



Addressing Disputes in Electronic Commerce: Final Recommendations and Report
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Addressing Disputes in Electronic Commerce: Final Recommendations and Report

*By the American Bar Association's Task Force on Electronic Commerce and
Alternative Dispute Resolution in Cooperation with the Shidler Center for Law,
Commerce and Technology, University of Washington School of Law**

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*The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of the American Bar Association, the Section of Business Law, the Section of Dispute Resolution, the Section of International Law and Practice, the Litigation Section, or the Section of Intellectual Property Law unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases and readers are responsible for obtaining advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

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World Intellectual Property Organization
The organizations and individuals listed above have not approved or endorsed
the Task Force's report or recommendations.

I. EXECUTIVE SUMMARY OF FINAL RECOMMENDATIONS

The American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution (“Task Force”) was asked to propose protocols, workable guidelines, and standards that can be implemented by parties to online transactions and by online dispute resolution (ODR) providers (referred to as “ODR providers” or “ODR service providers”). The Task Force was asked to focus specifically on “the challenges raised by multi-jurisdictional business to business (“B2B”) and business to consumer (“B2C”) transactions.”¹

ODR is a broad term that encompasses many forms of alternative dispute resolution (ADR)² that incorporate the use of the Internet, Web sites, e-mail communications, streaming media, and other information technology as part of the dispute resolution process. Parties may never meet face-to-face when participating in ODR. Rather, they might communicate solely online.

Alternatively, ODR may supplement ADR that takes place in the more conventional physical world. Parties may choose to post materials for arbitration on a Web site or interview witnesses online as a supplement to a hearing before an arbitral panel.

ODR allows for virtual communications between parties in cyberspace. As such, it provides a new and innovative means of resolving cross-border disputes—especially involving consumers. Parties can participate in ODR without having to travel to another jurisdiction to initiate a lawsuit or to participate in ADR involving a face-to-face meeting or hearing.

The Task Force also notes that the provision of ODR through the Internet and other forms of information technology is a new form of e-commerce in and of itself. Disputes generated offline may also be resolved online. An ODR transaction is itself an e-commerce transaction.

At the heart of e-commerce is an online transaction or series of transactions. As part of its focus, the Task Force has examined what types of mechanisms will help instill trust and confidence in e-commerce transactions and in the online marketplace—primarily for consumers, but for businesses as well. Each online transaction is premised upon the confidence of the parties that a bargain will be fulfilled. When focusing on electronic commerce (“e-commerce”) and ADR, the Task Force took a broad view of its mandate and recognized that dispute and complaint prevention is as important, if not more important, than dispute resolution as a means of promoting the growth of e-commerce.

1. See ABA E-Commerce and ADR Task Force, Welcome!, at <http://www.law.washington.edu/ABA-eADR/home.html> (last visited Oct. 16, 2002). An important motivation for the creation of the Task Force was to ensure that a “neutral entity” would study the issues and make the recommendations. As stated on the Section of Business Law Web site, “there is a clear need for a neutral non-provider entity to create a task force to study disputes in cyberspace and assist with the development of proposed protocols, guidelines and standards for dispute resolution.” American Bar Association Task Force on E-Commerce and ADR [hereinafter ABA Task Force], at <http://www.abanet.org/buslaw/adrtaskforce.html> (last visited Oct. 16, 2002).

2. ADR encompasses a wide variety of processes including mediation, arbitration, conciliation, and negotiation.

There are multiple ways to help prevent disputes from arising out of e-commerce transactions and to provide consumer redress in the event a problem does arise. Preventive measures include consumer education, the use of secure payment methods such as escrow or credit cards, the use of merchant trustmark or Web seal programs, and feedback or other evaluative mechanisms that rate merchants or online buyers and sellers.

Mechanisms for resolving consumer problems arising from e-commerce disputes may include insurance programs, merchant guarantees, in-house complaints handling, or customer service programs. In the B2B setting, parties may have to agree to arbitration as a prerequisite to trading on a particular Web platform or exchange. For B2C transactions, Internet merchants may offer dispute resolution through a third-party ODR provider. ODR, however, typically occurs after a consumer has failed to resolve his or her complaint directly with the Web merchant.

The Task Force's recommendations take into account multiple ways to assist in preventing and resolving online disputes. At the outset, the Task Force notes that when customers perceive problems arising from Internet transactions, effective complaints handling by a merchant is more important than ADR or ODR. ADR is a backup procedure that is only necessary if a customer is unable to get redress for his or her complaint.

