁷

Under the UDRP, the Claimant (i.e. the person claiming to be affected by a registered domain name) files its written request and pays a fee to one of the accredited ODR providers of his choice. The request is then transferred to the Respondent within three calendar days.¹¹⁸ If the Respondent accepts jurisdiction under the UDRP, it must file its answer within 20 days. Within 5 days after receipt of the response, the ODR provider selects an independent third party Neutral (unless the parties have

¹¹³ WIPO Arbitration and Mediation Center, *Recommended Contract Clauses and Submission Agreements at* <http://arbitr.wipo.int/arbitration/contract-clauses/index.html>.

¹¹⁴ *Id.*

¹¹⁵ <http://www.icann.org/dndr/udrp/policy.htm>.

¹¹⁶ <http://www.icann.org/dndr/udrp/uniform-rules.htm>.

¹¹⁷ <http://arbitr.wipo.int/domains/statistics/results.htm>.

¹¹⁸ Article 4 & 19. Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules").

asked for a three person panel).¹¹⁹ The arbitrator or panel shall then decide the case within 14 days.¹²⁰ The ODR provider shall then transmit its decision to the parties within 3 days, as well as to the registrar and ICANN, and publishes it on its website.¹²¹ If the Neutrals decide that the domain name should be transferred to the Claimant, the registrar implements such a decision, unless the Respondent shows that it has instituted a state court action.¹²²

E. UDRP IN ACTION: THE DOT PH DOMAIN NAME DISPUTE

The PH domain (.ph) is the country code top-level domain (CCTLD) assigned to the Philippines and is recognized worldwide. DotPH, the sole and official domain registry of the Philippines which holds the sole administrative and technical control over PH domain names, is currently headed by Mr. Jose Emmanuel Disini. DotPH was one of the first domain registries in the world to implement the UDRP. The UDRP provides a quicker and more economical alternative to court proceedings. UDRP disputes are heard by neutral bodies like the WIPO and all evidence is filed online. To date, there are currently four cases dealing with the .PH domain controversy which have been decided by the WIPO Center adopting the UDRP.

1. Koninklijke Philips Electronics NV v. Park Kyoung Seok¹²³

The Complainant is a public limited company incorporated in and has its principal place of business in the Netherlands. The Respondent is a resident of Kyounggi-do, South Korea. The domain names in issue in this case are “philips.com.ph” and “philips.ph”. These domain names are registered with dotPHone, Inc. and were acquired by the Respondent on May 2, 2000. The WIPO center invited Andrew Brown, Barrister, of Auckland, New Zealand, to serve as Sole Panelist in the case.

The Complainant is a Netherlands based multinational corporation which owns (and through its predecessors) has used the PHILIPS trademark since 1892. The trademark PHILIPS is used for a wide spectrum of products varying from consumer electronics to domestic appliances and

¹¹⁹ Article 6, the Rules.

¹²⁰ Article 15, the Rules.

¹²¹ Article 16, the Rules.

¹²² Article 3 c, 4 k, Uniform Dispute Resolution Policy.

¹²³ WIPO Domain Name Decision, Case No. DPH2000-0001 *available at* <http://arbiter.wipo.int/domains/decisions/html/2000/dph2000-0001.html>

from security systems to semi-conductors. The Complainant has registered the PHILIPS trademark in 145 countries worldwide. The Complainant contends that the domain names are identical or confusingly similar to the PHILIPS trademark registered by the Complainant and that the Respondent has no right or legitimate interest in the domain names and that they were registered in an attempt to extort financial gains, to prevent the Complainant from reflecting its trademark in a domain name and for the purpose of disrupting the Complainant's business. It likewise claims that the registration of the domain names was in bad faith. Reference was made to evidence that the Respondent has registered a number of domain names with well-known trademarks.

No response was received from the Respondent. Prior email communication between complainant and respondent, which complainant presented as evidence, was thus used by the panel in arriving at its decision. It can be gleaned from such communication that the Respondent alleges that the word "Philips" in the Philippines is at least a very "common and general" word, which enables it to express a very diverse and peculiar meaning or sense. The word "philips", according to the Respondent, would be the best word to reflect the Internet Business (Philippines Information Providing Service=Philips), which the Respondent will conduct in the Philippines in a very symbolic and perfect way. Respondent likewise contends that Philippines could be abbreviated to Philips, together with various uses for the business.

The sole panelist ruled that the domain names "philips.com.ph" and "philips.ph" are identical to the Complainant's famous trademark PHILIPS which is registered not only in the Philippines in six classes but also registered worldwide in a total of 145 countries. The panel also ruled that the Respondent has no legitimate rights or interests in relation to the trademark PHILIPS. It ruled that the suggestion that "Philips would be the best word to reflect the Internet business (Philippines Information Providing Service)" is not supported by any evidence showing any use of the mark or preparation to use that mark. The suggestion that the word Philippines could be abbreviated to Philips is likewise far-fetched. The panelist likewise found that the domain name was acquired and used in bad faith as there was evidence to indicate that Respondent had an intention to trade in the domain name. The panelist also ruled that the fact that other domain names registered in the name of the Respondent serves to cast suspicion on the motives of the Respondent in registering "philips.com.ph" and "philips.ph". The domain names registered in the name of the

Respondent include “toshiba.ph”, “nike.ph”, “nike.com”, “nec.ph”, “nec.com.ph”, “benz.ph”, “benz.com.ph”, “sanyo.ph”, and “sanyo.ph” and “sanyo.com.ph”. Hence the panelist ruled that it is a fair inference from the evidence that the Respondent acquired these domain names in order to prevent the Complainant from reflecting its trademark in the corresponding domain name. The panelist thus concluded that the registration of the domain names “philips.com.ph” and “philips.ph” be transferred to the Complainant.

2. Yahoo! Inc. v. Yahoo Computer Services¹²⁴

The Complainant is Yahoo! Inc. a Delaware Corporation with its principal place of business in Santa Clara, California. The respondent is Yahoo Computer Services, with its place of business in Makati, Philippines. The domain names in issue are “yahoo.com.ph” and “yahoo.ph”. The domain names were registered by Respondent with DotPhone, Inc. on May 9, 1999 and October 21, 1999, respectively. A three member Administrative Panel was appointed consisting of Geert Glas, David Tatham and the Presiding Panelist Ross Carson. .

Complainant Yahoo! is a global Internet communications, media, and commerce company that delivers a branded network of comprehensive searching, directory, information, communication, shopping services and other online activities and features to millions of Internet users daily. The main Yahoo! site can be accessed at the URL <http://www.yahoo.com>. Yahoo! has sites that are specific to particular countries or regions, such as “yahoo.com.tw”, “yahoo.com.hk”, “yahoo.com.jp”. Complainant does not currently have a site directed solely to the Philippines. There are however numerous categories in the Yahoo! directory containing information about the Philippines. Complainant also has six pending trademark applications in the Philippines filed variously between July 1996 and February 1999.