Mindful that there are many ways to help prevent, as well as to help resolve, disputes or complaints that arise from e-commerce transactions, the Task Force makes the following recommendations and observations:

1. E-commerce businesses should place an enhanced emphasis on all stages of dispute prevention, complaints handling, and effective methods of redress through ADR and ODR.
2. Internet merchants, governmental and nonprofit entities should place a greater emphasis on consumer education and the prevention of e-commerce disputes.
3. Protecting consumers requires adequate standards and codes of conduct for e-commerce businesses.
4. Internet merchants should be encouraged to participate in, and subscribe to, relevant e-commerce codes of conduct and trustmark programs.
5. Internet merchants should develop, or continue to improve on, their in-house complaints handling mechanisms, and educate consumers as to how to use these in-house procedures effectively.
6. For consumers, recourse to in-house complaints mechanisms is normally the first and best means to obtain redress from reputable merchants. Accordingly, consumers should be encouraged to utilize the in-house complaints handling mechanisms offered by reputable Internet merchants before resorting to third-party dispute resolution mechanisms.
7. At present, the lack of ODR does not appear to be a material impediment to the growth of B2C e-commerce.
8. At present, ODR is subsidiary to other higher priority consumer protection

- activities, including consumer education and use of measures that help prevent or decrease the incidence of fraud in Internet transactions.
9. Recognizing that enforcement of outcomes and decisions reached through ODR may be difficult, consumers should be encouraged to consider using other dispute prevention mechanisms such as escrow services and credit card charge back mechanisms when transacting online.
 10. Rather than create a code of conduct for ODR service providers, the Task Force has drafted Recommended Best Practices by Online Dispute Resolution Service Providers (“Recommended Best Practices”) (see Annex A).
 11. The Task Force recommends the creation of a new informational entity (referred to as the iADR Center) that would provide information about ODR in an effort to educate and familiarize consumers, businesses, lawyers, and other professionals with this new type of service.
 12. For the advancement of ODR as an effective and efficient means of cross-border dispute resolution for both B2B and B2C transactions, there needs to be an appropriate emphasis on the development of interoperable communication and data-sharing platforms.
 13. The Task Force believes much of the education that will be useful for consumers will also be useful for businesses—especially small- to medium-sized enterprises and those who are new to the Internet marketplace and to cross-border transactions.

II. BACKGROUND AND INTRODUCTION

A. TASK FORCE MISSION

Mindful of the dramatic growth and use of the Internet for commercial transactions, and the profound jurisdictional issues raised by such use, the American Bar Association’s (ABA’s) Section of Business Law, Committee on the Law of Cyberspace, initiated a project in 1998—the Global Cyberspace Jurisdiction Project—designed to explore in detail those jurisdictional issues. The Committee’s efforts resulted in the drafting and presentation in July 2000 of a report entitled *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*.³

This study examined the questions and issues raised by Internet jurisdiction in a series of important subject areas—consumer protection, privacy, intellectual property, banking, securities, taxes, and gaming. The final report identified a menu of possible solutions to various jurisdictional challenges posed by different types of Internet transactions or online content. The recommendations included:

- establishment of a multinational “Global Online Standards Commission” to develop uniform principles and global protocol standards;
- development of new online forms of dispute resolution; and

3. To download a copy of the study and for related background information, please see <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (last visited Oct. 16, 2002).

- usage of programmable electronic agents (“bots”) to automate Internet transactions and protect consumers from Web sites that do not meet their personal standards.

As part of its work, the Jurisdiction Project specifically noted the difficulties associated with resolving disputes arising in cyberspace where cyber-transactions are not tied to any particular geographical location, observing that:

Cyberspace may need new forms of dispute resolution—to reduce transaction costs for small value disputes, and to erect structures that work well across national boundaries. Voluntary industry councils and cyber-tribunals should be encouraged by governmental regimes to continue developing private sector mechanisms to resolve electronic commerce disputes. Government-sponsored online cross-border dispute resolution systems may also be useful to complement these private sector approaches.⁴

The Jurisdiction Project’s Report specifically foresaw the need for, and possibility of, “new forms of dispute resolution” and the fact that the nature of dispute resolution itself would have to evolve, just as e-commerce was evolving.⁵ With this particular focus in mind, the ABA again acted to address the issue of ADR in cyberspace. Specifically, in September 2000, five different sections of the ABA, including Business Law, Dispute Resolution, Litigation, International and Intellectual Property, jointly created a Task Force and Advisory Committee on E-Commerce and ADR (“Task Force”) to propose protocols, workable guidelines, and standards that can be implemented by parties to online transactions and by ODR providers. The Task Force was asked to focus specifically on multi-jurisdictional B2B and B2C transactions.⁶

In addition, in March 2001, the Committee on the Law of Cyberspace (CLC) of the ABA’s Section of Business Law established an Online ADR Task Force (“CLC Task Force”) to provide advice and assistance to this joint Task Force. The support the Task Force has received from the CLC Task Force has been extensive and consistently excellent. It is reflected widely in the reasoning and language of this Report. Further, the Task Force has been separately advised by the Consumer Protection Working Group from the Cyberspace Committee and the perspectives of that Working Group have also helped shape this Report in important ways. We are grateful for the dedication of these ABA colleagues.

After the establishment of its own Web site⁷ and an extensive period of

4. American Bar Association Global Cyberspace Jurisdiction Project, London Meeting Draft, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, available at <http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf> (last visited Oct. 16, 2002).

5. *Id.*

6. See ABA Task Force, *supra* note 1 and accompanying text.

7. The initial act of the Task Force was to partner with the Center for Law, Commerce and Technology at the University of Washington School of Law in Seattle. The Center took on the responsibility of providing research support for the Task Force and creating and maintaining the Task Force Web site. See <http://www.law.washington.edu/ABA-eADR/home.html> (last visited Oct. 16, 2002).

international public outreach,⁸ fact-finding and preliminary analysis, the Task Force concluded that the issues under consideration, by their very nature, compelled as broad and comprehensive an analysis as possible. Indeed, responsible U.S. and foreign government officials and entities have consistently stressed the need for globally *compatible solutions*, including global dispute resolution systems, codes, and guidelines.⁹

B. TAXONOMY AND STATISTICAL DATA

1. Dispute Terminology

The words “complaints” and “disputes” are used frequently and interchangeably without providing any definition or context. There are various types of injurious experiences consumers may have. Commentators often refer to a pyramid of injurious experience, or a dispute pyramid.¹⁰ At the base of the pyramid is unperceived injurious experience, moving up to perceived harms, grievances, and complaints. At the very top of the pyramid are disputes, with a subset being disputes voiced to third parties and resolved through formal dispute resolution—which would include ADR as well as lawsuits.

The layers of the dispute pyramid have been characterized in the following manner:

Unperceived injurious experience. Consumers may experience a problem with a transaction but never perceive it as injurious per se. For example, a consumer may lack the expertise to recognize a specific problem such as a product defect that makes a product work inefficiently.

8. In addition to the creation of its Web site and the development of written surveys in English, French, German, Spanish, Japanese, Chinese, and Russian, the Task Force held a series of public meetings in Washington, D.C., New York, San Diego, London, and Paris at which time public input was received. See ABA E-Commerce and ADR Task Force, Meetings, at <http://www.law.washington.edu/ABA-eADR/meetings/index.html> (last visited Oct. 16, 2002).

9. The Task Force notes the following from the Joint U.S.–E.U. Statement of December 18, 2000:

We now reaffirm these important goals and objectives, including the agreement to provide “active support for the development, *preferably on a global basis*, of self-regulatory codes of conduct and technologies to gain consumer confidence in electronic commerce.” We also reaffirm our commitment to the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce issued in December 1999.

Statement of the European Union and the United States on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution, European Union in the US (Dec. 18, 2000) [hereinafter Building Consumer Confidence] (emphasis added), available at <http://www.eurunion.org/partner/summit/Summit0012/Ecommerce.htm> (last visited Oct. 16, 2002).

10. The Working Group on Consumer Protection of the Electronic Commerce Subcommittee, Cyberspace Law Committee of the ABA Section of Business Law suggested the discussion of the dispute pyramid and its layers. For further discussion and explanation of the dispute pyramid, see generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11–36 (1993); BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977); Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977).

Perceived injurious experience. Out of the larger mass of experience, some of it is perceived by individuals as injurious. A consumer or customer, however, may blame him or herself or feel the injury is too vague or debatable to be susceptible to a remedy. Thus, the experience may never develop into a grievance.

Grievances. A grievance is a sense of violation of a right or entitlement that can be ascribed to a specific person or entity. Grievances are usually not voiced, although they may make customers decide not to return to a particular merchant or type of merchant or medium. For example, a consumer who has a grievance arising out of an Internet transaction may choose never to use the Internet for future purchases. When a grievance is not voiced, the consumer, in essence, absorbs the loss.

Complaints or claims (not legal claims or complaints). A complaint is a grievance that is voiced to the perceived offending party. Most frequently, complaints are granted or redressed. These would be referred to as "resolved" complaints. Reputable merchants, who seek repeat business and value positive reputation among consumers will encourage customers who perceive grievances to complain. A merchant who receives a complaint is in a position to grant relief and satisfy the customer. Granting relief builds trust and confidence with the customer for future dealings.

Disputes. A dispute, as contrasted with a complaint, is a complaint that has been rejected in whole or in part. Often, customers do nothing after a complaint has been rejected by a merchant. This is another stage at which consumers may choose to absorb or internalize the loss. This is often rational because the cost of pursuing relief may be more expensive than the loss itself. The customer, however, may choose to avoid future dealing with the merchant and can create negative feedback or word of mouth.

Disputes voiced to a third party. A small fraction of customers with disputes choose not to give up but to seek the assistance of some third party. Third parties might include a government agency, a merchant association, or a lawyer. Not infrequently, the third party will advise a consumer that it is not worth it to commence a formal proceeding against a merchant.

Formal dispute resolution would include ADR or lawsuits. This is the top of the pyramid and the smallest category on the dispute pyramid.