Respondent operated a website which offers computer hardware and software and computer consulting, development and support services including web development services under the name Yahoo Computer Services. Respondent stated that Yahoo Computer Services is a legally registered name with the Department of Trade and Industry of the Republic of the Philippines. Respondent contends that the disputed domain names do not contain the Yahoo! mark and that the logo and site layouts employed

¹²⁴ WIPO Domain Name Decision, Case No. DPH2001-0001, *available at* <http://arbiter.wipo.int/domains/decisions/html/2001/dph2001-0001.html>.

on Respondent's websites are neither identical or confusingly similar to Complainant's trade or service marks, he contends that it has a right and legitimate interest in the domain names "yahoo.com.ph" and "yahoo.ph" in the Philippines by virtue of the fact that Yahoo Computer Services is a legally registered business name in the Philippines. Respondent further submits that following Complainant's letter giving it five days to change its registered name, Respondent amended its website by disclaiming any relationship or affiliation with the Complainant and provided a list of "Other Yahoos" which includes links to the Complainant's sites and other sites or registered companies using the word "yahoo".

The panel ruled that each of the two domain names is confusingly similar to the Complainant's trademarks. It likewise ruled that Respondent does not have any legitimate rights of interests in the domain names. It explained that there is no evidence that registration of a business name with the Department of Trade and Industry provides the registrant with any exclusive rights with respect to the business name. The registration of the domain names likewise did not provide the Respondent with an exclusive right to the use of the domain names. Lastly, the Panel determined that there clearly is bad faith. It stated that it is inconceivable that the Respondent could have been unaware of the Complainant's name and trademark when Respondent registered the domain names. It further ruled that the fact that Respondent previously registered the business name Yahoo Computer Services incorporating the distinctive word Yahoo before registering the domain names in dispute has no bearing on the case. The Respondent registered the domain names to intentionally attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's Yahoo! mark as to the source, sponsorship, affiliation, and endorsement of Respondent's website. The panel thus ruled that the domain names "yahoo.ph" and "yahoo.com.ph" be transferred to the Complainant.

3. Talal Abu-Ghazaleh International, Talal Abu Ghazaleh & Co. and Abu Ghazaleh Intellectual Property v. Anis Wakim¹²⁵

The Complainants are three Jordanian corporations with offices in Amman, Jordan. The Respondent is Mr. Anis Wakin of Costa Mesa, CA, United States of America. The domain names at issue are

¹²⁵ WIPO Domain Name Decision, Case No. DPH2001-0002, *available at* <http://arbitrator.wipo.int/domain/decisions/html/2001/dph2001-0002.html>.

“talalabughazaleh.tv” and “talalbughazaleh.com.ph”. The first domain name is registered with The TV Corporation and the second with Dotph. Inc. The WIPO Center invited the Honorable Sir Ian Barker QC of Auckland, New Zealand as Panelist.

Complainants are members of a group of professional service firms operating in the Arab world. Complainant Talal Abu-Ghazleh International, established 28 years ago, is the umbrella corporation under which his other corporations are member firms. Complainant Talal Abu-Ghazleh & Co., is alleged to be the Arab world’s largest provider of professional services which advises businesses on accounting, quality assurance, and project management. Complainant Abu-Ghazleh Intellectual Property was established in 1972 to establish and promote the protection of intellectual property rights throughout the Arab world.

In a December 24, 2000 WIPO Panelist Decision (D2000-1479), the Panel refused to transfer the domain “talalabugazaleh.com” from the then respondents, Tony Dabbas and Fadi Mahassel to the then complainant, Mr. Talal Abu-Ghazleh. The Panel in that case ruled that there was no confusion between the similarly worded trademarks and domain names since the categories of services, IP and accounting, by the then complainant and pet grooming, by the then respondent, were not similar.

Subsequently, in September 13, 2001, Respondent Mr. Anis Wakin’s alleged business partner, Mr. Fadi Mahassel, was made a respondent in a case filed by the Complainant against Mr. Mahassel involving the domain names “talalabughazaleh.com”, “talalabughazaleh.org”, “talalabughazaleh.net” and “aldarauditbureau.com”. The WIPO Decision (D2001-0907) in said case ruled that the Complainant is not precluded from pursuing the Complaint notwithstanding the previous panel decision and ordered the transfer of said domain names to the Complainants. A few days after the said decision, in September 27, 2001, Respondent Mr. Anis Wakin, registered the domain name “talalabughazeleh.tv” and “talalabughazaeh.com.ph”. Hence a case was filed by the same Complainant against the Respondent.

Respondent alleged that it was running a pet grooming service under the name Talal Abu Ghazaleh and that whereas the Complainant’s trademarks have a dash and other words attached to the name, the Respondent’s domain names and service marks do not have such marks.

The panel ruled that the disputed domain names are confusingly similar to the Complainant’s marks. Also, it is clear that having been

bumped off the .com, .net, and .org domain names in dispute in WIPO Case No. D2001-0907, Respondent then registered the same names with the country suffixes of Tuvalu and the Philippines. Moreover, it is not also clear from the Response when the alleged pet-grooming business of the Respondent started as there was no proof offered to show that he operates a genuine pet-grooming business. The Panel ruled that the overwhelming inference is that Respondent knows exactly what marks the Complainants own and that his apparently unremitting campaign against Mr. Talal Abu-Ghazaleh is ample proof of bad faith registration and continuing bad faith use of domain names which replicate the trademarks owned by Mr. Talal Abu-Ghazaleh. The inescapable inference is that he is actually using the domain names to prevent Complainants from reflecting their marks in them.

The Panel thus ordered that the domain names “talalabughazaleh.tv” and “talalabughazaleh.com.ph” be transferred to the Complainants.

4. Microsoft Corporation v. Maganda Industries and/or Douglas Morris a.k.a. Douglas Morrison¹²⁶

The Complainant is Microsoft Corporation, with its place of business in the United States of America. The respondent is Maganda Industries and/or Douglas Morris a.k.a. Douglas Morrison with its place of business in Queensland, Australia. The domain name in dispute, “hotmail.com.ph”, is registered with dotPH. The WIPO Center appointed Peter G. Nitter as the sole panelist.

The Complainant is a worldwide provider of computer software and related products and services, including products and services designed for use through the Internet. The Complainant also offers a number of online services for use by Internet users, including the free electronic mail service found at www.hotmail.com. The Complaint alleges that the domain name in dispute is identical, or at the very least, confusingly similar to the Complainant's HOTMAIL trademark. The only difference being the “.ph” extension. Reinforcing the confusing similarity, according to the Complainant, is the fact that when accessing the website connected to the domain name in dispute, one is merely redirected to the opening page of the Complainant's website at www.hotmail.com, however, in the course of

¹²⁶ WIPO Domain Name Decision Case No. DPH2004-0001, *available at* <http://arbitrator.wipo.int/domains/decisions/html/2004/dph2004-0001.html>.

redirecting to the Complainant's website, a pop up window for the website "chat.com.ph" appears. Further links in the pop up window lead to pages featuring content that is apparently the Respondent's, some of which seemingly were pornographic. The Complainant further alleged that Respondent's sole intent in using the domain name is to mislead Internet users who mistakenly type the Complainant's website with the extension ".ph", to unwittingly patronize the contents of the Respondent's "chat.com.ph" pop up window. Respondent did not reply to the Complaint and was declared in default.

The Panel ruled that the addition of the terms ".com.ph" does not have the necessary distinguishing effect, and these additions to the trademark are not sufficient to prevent the domain name from being confusingly similar to the trademark. Hence the panel ruled that the domain name in question is confusingly similar to the mark of the Complainant. The panel likewise ruled that Respondent's conduct leaves no doubt that he both registered and used the domain name in bad faith, that the Respondent has exploited the goodwill of a world famous trademark and the equally famous website of the Complainant, by creating a likelihood of confusion as to the source, sponsorship, affiliation or endorsement of the domain name in dispute, and by that attract Internet users to his own website or to other online locations. Moreover, Respondent's conduct is clearly motivated by the Respondent's intent for commercial gain. The domain name is used to attract potential customers to the Respondent's website and other sites, offering various products and services.

F. A CHALLENGE TO THE UDRP: THE BPIEXPRESSONLINE.COM.PH CASE

Despite the economy and efficiency of the mode of dispute resolution under the UDRP, the reality cannot be denied that such mode of dispute settlement is still not widely known and accepted. A vast majority still regard these "new age" modes of dispute resolution with apprehension. A recent example would be the bpiexpressonline.com.ph case.

On November 27, 2003, the Bank of the Philippine Islands (BPI) filed Civil Case No. 03-1377 with the Regional Trial Court of Makati. BPI sued Jose Emmanuel Disini, the PH country code top-level domain (ccTLD) administrator due to disputes involving bpiexpressonline. BPI, in its petition for temporary restraining order/preliminary injunction sought to prohibit the continued operation of the www.bpiexpressonline.com.ph web site. BPI is the owner of the "BPI Express On Line" trademark and

operates the website www.bpiexpressonline.com for its Internet banking or website marketing of its products and services. BPI however does not own the domain bpiexpressonline.com.ph. Such domain name is registered with "Maganda Industries" with its place of business in Queensland, Australia. Incidentally, Maganda Industries is the Respondent in one of the cases summarized above. BPI stated that when the site www.bpiexpressonline.com.ph is accessed, the front page of BPI's website appears but with an unauthorized pop-up window which reads "Blah, Blah...chat all you like at CHAT.COM.PH" When BPI looked into the unauthorized pop-up window, it advertised "chat.com.ph" and linked to www.pinoypages.com which sells various wares including pornography. BPI demanded that the respondent registrar block and deactivate the site. The respondent however refused to deactivate the www.bpiexpressonline.com.ph website and argued that he was contractually obliged to the domain registrant.¹²⁷

The Respondent maintained that BPI should have instead filed a case against the registrant of the domain bpiexpressonline.com.ph through the UDRP channel which, according to the Respondent, provides a quicker and more economical alternative to court proceedings. BPI's legal counsel however points out that only those who register any dotPH domain names agree to be bound by UDRP. He argues that UDRP rules might not be binding on BPI.¹²⁸

This case is the first of its kind to be filed in the courts against the PH domain administrator. This case likewise highlights the fact that there is still an overwhelming preference of parties to resort to traditional court litigation as a mode of dispute settlement. Admittedly, while the parties cannot be blamed for subscribing to such preference, it may have been brought about by the general reluctance of parties to try untested and novel modes due to a general sense of mistrust and skepticism to things which they have not yet tried or to novel ideas in general. On the other hand, this prevailing sense of skepticism does not bode well for the advocates of online dispute resolution, particularly for the UDRP. Emil Avancena, corporate communications manager of dotPH, the official domain registry of the

¹²⁷ Prudencia R. Orani, *Legal Battle Brews Over bpiexpressonline.com.ph Domain*, Metropolitan Computer times, available at <http://www.mctimes.net>, (posted at December 31, 2003).

¹²⁸ *Id.*

Philippines, expresses the hope that BPI would reconsider using the UDRP as a faster and more economical way to resolve the said dispute.¹²⁹

G. VARIANTS OF ONLINE ARBITRATION

1. High-Low Arbitration¹³⁰

Also called “bracketed arbitration”, this type of online arbitration is commonly used where liability is not an issue. This condition though is not a prerequisite. In this type of arbitration, the parties negotiate to impasse, and then proceed to arbitration. The plaintiff’s last settlement demand and the defendant’s last offer establish a bracket defining the limits of the arbitrator’s award in the case. The arbitrator conducts the arbitration without knowledge of the endpoints of the bracket. The parties are free to make any evidence-based arguments they wish regarding damages. Assuming that the arbitrator determines the defendant to be liable, he or she makes a decision on damages as if it were ordinary arbitration. When the arbitrator renders an award, neither party will be liable for a figure outside the agreed-to bracket.¹³¹

There are several advantages of high-low arbitration. It reduces the risk incidental to allowing a third party to decide your fate because both parties enter into arbitration knowing the upper and lower limits of the award. It also encourages vigorous bargaining, the plaintiff wanting to establish the highest minimum award possible and the defendant seeking to fix the lowest maximum award possible. This situation usually forces the parties to find a reasonable settlement range and at the same time a reasonably narrow bracket.¹³²

2. Baseball Arbitration

Also called “last best offer” arbitration wherein the disputing parties agree in writing to negotiate to only one position (i.e. their last best offer) and then submit the dispute to arbitration.¹³³ The arbitrator must choose the last best offer of one of the parties and may not find a different result in any

¹²⁹ *Id.*

¹³⁰ JOHN W. COOLEY & STEPHEN LUBET, ARBITRATION ADVOCACY 218-219 (1997).

¹³¹ John W. Cooley. *New Challenges for Consumers and Business in the Cyber-Frontier: E-Contracts, E-Torts and E-Dispute Resolution*. 13 Loy. Consumer L. Rev. 102.