2. *E-Commerce Terminology and Statistics*

The vocabulary of electronic commerce and the Internet is rich and complex.¹¹ Thus, it may be appropriate to define at least those few words and expressions that have had particular impacts on our thinking.

The term *electronic commerce*, or *e-commerce* is itself broad and open to many definitions. Broadly defined, e-commerce can be viewed as the aggregate of goods

11. A hyper dictionary of electronic commerce law may be found at MICHAEL I. SHAMOS, CARNEGIE MELLON INSTITUTE FOR ECOMMERCE, HYPERDICTIONARY OF ELECTRONIC COMMERCE LAW (1999), at http://www.ecom.cmu.edu/elib_eclgloss.htm (last visited Oct. 22, 2002); see also ERIN JANSEN, NETLINGO, THE INTERNET DICTIONARY, available at <http://www.netlingo.com> (last visited Oct. 16, 2002).

and services sold over computer-mediated networks. For these purposes, sales include licenses. Examples of e-commerce transactions include the sale of a book over the Internet, the sale of parts at an electronic marketplace or trading platform to another business, the sale of component parts from one plant to another within the same company over the Intranet, and a manufacturer selling to a retailer over an electronic data interchange (EDI) network. When we refer to electronic or e-commerce transactions, we refer to the “sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer-mediated networks.”¹²

The Task Force categorizes electronic commerce (“e-commerce”) into two principal segments: business-to-business (“B2B”) and business-to-consumer (“B2C”).

The B2C component of e-commerce represents the value of products and/or services that individuals purchase “online” that are intended for personal, family or household use.¹³ B2C transactions are carried out daily on a global basis primarily over the Internet. We do not, for our purposes, separately define consumer-to-consumer (“C2C”) or person-to-person (“P2P”) purchases, such as those made through Internet auctions. We include such transactions within the B2C category because of the involvement of a business service provider interfacing with the consumer parties.

B2B transactions, by contrast, represent the value of products and/or services that are intended for use by a business, an educational institution, a nonprofit organization, or a governmental agency. Currently, B2B e-commerce—both buying and selling—is dominated by large enterprises, again on a worldwide basis but typically over closed or private networks. B2B e-commerce is carried out principally in three ways:¹⁴

- (supplier-driven) eDistribution sites
- (buyer-driven) eProcurement sites
- (independent) eMarketplaces

The first of these methods involves a supplier—which may be a new Internet supplier or a traditional brick-and-mortar company with an expanding e-commerce component to its sales and marketing efforts—which owns and operates an e-commerce site as its own private eDistribution system. Examples of this type of effort would include the online distribution systems of Dell Computers and Cisco Systems.

12. The OECD coined this definition. See *Business to Consumer Electronic Commerce: An Update on the Statistics*, at <http://www.oecd.org/pdf/M00018000/M00018264.pdf> (last visited Oct. 16, 2002).

13. The phrase “personal, family or household use” appears in Article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980) and sets out a useful, if not authoritative, definition for consumer-type transactions, online or otherwise. For the text of the Convention as well as comprehensive related information, see <http://www.cisg.law.pace.edu>. A “consumer” can be defined as a natural person acting for purposes, which are outside of his or her trade, business or profession. The Meaning of ‘Consumer,’ Legal500.com, at http://www.legal500.com/devs/uk/cs/ukcs_130.htm.

14. Of course, cultural differences do affect the adoption of B2B models in various countries and regions, particularly in Japan and Asia/Pacific.

The second method involves the traditional procurement function carried out on an online basis by a single buyer or on behalf of a number of buyers that agree to use a common eProcurement platform.

The third method is the independent eMarketplace, which is established to facilitate multiple buyers purchasing products and/or services from multiple suppliers. Other terms used to describe the eMarketplace are "trading hub," "exchange," "digital marketplace," "electronic hub," etc.

Statistics suggest that the numbers of both B2C and B2B e-commerce transactions are increasing. Nevertheless, it must also be observed that both types of transactions are subject to technological limitations as well as advances. B2B online commerce appears in fact to be at a technological crossroads, in that traditional B2B activities have been carried out by the largest companies over private networks that specialize in EDI.¹⁵

As discussed below, in order for merchants to engage in B2B transactions they will need interoperable communications and data-sharing platforms. Extensible Markup Language (XML) may be the successor to EDI as a means of providing such interoperability for e-commerce and also for ODR as one aspect of e-commerce. Clearly the next generation of B2B transactions—which will affect all of the current selling models: eDistribution, eProcurement, and eMarketplaces—will involve the scaling of those transactions beyond simple exchanges over private networks between top-tier customers, extending their reach to small and midsize customers communicating and contracting over the Internet.

Internet and e-commerce statistics vary tremendously. Because retail and B2B e-commerce is still relatively new, there is no historical data, which allows for accurate long-term projections about the growth rate of e-commerce for B2C or B2B.¹⁶ Thus, care must be taken when interpreting statistics concerning the Internet and e-commerce.