¹³² *Id.*

¹³³ STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 274 (1999).

circumstance.¹³⁴ A valuable feature of this type of arbitration is its ability to render a quick decision. The arbitrator must pick one figure or the other and is encouraged to render his or her decision within twenty four hours.¹³⁵ The decision is binding, and there can be no compromise.¹³⁶ The arbitrator may also give no explanation for his decision.¹³⁷ The risk of having to resort to this process often convinces parties to resolve their monetary differences.¹³⁸

3. iCourthouse¹³⁹

iCourthouse offers ODR by jury. Unlike juries in the judicial system however, iCourthouse juries consists of volunteers who choose whether they want to serve, which cases, and how many they want to decide.

To initiate a case, a party registers, files his or her claim, and receives a case number and a password. The party and his or her opponent post their arguments and submit their evidence, which can include audio and video media. Jurors review the evidence, ask questions, make comments, and render their verdicts. The parties are given a verdict summary that includes the juror's comments about the case. For a fee, the parties can select their jurors, which can be any number the party chooses. The jurors deliberate in a chat room where the parties and their attorneys can "listen in".

Unless otherwise agreed upon, all decisions are nonbinding and the parties can still go to court. According to iCourthouse however, no one has done so as yet.

4. Mini Trials

The mini-trial is an abbreviated trial or hearing.¹⁴⁰ This method is a relatively new approach.¹⁴¹ It has two major advantages: first, it requires much of the discovery process to be curtailed.¹⁴² Second, it involves high

¹³⁴ John W. Cooley & Stephen Lubet. ARBITRATION ADVOCACY 218-219 (1997).

¹³⁵ *Id.*

¹³⁶ See note 133 *supra*, at 218.

¹³⁷ See note 134 *supra*, at 218.

¹³⁸ See note 133 *supra*, at 274.

¹³⁹ <http://www.i-courthouse.com>

¹⁴⁰ JOHN W. COOLEY & STEVEN LUBET. ARBITRATION ADVOCACY 224 (1997).

¹⁴¹ *Id.*

¹⁴² See note 133 *supra* at 281.

level business persons in the dispute resolution process early.¹⁴³ The mini-trial method is best suited to large disputes and complex litigation.¹⁴⁴ Cases involving breaches of complex contracts, particularly if there are complex technical issues, patents cases, commercial cases, and products liability cases are most appropriate for mini-trial resolution.¹⁴⁵ This is brought about by the fact that the panel asked to decide the case includes business experts in the field (i.e. a high level management executive of each party)¹⁴⁶.

H. PROBLEMS AND ISSUES OF ONLINE ARBITRATION

The New York Convention establishes clear international principles for creating arbitration agreements and enforcing them on a global scale. This is important because cyberspace is a bundle of overlapping jurisdictions and some have incompatible commercial law practices. However, most jurisdictions recognize the right of private parties to enter into contracts as well as the right of the parties to create private law through contractual stipulations and to provide for the private adjudication of disputes arising out of the privately ordered relationship. Cyber-arbitration may thus build on existing arbitral institutions and international law and not require the creation of a sui generis convention or treaty to resolve disputes.¹⁴⁷

The New York convention however, like many national laws providing for the enforcement of arbitration clauses, requires that the arbitration clause be in writing.¹⁴⁸ This is a critical issue in cyberspace where the writing may consist of an exchange of bytes or packets that will ultimately be printed out and submitted in court as a "writing".

The Uniform Commercial Code defines writing as "any...intentional reduction to tangible form."¹⁴⁹ Article 7 of the UNCITRAL Model Law on International Commercial Arbitration defines writing as "other means of telecommunication which provide a [written] record of the agreement".¹⁵⁰ The question is whether courts will enforce an arbitration agreement that consists of a print out of an electronic mail message. However, assuming that the local contract law will not recognize

¹⁴³ JOHN W. COOLEY & STEVEN LUBET. ARBITRATION ADVOCACY 224 (1997).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforcing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace.*, 24 Ohio N.U.L.Rev. 769.

¹⁴⁸ Article II, New York Convention.

¹⁴⁹ U.C.C. § 1-201 (46) (1994).

¹⁵⁰ Article 7 (2), UNCITRAL Model Law.

an exchange of e-mail as writing, commentators opine that there is arguably sufficient basis in the New York Convention to support the contrary view.

The New York Convention provides that “the term ‘agreement in writing’ shall include an arbitral clause...contained in an exchange of letters or telegrams”.¹⁵¹ Telegrams, in the late 1940s, are the immediate predecessor to the e-mail. So long as there is a sufficient “writing” to meet the intent behind the writing requirement, then there is more than enough basis to argue that an exchange of e-mail is sufficient to constitute a “writing” for the purposes of creating an enforceable arbitration clause¹⁵².

VI. PHILIPPINE EXPERIENCE

Arbitration, as an alternative mode of settling disputes, has long been recognized and accepted in the Philippines. Article 2044 of the New Civil Code provides that “any stipulation that the arbitrators’ award or decision shall be final, is valid, without prejudice to articles 2038, 2039 and 2040”. In fact, as early as 1949, the Philippines already had a law on arbitration, namely Republic Act No. 876 also known as the Arbitration Law which was modeled after the US Federal Arbitration Act.¹⁵³

The said law expressly authorizes arbitration of domestic disputes. It not only recognizes the validity, enforceability and irrevocability of arbitration agreements but it also allows the parties to an arbitration agreement to stipulate that the arbitral award shall be final. Section 2 of Republic Act 876, the Arbitration Law, provides that “Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing, between them.... Such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract”.

Foreign arbitration as a system of settling commercial disputes of an international character was likewise recognized when the Philippines adhered to the United Nations “Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958” (New York Convention). The Philippines, being a signatory to said Convention, is bound to recognize arbitration agreements and enforce arbitral awards made in any Contracting

¹⁵¹ Article II (2), New York Convention.

¹⁵² See note 147, *supra*.

¹⁵³ Claro V. Parlade, Challenges to ODR Implementation in a Developing Country. Proceedings of the UNECE Forum on ODR 2003 available at <http://www.odr.info/unece2003>.

State. Thus under the 10 May 1965 Resolution No. 71 of the then Philippine Senate, reciprocal recognition and allowance of enforcement of international agreements between parties of different nationalities within a contracting state was given.¹⁵⁴

Under Article II of the said Convention, each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.¹⁵⁵ Moreover, under Article III, each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.¹⁵⁶ Our own Supreme Court reiterated the Philippines' commitment to observe the New York Convention in the case of *National Union Fire Insurance Company of Pittsburg v. Stolt-Nielsen Philippines, Inc.*¹⁵⁷

Finally in 1985, Executive Order 1008 or the Construction Industry Arbitration Law, a special law mandating arbitration of construction disputes was enacted.

A. ODR PHILIPPINE STYLE: A SUCCESS STORY?

The Cyberspace Policy Center for Asia Pacific (CPCAP) has opened up the country's first online dispute mediation website, the Philippine Online Dispute Resolution (PH-ODR), to promote the use of technology in dispute resolution for speedy and inexpensive resolution of disputes outside of the court system. The concept behind the website is known as the "multi-door courthouse system" which was introduced by Prof. Frank Sander of Harvard Law School. He envisaged a large courthouse with multiple alternative dispute resolution (ADR) "doors" which includes among others conciliation, mediation, and arbitration.

¹⁵⁴ *National Union Fire Insurance Company of Pittsburg v. Stolt-Nielsen Philippines Inc.* G.R. No. 87958, 184 SCRA 682 at 688-689 (1990).

¹⁵⁵ Article II, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

¹⁵⁶ *Id.* at Article III.

¹⁵⁷ G.R. No. 87958, 184 SCRA 682 (1990).

The site, www.disputeresolution.ph, offers trade dispute resolutions as well as legal services for blind biddings and neutral evaluation and arbitration.¹⁵⁸ The website caters mostly to trade disputes among franchises as well as e-commerce related issues. Several arbitrators and mediators have already been trained to start offering services online. Services are initially offered for free for the first six months.

PH-ODR shall soon be integrated with the I-reklamo system of the Department of Trade and Industry, providing consumers with the option to resolve disputes online. The I-reklamo system is presently limited to receiving complaints. The PH-ODR will not only provide greater functionality to the service but will also expand the effective geographic reach of DTT's dispute resolution capability. In order to develop consumer awareness of this service, PH-ODR will be promoting its service through members of the Philippine Retailer's Association. It also entered into a Memorandum of Agreement with the Philippine Franchise Association (PFA) for the use of PH-ODR's service by PFA members and their franchisees.¹⁵⁹ The group behind this ambitious project includes as members the Philippine Dispute Resolution Center, the CyberNet Group, the Conflict Resolution Group Inc., the Philippine Internet Commerce Society and the Information Technology Association of the Philippines.¹⁶⁰

ODR offers considerable promise in helping decongest the court dockets, particularly in cases involving unpaid claims in ordinary consumer or business transactions, by creating a mechanism wherein current cases involving such disputes could be diverted to an ODR system offering mediation or arbitration of the dispute. This option is available to future or potential litigants prior to instituting a complaint in court.¹⁶¹

B. ODR PHILIPPINE STYLE

Generally, only disputes of a commercial character may be filed. These disputes include, among others, claims for damages for non-delivery or misdelivery of goods, insurance claims, franchise disputes, commercial contracts, money claims, specific performance of contracts, franchise

¹⁵⁸ Philippines Opens First Online Dispute Resolution Service, *available at* http://i-policy.typepad.com/informationpolicy/2004/11/philippines_ope.html

¹⁵⁹ <http://www.disputeresolution.ph/about.asp>

¹⁶⁰ Alexander Villafania. Law Group Opens Online Dispute Resolution Service, *available at* www.inq7.net/infotech/index.php?index=1&story_id=17600

¹⁶¹ <http://www.disputeresolution.ph/faqs.asp>.

disputes, and similar cases. Non-commercial disputes, such as those involving criminal violations, disputes arising from marital or family relationships, complaints against public officials and employees, and similar cases, may not be filed before the PH ODR.¹⁶² The services of the site are available to the general public, merchants, retailers, franchisers, and commercial establishments.

Parties can avail themselves of the dispute resolution facilities of the site in either of two ways: first, by inserting a dispute resolution clause in their commercial contract agreeing to submit any future dispute to the site and agreeing to comply either with the terms of any settlement or award; or, second, even without a prior written agreement, by simply agreeing to the site's assumption of the dispute after the other party files the case before the site.¹⁶³

Any party wishing to file a commercial dispute before the site simply logs in to the website, types in his chosen user name and password (to ensure the privacy of the case file), and clicks on "file a case". The party is then directed to a series of pages requesting information about himself and the adverse party, as well as the particulars of the dispute and the relief sought. The complainant is also asked to indicate whether there is a prior written agreement between him and the respondent to submit the dispute to the site and, if so, to upload a copy of the agreement to the site via PDF format. If there is such an agreement, the site sends an email notification to the respondent advising him that the case has been filed, and the particulars of the claim. If there is no prior agreement, the site asks the respondent whether he consents to having the dispute resolved through the facility. The staff then evaluates the claim and, based on the nature of the claim, sends an email to both parties suggesting a particular mode of resolving the dispute. This may be any one of four modes, namely: (a) blind bidding; (b) neutral evaluation; (c) online mediation; and (d) online arbitration. Once the parties have agreed upon a particular mode of dispute resolution, the site then sets the case in motion and assists the parties in appointing a neutral or a panel of neutrals from the roster of accredited neutrals to conduct the agreed proceeding.¹⁶⁴

If a party to a settlement refuses to comply with his part of the agreement, the other party can file a suit in court to enforce the agreement. Likewise, if a party who has agreed to submit the dispute to arbitration

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

refuses to comply with the terms of the award, the prevailing party can file suit in court to enforce the award. The burden of proving one's suit for enforcement, however, would now be a lot simpler and easier because of the presence of the agreement or the award. All the court needs to do would be to make a determination that the settlement or award is in accordance with law, and then proceed to order its enforcement in accordance with its express terms. Without the existence of the agreement or the award in the first place, the court would have to go into the merits of the dispute and reach a decision, a process that is normally tedious, expensive, and time-consuming.¹⁶⁵

C. NEW ADR LAW

Recently, President Gloria Macapagal-Arroyo signed into law R.A. 9285 or the Alternative Dispute Resolution Act (ADR Act) of 2004. The law, authored by Senator Francis Pangilian Jr., seeks to promote methods of resolving cases other than through traditional court litigations. Moreover, the newly signed law gives ODR which uses the Internet and other web based applications concrete legal basis.¹⁶⁶

The said law defines ADR system or Alternative Dispute Resolution System as any process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, wherein a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.¹⁶⁷ Also the new law provided for the application of the provisions of the Electronic Signatures in Global and E-Commerce Act, and its implementing Rules and Regulations in proceedings contemplated under the new law.¹⁶⁸

With regards the enforcement of the mediated settlement agreement, should one be entered into as a result of the ADR method employed, the new law likewise provides for the procedure to be followed. First, a settlement agreement following successful mediation shall be prepared by the parties with the assistance of their respective counsel, if any, and by the mediator. The parties and their respective counsels shall

¹⁶⁵ *Id.*

¹⁶⁶ Kerlyn Bautista. New law gives teeth to ODR, *available at* http://www.itmatters.com.ph/news/news_04052004c.html

¹⁶⁷ Section 3 (a), RA 9285

¹⁶⁸ *Id.* at Section 4.

endeavor to make the terms and condition thereof complete and make adequate provisions for the contingency of breach to avoid conflicting interpretations of the agreement.