Internet access and use on a worldwide basis is growing at an exponential rate. On October 1, 2001, the research firm NUA reported that the number of people

15. For a practitioner's view of EDI, see BENJAMIN WRIGHT, J.D., *EDI AND AMERICAN LAW: A PRACTICAL GUIDE* (1989).

16. For a useful report on Internet and e-commerce data, see Rita Tehan, *Internet and E-commerce Statistics: What They Mean and Where to Find Them on the Web*, CRS Report for Congress (updated Oct. 24, 2000), at <http://www.cnire.org/NLE/CRSreports/Science/st-36.cfm>. See also Thomas L. Mesenbourg, *Measuring Electronic Business* (Aug. 2001), at <http://www.census.gov/eos/www/papers/ebusasa.pdf> (last visited Oct. 22, 2002); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) COMMITTEE ON CONSUMER POLICY, DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY, *BUSINESS-TO-CONSUMER E-COMMERCE STATISTICS 3 (2001)* [hereinafter *E-COMMERCE STATISTICS*], available at <http://www.oecd.org/pdf/M00001000/M00001293.pdf> (last visited Oct. 22, 2002).

Until recently, there has been no internationally-agreed definition of what e-commerce is. It is therefore difficult to compare estimates of its size, breakdown and growth. A variety of sources produce estimates, including IT market research firms, investment banks, and increasingly, national statistical offices. Not only are their definitions different, but the methodologies are often not comparable, leading to a wide range of estimates and forecasts.

Id. at 3 (citation omitted).

with Internet access around the world reached 513.41 million, give or take a few million.¹⁷ Surprisingly, the same firm's November 2000 report indicated that worldwide Internet access then totaled 407.1 million,¹⁸ which suggests that worldwide Internet access and use is currently growing at a rate of substantially more than 100 million individuals a year.

Internet "penetration"—presenting this same data as a percentage of the local population¹⁹—also varies by region and by country. NUA reports that Internet penetration is high in Western Europe, parts of Asia, and North America, but low in the developing countries.²⁰ The research firm Taylor Nelson Sofres, which recently published the second of its lengthy and detailed global e-commerce reports, provides a similar view of Internet penetration.²¹

From an e-commerce standpoint, however, the key statistics are not those concerning general Internet use or access, but those concerning use of the Internet for the conduct of B2B or B2C purchase and sale transactions.

Surveys show that the global volume of B2B e-commerce has increased rapidly over the past three to four years, and estimates are that this volume will continue to increase dramatically over the next several years.²²

These estimates were formulated prior to the slow down in global production that became evident in mid to late 2001 and that was exacerbated by the attack on the United States on September 11, 2001. Hence, future estimates may show less dramatic growth rates for this segment. ODR is not used to any meaningful degree in the B2B market segment because the parties have made other arrangements for the settlement of disputes between them and disputes among them are rare in any case.

17. The authors of the report emphasize that these figures are "guesstimates." NUA currently reports data from 202 out of 227 states and territories, but the local research firms that collect such data do not necessarily use identical methodologies. See Kathy Foley, Half a Billion Online, NUA Internet Surveys: Analysis, Weekly Editorial (Oct. 1, 2001) [hereinafter Half a Billion], at http://www.nua.ie/surveys/analysis/weekly_editorial/archives/issue1no197.html.

18. Kathy Foley, 2000: Year in Review: That Was the Year That Was, NUA Internet Surveys: Analysis (Dec. 28, 2000), at http://www.nua.com/surveys/analysis/yearinreview/archives/2000_yearly_review.html.

19. The Internet penetration rates would be even more impressive if they were calculated as a percentage of adults or those most likely to use the Internet, say, fifteen years or older.

20. NUA's figures (country and percent of population) for the top ten countries follow: Sweden, 63.55%; Iceland, 60.79%; United States, 59.75%; United Kingdom, 55.32%; Hong Kong, 54.50%; Netherlands, 54.44%; Norway, 54.40%; Australia, 52.49%; Taiwan, 51.85%; Singapore, 49.30%. See *Half a Billion*, *supra* note 17.

21. See TAYLOR NELSON SOFRES INTERACTIVE, GLOBAL E-COMMERCE REPORT 2002 (2002), at <http://www.tnssofres.com/ger2002/index.cfm> (last visited Oct. 16, 2002).

22. The Boston Consulting Group (BCG) reports that the transaction value of B2B e-commerce is expected to reach two trillion by 2003 with an additional \$780 billion in purchases made over private networks using EDI. Moreover, BCG estimates that B2B e-commerce will account for nearly twenty-four percent of total business-to-business commerce by 2003. See THE BOSTON CONSULTING GROUP, NEW BCG STUDY RE-EVALUATES SIZE, GROWTH AND IMPORTANCE OF BUSINESS-TO-BUSINESS E-COMMERCE (1999), at http://www.bcg.com/new_ideas/new_ideas_subpage5.asp (last visited Oct. 22, 2002). IDC reports that the total worldwide value of B2B commerce will increase from \$282 billion in 2000 to \$4.3 trillion by 2005. See CYBERATLAS STAFF, B2B E-COMMERCE HEADS FOR TRILLIONS (2002), at http://cyberatlas.internet.com/markets/b2b/article/0,,10091_986661,00.html (last visited Oct. 22, 2002).