Second, the parties and their respective counsels, if any, shall sign the settlement agreement. The mediator shall certify that he/she explained the contents of the settlement agreement to the parties in a language known to them. If the parties so desire, they may deposit such settlement agreement with the appropriate Clerk of a Regional Trial Court of the place where one of the parties resides. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court, in which case, the court shall proceed summarily to hear the petition, in accordance with such rules of procedure as may be promulgated by the Supreme Court.

Finally, the parties may agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award which shall be subject to enforcement under Republic Act No. 876, otherwise known as the Arbitration Law.¹⁶⁹

ADR methods can thus be modified if disputing parties decide to settle cases through ODR. There are at least 5 processes to choose from, namely, a) Facilitated negotiation—a software assisted process where parties assess the merits of their case with the help of a program, b) Automated negotiation—used for cases that involve blind bidding for money claims, c) Case appraisal—a non-binding assessment of the major points and weaknesses of a case, d) Online mediation and e) Online arbitration.¹⁷⁰

D. COURT-ANNEXED MEDIATION

In line with the desire to fully promote ADR as the preferred mode of dispute settlement, the Supreme Court recently issued A.M. No. 01-10-5-SC-PHILJA, outlining and providing for guidelines for the implementation of mediation proceedings. The said circular provided for cases which shall be covered by court-annexed mediation, namely, (a) All civil cases, settlement of estates, and cases covered by the Rule on Summary Procedure, except those which by law may not be compromised. (b) Cases cognizable by the Lupong Tagapamayapa under the Katarungang Pambarangay Law (c)

¹⁶⁹ *Id* at Section 17.

¹⁷⁰ See note 166, *supra*.

The civil aspect of BP22 cases; and (d) The civil aspect of quasi offenses under Title 14 of the Revised Penal Code.¹⁷¹

It outlines the procedure to be followed as well. In the mediation proceedings referred to, a mediator is first and foremost considered as an officer of the Court.¹⁷² A conference before the mediator shall first be held with both parties present. The mediator shall then explain the mediation proceedings stressing the benefits of an early settlement of the dispute and shall attempt at immediate settlement. If no settlement is reached at this conference, the mediator may, with the consent of both parties, hold separate caucuses with each party to enable the mediator to determine their respective real interests in the dispute. Thereafter, another joint conference may be held to consider various options proposed by the parties to the mediator to resolve the dispute.¹⁷³

The mediator shall not record the proceedings in any manner but he may take down personal notes to guide him.¹⁷⁴ The mediator shall however submit to the trial court, which referred the case to mediation, a status report on the progress of the proceedings at the end of the mediation period.¹⁷⁵ The Philippine Mediation Center shall not keep a file of mediation proceedings except the report of the mediator. All other records or documents that have been submitted by the parties shall be returned to them.¹⁷⁶

At the end of the thirty-day period allowed by the trial court, if no settlement has been reached, the case must be returned to the trial court for further proceedings, unless the parties agree to further continue the mediation, in which case a last extension of thirty days may be granted by the trial court.¹⁷⁷

¹⁷¹ A.M. No. 01-10-5-SC-PHILJA (Section 1)

¹⁷² *Id.* at Sec. 6 (a)

¹⁷³ *Id.* at Sec. 6 (b)

¹⁷⁴ *Id.* at Sec. 6 (c).

¹⁷⁵ *Id.* at Sec. 6 (d).

¹⁷⁶ *Id.* at Sec. 6 (e).

¹⁷⁷ *Id.* at Sec. 6 (f).

VII. ODR: ADVANTAGES AND DISADVANTAGES

A. ADVANTAGES OF ODRS

The main advantage of ODRS is that parties will not have to commute over long distances to resolve their dispute.¹⁷⁸ If parties are far apart, at least one party will have to travel far to litigate. This is time consuming and expensive. With ODR, parties could sit at home in front of their computers and settle their disputes at any time they choose. These mechanisms are available to them twenty-four hours a day and seven days a week.¹⁷⁹

Another advantage is the convenience of scheduling.¹⁸⁰ If parties choose to mediate their disputes through email or a user group, any of the parties may post messages and read posted messages at any time, avoiding the inconveniences of trying to find a common time to meet.¹⁸¹ Still another advantage is the savings in professional expenses. A major portion of the expense of litigating a dispute is the cost of hiring a lawyer. With ODRS, parties may not have to hire a lawyer at all. ODRS can also save the parties the cost of long distance calls and teleconferencing.¹⁸² Moreover, since the ODR sites have mediators and arbitrators trained in ADR and computer usage, parties do not have to worry about an inexperienced person overseeing the dispute.¹⁸³

Finally, the advantage of ODRS over land-based legal systems is that it avoids the problem of determining which court has jurisdiction over an issue. The jurisdiction issue is especially relevant in light of the global nature of the Internet. Conducting business over the Internet will leave some parties facing foreign jurisdiction and foreign law.¹⁸⁴ With ODR, parties can bind themselves to resolve the dispute through arbitration agreements.¹⁸⁵ The international character of a web site which offers services in various foreign languages is also one of the solutions to the problems arising out of international Internet transactions. Not only could ODRS resolve

¹⁷⁸ Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems and a Proposal*, 3 Harv. Negotiation L. Rev. 192 (1998).

¹⁷⁹ George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 Hastings Comm. & Ent. L. J. 712 (1997).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Online Ombuds Office at <http://aaron.sbs.umass.edu/center/ombuds/default.htm>.

¹⁸⁴ Catherine Kessedjian & Sandra Cahn, *Dispute Resolution On-Line*, 32 Int'l Law. 978 (1998).

¹⁸⁵ E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 Ohio St. J. on Disp. Resol. 200 (1996).

international disputes, more importantly, it also reduces the burdens of both national and foreign court systems as well.¹⁸⁶

B. DISADVANTAGES OF ODRS

Online mediation and arbitration offers no face-to-face contact which is a relevant factor in alternative dispute resolution.¹⁸⁷ Mediation and arbitration through email losses the dynamics of the traditional ADR process, where the parties meet in the same room and face each other.¹⁸⁸ Mediation, for instance, is thought to help bring about solutions because it forces the parties to confront their emotion and vent their feelings.¹⁸⁹ Emails on the other hand, do not carry the same emotionally charged tones, thereby hindering the mediation process.¹⁹⁰ And since parties cannot see each other, they will not be able to read the same emotional messages through body language as they could if they were in the same room together.¹⁹¹

Another problem seen is the fact that mediators/arbitrators may not be proficient in online communications.¹⁹² ODRS requires parties to own a computer, sufficient software and hardware, and Internet connection.¹⁹³ A party may not conveniently have access to the computer all the time. Additionally, he may know how to access the Internet, but he may not know how to communicate effectively online. He may thus be at an unfair disadvantage with online mediation or arbitration.¹⁹⁴

This is what is often referred to as the problem of the "digital divide". It refers to the disparity in the access to technology among the rich and the poor. It is a disparity engendered by a pre-existing economic gap rather than by technology itself. It includes access to technological devices such as telephones, computers and the Internet with costs that are usually beyond the means of the underprivileged who comprise a large segment of our society. As much of commerce, government services and civic

¹⁸⁶ Alejandro Almaguer & Roland W. Baggot III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 Ohio St. J. on Disp. Resol. 714 (1998).

¹⁸⁷ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1312-13 (1998).

¹⁸⁸ *Id.* at 1323.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1336.

¹⁹⁴ *Id.*

interaction become more and more Internet-dependent, the ill-effects of lack of access is pronounced and made more obvious. Thus, one obvious challenge for the realization of ODR's potential to improve access to justice is the problem of access to technology.

One of the hallmarks of traditional ADR is that it leaves no physical record. If someone wanted to record the proceedings, the others would know about it, unless someone brings a hidden recorder. No such guarantee exists with ODRS. Someone could easily print out emails used in the process and disseminate that information without anyone else's knowledge. The feeling of confidentiality in ADR proceedings promotes a feeling of trust among the parties. This is important because parties are more likely to speak freely when they can be sure that their words will not come back and be used against them. Furthermore, there is a threat that hackers may try to break into the system to cause mischief. If one party does not fully trust the other party, the ADR process is in jeopardy.¹⁹⁵

VIII. PROBLEMS AND ISSUES OF ODR

The emergence of online dispute resolution brought forth a host of legal problems and issues unique to this type of technology. These issues include the problem of impartiality, the issue of due process, the place or situs of arbitration, and enforcement issues.

A. DUE PROCESS AND IMPARTIALITY

It is an admitted fact that ODR brings with it a host of advantages. However, these same advantages tend to conflict with a number of procedural guarantees inherently built in and which characterizes adversarial dispute resolution process. Independence and impartiality of the Neutral, the right to be heard, and consent of the parties to the procedural setting, are admittedly some of the most important elements of due process whether the proceedings are to be conducted online or offline. It may be observed that all three elements are reflected, among others, in Articles 34 and 36 of the UNCITRAL Model Law and Article V of the New York Convention. It is interesting to see how these rights are to be implemented in ODR proceedings to comply with the due process requirements¹⁹⁶.

¹⁹⁵ Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law* 41 Santa Clara L. Rev. 837.

¹⁹⁶ Daniel Girsberger and Dorothee Schramm, *Cyber-Arbitration*. 3 European Business Organization Law Review 605-622 (2002).

Likewise it may be gleamed that at the forefront of the tension between speed and cost-efficiency, on the one hand, and due process, on the other is the right to be heard. This right, translated in the online environment is said to comprise of two elements 1) an appropriate occasion and technical means to specify each position and argument and to be provided with those of the counter party and 2) an appropriate way of taking evidence.¹⁹⁷

In an online environment, the first element is at once questionable: Is a simple exchange of e-mails sufficient or is it necessary to offer video-conferencing or telephone conferencing? The lack of real face to face communication is admittedly one of the greatest weaknesses of ODR. Face to face communication will allow an experienced Neutral to sense the truth from expressions, body language, and other signals.

Certain ODR providers are working on a system of incorporating videoconferencing, as opposed to the UDRP for example which does not normally allow this type of communication.¹⁹⁸ Another problem associated with web conferencing is the difficulty in assuring that all parties and Neutrals are always present, and that no third parties are participating in the conference without permission. Also, it must be assured that no party misses important parts of an online hearing due to technical failures, otherwise, the party affected may attack a decision due to violation of the right to be heard.¹⁹⁹

The second element also leads to certain problems. First, it is almost impossible to have an onsite inspection of certain evidence on-line. In addition, the danger and risk of forged documents is also high. Second, it is difficult to solve the problem of identifying witnesses. Added to that is the issue on the reliability of a witness. The Neutral cannot sense the reliability of a witness for lack of personal contact. The solution of having the witness to testify in front of an authority such as a court would fly in the face of ODR, which is chosen precisely with the purpose of avoiding governmental authorities and the duration and costs associated with them.²⁰⁰

¹⁹⁷ *Id.*

¹⁹⁸ Article 13, UDRP Policy.

¹⁹⁹ Daniel Girsberger and Dorothee Schramm, *Cyber-Arbitration*. 3 European Business Organization Law Review 605-622 (2002).

²⁰⁰ *Id.*

The requirements of impartiality (subjective aspect) and independence (objective aspect) are in principle identical in online and off-line proceedings.²⁰¹ One aspect which requires particular attention is with regards the problem of ex parte communication of the Neutral with one party only. Such communications, in which the other party cannot participate even passively, are not allowed in traditional arbitration proceedings, and should not be allowed in online proceedings as well. Admittedly however, improper ex parte communications cannot totally be avoided in either types of proceedings.

The risk of partiality becomes even more pronounced in cases wherein the ODR proceedings are financed by one party, as is the case when major businesses refer disputes with their consumers to an ODR mechanism they have financed themselves.²⁰²

B. PLACE OF ARBITRATION

In international arbitration, the place of arbitration is a core element on which various legal implications depend.²⁰³ The procedural law of the place of arbitration in particular governs the proceedings to the extent not regulated by the parties, and, even where the parties have deviated from it, to the extent that it has a mandatory nature.²⁰⁴ Due to the ubiquity of the Internet, the localization of these elements constitutes a problem particularly in the context of ODR.²⁰⁵

The place of arbitration, may be difficult to locate. Shall it be the place of the server of the offeror, or its incorporation, its head office or principal place of administration, or the domicile of the arbitrator? Whereas in traditional arbitration agreements, the place of arbitration is determined in advance, many ODR clauses do not foresee such a determination and therefore, make it difficult to locate it after the dispute arises.²⁰⁶

²⁰¹ A. REDFERN AND M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 217 (1999).