In contrast, surveys also show that the volume of B2C e-commerce has increased relatively slowly over the past three to four years.²³ The U.S. Department of Commerce, for example, estimates that B2C transactions accounted for less than ten percent of all e-commerce transactions in the United States during 1999.²⁴ In 2000, B2C e-commerce was estimated to be only six percent of all e-commerce transactions in the United States.²⁵ Furthermore, even aggressive estimates predict that this volume will continue to grow at a relatively slow rate in the future.²⁶

B2C transactions also appear to represent a small sector of the retail marketplace. In 2000, the Department of the Census reported that e-commerce transactions accounted for an estimated 0.9% of all retail sales. The U.S. Department of Commerce reported that retail e-commerce sales during the fourth quarter of 2001 were \$10 billion—up 13.1% from the fourth quarter of 2000. E-commerce sales made up 1.1% of the total retail sales during this period.²⁷ It is in this “retail” segment that ODR has been most used and has its greatest potential application.

It should be noted that the various estimates with respect to both B2B and B2C commerce are averages over the entire globe or over very large geographic regions. Hence, depending on many local factors, either segment may show sharp increases or decreases more locally. In general, the factors that seem to be most conducive to growth of B2C commerce in particular sub-regions and countries are the availability of technological infrastructure and the maturity of social structures based on strong and reliable commercial law and related financial and accounting systems.

C. UNDERSTANDING CONSUMER CONCERNS RELATED TO E-COMMERCE

Many organizations have studied and detailed the concerns of consumers in online transactions.²⁸ A representative list includes:

23. See E-COMMERCE STATISTICS, *supra* note 16, at 14 (“With B2C e-commerce still accounting for a very small share of all retail trade in OECD countries, usually less than 1%, it is understandable that some public attention has shifted to the B2B e-commerce sphere which accounts for more than four-fifths of all transactions.”); see also U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, SMALL BUSINESS EXPANSIONS IN ELECTRONIC COMMERCE: A LOOK AT HOW SMALL FIRMS ARE HELPING SHAPE THE FASTEST GROWING SEGMENTS OF E-COMMERCE 13 (2000), at http://www.sba.gov/advo/stats/e_comm2.pdf (last visited Oct. 22, 2002).

24. U.S. DEP’T OF COMMERCE, E-STATS, E-COMMERCE 2000 (2002), at <http://www.census.gov/eos/www/papers/estatstext.pdf> (last visited Oct. 22, 2002).

25. *Id.*

26. A recent 2001 OECD report that compiles and analyzes government and private sector data on B2C e-commerce reports that B2C e-commerce is expected to account for three to six percent of all retail sales within the next few years. See E-COMMERCE STATISTICS, *supra* note 16, at 14.

27. *Retail E-Commerce Sales in Fourth Quarter 2001 Were \$10.0 Billion, Up 13.1 Percent from Fourth Quarter 2000*, Census Bureau Reports, U.S. DEP’T OF COMMERCE NEWS, Feb. 20, 2002, at <http://www.census.gov/mrts/www/data/pdf/20014q.pdf>.

28. See, e.g., CONSUMERS INTERNATIONAL, CAMPAIGNS & ISSUES, at <http://www.consumersinternational.org/campaigns/index.html> (last visited Oct. 16, 2002). The Consumers International study entitled *Consumers@shopping* identified problems with consumers being billed more than

- lack of confidence in online financial transactions (possible misuse of debit and credit cards);
- non-delivery or late delivery of goods;
- Internet fraud;
- hidden costs, such as VAT, duties, delivery charges, postage, and packing;
- no clear guide to the seller's rules and procedures;
- lack of independent certification of Web site policies and practices;
- concerns about the unrestricted or hidden collection of personal data;
- a general failure to protect the consumer's privacy; and
- lack of available, plain language information.

Of this array of concerns, however, which are the most prevalent among consumers? The most recent statistics concerning consumer complaints, released by the Federal Trade Commission (FTC), suggest that identity theft generates the highest incident of consumer fraud complaints in the United States.

In 2001, forty-two percent of the 204,000 consumer fraud complaints compiled by the FTC related to identity theft. This data was compiled by a government database that collects consumer complaints from more than fifty law enforcement and consumer organizations. The second most frequent complaint related to Internet auctions (ten percent). Late delivery or non-delivery of goods, goods less valuable than those advertised, deceptive trial offers from Internet, and computer services generated collectively seven percent of the complaints. Shop-at-home and catalogue offers that failed to deliver or honor guarantees constituted another six percent.

These statistics indicate that the complaints arising from e-commerce transactions represent a significant but not primary cause of consumer complaints.

Other statistics also indicate a similar picture—that consumers are most concerned about identity theft, misuse of their personal information, and also Internet fraud (i.e., situations where a Web site operator intentionally deceives consumers, situations involving fraudulent investment schemes, and situations involving a merchant who takes a consumer's money and has no intention of providing a product or service).

In a poll taken by Harris Interactive in August 2000,²⁹ consumers were asked the following question:

expected (often due to non-disclosed delivery charges), non-arrival of ordered goods, delays in delivery, goods damaged on arrival, wrong products being sent, electrical appliances being delivered in a country where they could not be used because of differences in the power supply, high costs involved in returning defective goods, and non-arrival or delays in refund payments. See CONSUMERS INTERNATIONAL, *CONSUMERS@SHOPPING: AN INT'L COMPARATIVE STUDY OF ELECTRONIC COMMERCE* 24–42 (1999), available at <http://www.google.com/search?q=cache:ikYzTmqSRQC:www.consumersinternational.org/campaigns/electronic/e-comm.pdf+%22consumers%40shopping%22&hl=en&ie=UTF-8> (last visited Oct. 22, 2002).

29. The "E-Consumer Confidence Study" was commissioned by the National Consumers League, with the support of Dell Computers. The poll was conducted among 2,810 adults, aged eighteen or over. See *E-Consumer Confidence Study* (Aug. 30, 2000), at <http://www.nclnet.org/downloads/results.pdf>.

Why haven't you bought anything online in the last twelve months?

57%	Afraid my credit card number will be stolen if given online.
57%	Concerned that my personal information may be abused.
38%	Worried that sellers may be fraudulent.
26%	Want to be able to talk to someone when I place an order.
37%	Don't know if sellers will be reliable.
47%	Want to see a product in person.
25%	Other.

After reviewing recent literature concerning consumer concerns relating to the Internet and studies concerning how Internet merchants are conducting their business, the Task Force notes that consumers are concerned primarily about their ability to transact safely online—that is, to do so without fear of the loss or theft of their personally identifiable information, without fear of identity theft, or of becoming a victim of Internet fraud.

These types of concerns are unlikely to be addressed through the use of ODR. ODR presupposes that a merchant or other party and a consumer are willing to engage in a process to resolve a dispute and possibly to achieve an agreed outcome. Internet fraudsters, whether they are stealing someone's credit card number or refusing to deliver goods and services, are unlikely to participate in ODR.

Rather, consumer education, which focuses on the means by which consumers can transact safely and securely, would be one means of addressing such consumer concerns. The Task Force's recommendations, outlined in the Executive Summary and in Part IV below, therefore have a strong educational component.

Problems with e-commerce transactions that would give rise to a complaint to the merchant are of secondary concern. Such problems might include late delivery of goods, non-conforming goods, or problems with the quality of customer service provided. The Task Force notes that a greater emphasis on in-house complaints handling, coupled with the provision of ODR (as the industry develops) will help to address this secondary set of consumer concerns. Privacy disputes relating to the use or misuse of a consumer's personal data by an Internet merchant may be suitable for ADR. Alternatively, they might be the subject of litigation or regulatory action by government agencies.

D. THE NEED FOR INCREASED CONSUMER EDUCATION AND DISCLOSURE BY INTERNET MERCHANTS AND OTHER STAKEHOLDERS

Consumer concerns point to the need for additional consumer education about how to transact online safely and securely. At the same time, reports and data concerning best practices among Internet merchants suggest there is great room for improvement in the manner in which merchants provide information to consumers. A recent study of international B2C e-commerce transactions, conducted

by Consumers International, also points to the need for enhanced disclosure by merchants on their Web sites as well as heightened compliance with relevant consumer protection law.³⁰

It is important to stress that many online vendors are committed to the highest best practices standards and their Web sites fully reflect that commitment. Indeed, as experience is gained, one can only anticipate that the market for these early entrants will improve dramatically. Nevertheless, the Task Force must be cognizant of the fact that the rate of entrance to the world of online selling is almost certainly growing faster than the rate that the existing vendors improve their online practices and procedures. This suggests that all relevant communities—business, government, and legal—have considerable work yet to do to inform and protect consumers, as well as ensure the scope and availability of appropriate ADR and ODR mechanisms.

From the standpoint of the typical vendor's Web site, these concerns appear to be well documented. A New Zealand study³¹ of 700 Web sites released in October 1999 revealed that:

- more than 50% of the vendors failed to outline their payment security mechanisms;
- 62% provided no refund or exchange policies;
- 75% had no privacy policy;
- 78% failed to explain how to lodge a complaint;
- 90% failed to advise customers what laws applied; and
- 25% showed no physical address.