²⁰² M. Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, available at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>.

²⁰³ A. Vahrenwald, *Out-of-court Dispute Settlement Systems for E-commerce*, 82 (2002).

²⁰⁴ *Id.* at 83.

²⁰⁵ R. Hill, *The Internet, Electronic Commerce and Dispute Resolution: Comments*, 14/4 J. Int. Arb. 104 (1997).

²⁰⁶ Daniel Girsberger and Dorothee Schramm, *Cyber-Arbitration*, 3 European Business Organization Law Review 605-622 (2002).

C. ENFORCEMENT OF AWARDS

Parties almost always agree, either in their arbitration agreements or in their agreed arbitration rules, that the award to be rendered by the arbitrator shall be final and binding. In fact the UNCITRAL Arbitration Rules in its Article 32 (2) even provides that “the award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.”

This kind of provision carries with it a waiver of the right to appeal from an arbitral award. In most cases, the parties expressly agree that they waive their right to any form of appeal from the arbitral award where such waiver may be validly made.

Unfortunately, losing parties almost always appeal from the arbitral awards even if there is a prior agreement that the award shall be final. Not only do the losing parties appeal, but they also assail factual findings and the appreciation of the evidence by the arbitrator in their appeal, with the hope of re-litigating anew what the arbitrator had already settled.²⁰⁷

It may be useful to note that the enumerated grounds for vacating an award under Section 24 of the Arbitration Law does not include questions of fact. Section 24²⁰⁸ provides for four grounds for vacating an award, it further instructs the court to make an order vacating the award upon petition of any party when such party is able to prove affirmatively the presence of these elements.

The said law further provides for a mechanism to ensure the finality of the award. Section 23 of the said law provides that at any time within one month after the award is made, any party to the controversy which was arbitrated may apply to the court having jurisdiction for an order confirming the award. Judicial confirmation of the arbitral award is important because it

²⁰⁷ Arthur P. Autea, *International Commercial Arbitration: The Philippine Experience*, 77 Phil. L. J. 143-157 (2002)

²⁰⁸ These instances include: (a) The award was procured by corruption, fraud, or other undue means; or (b) That there was evident partiality or corruption in the arbitrators or any of them; or (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under section nine hereof; and willfully refrained from disclosing such disqualifications or of any other misbehavior which the rights of any party have been materially prejudiced, or (d) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

is the winning party's means to obtain compulsory orders from the court, like a writ of execution, to enforce the award.²⁰⁹

IX. FUTURE TRENDS

As it currently stands, ODR cannot as yet fully guarantee to deliver a fast, fair, efficient, and effective method of dispute resolution for unhappy online consumers. Commentators point out five essential areas for improvement before ODR can be credible and reliable for online consumer disputes.

A. SPECIALIZED TRAINING AND STANDARDS FOR ODR PRACTITIONERS.

Online consumers need to be certain that ODR providers are offering quality conflict resolution services. There are currently no formal standards for the practice of ODR and no uniform specialized training for ODR practitioners. Either a self-regulating Internet body or a single government entity within each participating nation needs to oversee ODR provider standards.²¹⁰

B. INTERNATIONAL ENFORCEABILITY

Reaching settlement is only part of the conflict equation. Settlement can only be useful if the outcome is enforced within a relatively short period of time. Online consumers may spend time and money using ODR services to resolve a dispute only to find that the terms are not enforceable. It is unlikely that a consumer will cross state or national borders in order to enforce a low cost online disagreement. It is also doubtful whether a court in another jurisdiction will agree to enforce a decision reached in cyberspace that does not comport with established legal, ADR, and public policy standards.²¹¹

C. COST OF ODRS

While a number of ODR providers may see the wave of online consumer disputes as a potential source of additional revenues, in reality,

²⁰⁹ See note 207, *supra*.

²¹⁰ Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution Really Deliver the Goods for the Unhappy Internet Shopper?* 3 Tul. J. Tech. & Intell. Prop. 55

²¹¹ *Id.*

most Internet consumer disputes involve relatively low-cost transactions.²¹² Thus, in order for ODR to be of value to online consumers, ODR services must be provided at low or no cost to the consumer.

D. CONTINUED TECHNOLOGICAL EXPERIMENTATION

ODR providers have utilized conferencing systems, automated software, password-protected chat rooms and neutral sites, listservs, and e-mail. To add the human element to ODR proceedings, the development of cost-effective video and web-conferencing devices and other similar real time options need to be encouraged. There should in addition be increased public and private support of initiatives that improve public access to ODR technological tools that are central to improving the quality of the ODR experience.²¹³

E. GREATER PUBLIC AWARENESS AND UNDERSTANDING

Currently, ODR, with a few technological twists, reflects traditional ADR models. Thus ODR faces one of the main obstacles that haunts ADR today-- the lack of public awareness and education about ADR principles and methods. Few have been exposed to ADR, they will therefore most likely to be reluctant to use ODR services. Before ODR can gain credibility, ADR must be better understood and valued by the public.²¹⁴

X. CONCLUSION

We see a conscious move towards bringing the resolution of various disputes, whether online or offline, to the online forum. The US Congress enacted the United States Arbitration Act, also known as the Federal Arbitration Act, in 1925. The following year, the American Arbitration Association ("AAA") was formed to promote knowledge of arbitration and its application to the settlement of disputes.²¹⁵ Today, the AAA is in the

²¹² Henry J. Perritt, Jr. *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol. 675 (Summer 2000).

²¹³ See note 210, *supra*.

²¹⁴ *Id.*

²¹⁵ *Past, Present & Future: Building on 70 Years of Innovation—The AAA Looks to the 21st Century*, 51 Disp. Resol. J. 109, 110 (1996).

process of preparing for a more “digital” approach to conflict management.²¹⁶

In the Philippines, RA 9285 or the Alternative Dispute Resolution Act was recently enacted. The law seeks to promote methods of resolving cases other than through traditional court litigations. More importantly, this newly enacted law gave ODR concrete legal basis by providing for the application of the provisions of the Electronic Signatures in Global and E-Commerce Act.²¹⁷

Undeniably, the Internet offers online consumers the opportunity for twenty-four-hour access to a global marketplace. This increased access means more online transactions and online consumer disputes. The court system standing alone does not have the resources or expertise to deal with a flood of Internet litigation that involves numerous, thorny cross-border issues. As business transactions are continuously moving from the offline to the online sphere, it is just but reasonable to expect that dispute resolution mechanisms adopt the same movement as well.

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²¹⁶ *Id.* at 109.

²¹⁷ Section 4, RA 9285.