In September 2000, the U.K. company Clicksure examined business Web sites in Europe and the United States—focusing on privacy, security, Web site information, transaction management, quality, and monitoring—and concluded that there was a clear failure to measure up to “internationally recognized best practice[s].”³² Thereafter, in January 2001, the leading international consumer organization, Consumers International, released its Privacy@net study³³ in which it concluded:

Despite the fact that the majority of the sites collected personal information from the user, only a tiny minority provided a privacy policy that gave users meaningful information about how that data would be used. Sites both in the US and EU fall woefully short of the standards set by international guidelines

30. CONSUMERS INTERNATIONAL, SHOULD I BUY? SHOPPING ONLINE 2001: AN INTERNATIONAL COMPARATIVE STUDY OF ELECTRONIC COMMERCE 10 (2001), available at http://consumersint.eval.poptel.org.uk/document_Store/Doc33.pdf (last visited Oct. 22, 2002).

31. MINISTRY OF CONSUMER AFFAIRS, ELECTRONIC COMMERCE AND THE NEW ZEALAND CONSUMER—A STATUS REPORT (2000), available at http://www.consumer-ministry.govt.nz/discussion_papers/dp_ecommerce_statusreport.htm (last visited Oct. 22, 2002).

32. See [ISN] *European Survey Finds Most Web Health Sites Insecure*, INTERNET SECURITY NEWS, Sept. 14, 2000, available at <http://www.landfield.com/isn/mail-archive/2000/Sep/0062.html>.

33. See CONSUMERS INTERNATIONAL, PRIVACY@NET: AN INTERNATIONAL COMPARATIVE STUDY OF CONSUMER PRIVACY ON THE INTERNET (2001), at <http://www.consumersinternational.org/news/pressreleases/fprivreport.pdf> (last visited Oct. 22, 2002).

on data protection. The majority of sites ignore even the most basic principles of fair information use, such as telling consumers how their data will be used; how it can be accessed; what choices the consumer has about its use; and how security of that data is maintained. . . . Despite tight EU legislation in this area, researchers did not find that sites based in the EU gave better information or a higher degree of choice to their users than sites based in the US. Indeed, US-based sites tended to set the standard for decent privacy policies. . . . EU consumers are not only protected by legislation, but also have a data protection commissioner in each country looking out for their rights, and have a right to redress if the law is breached. However, in practice, EU sites do no better than US ones at keeping their users informed.³⁴

More recently, on August 16, 2001, Arthur Andersen released a study of seventy-five Fortune 500 and medium-sized, well-known U.S. companies—in five different industries, including financial services, retail, technology, telecommunications/media/entertainment, and travel/leisure—as to how the U.S.-E.U. “safe harbor” principles had been implemented. Its conclusion was starkly clear: “[M]any U.S. multinational[s] . . . doing business internationally have made little progress in adopting and implementing minimum worldwide standards for ensuring the privacy of individuals’ personal data.”³⁵

Not only are consumers beset by inadequate vendor policies and practices in the area of e-commerce transactions,³⁶ enforcement records of key government agencies suggest that the problems for consumers in the online world go well beyond mere “inadequacy.” The U.S. Federal Trade Commission (2001) has provided the Task Force with the following data:

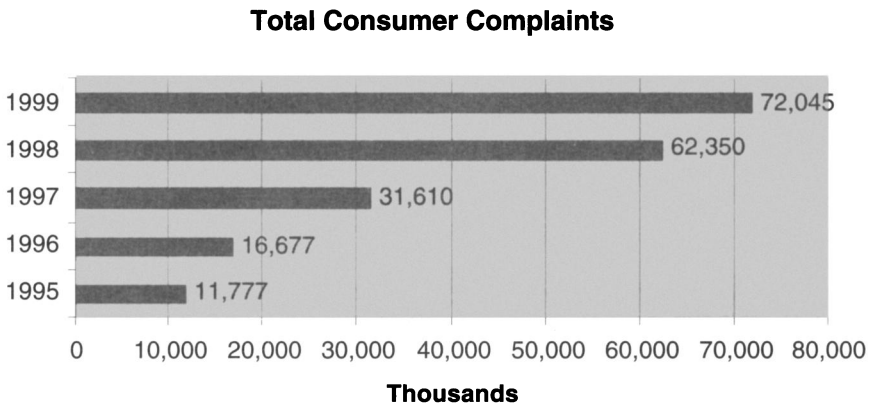


Figure 1.

34. *Id.* at 6.

35. See Press Release, Arthur Andersen, U.S. Multinationals Slow to Implement Emerging Global Privacy Practices, Andersen Study Shows (Aug. 16, 2001) (emphasis added), at <http://www.andersen.com/website.nsf/content/MediaCenterNewsReleaseArchiveprivacystudy08162001!OpenDocument>.

36. Of course, not all Web sites fail to meet recognized best practice standards, and the expectation is that a great many Web sites will improve substantially over time. Considering the infancy of B2C

Internet Related Complaints

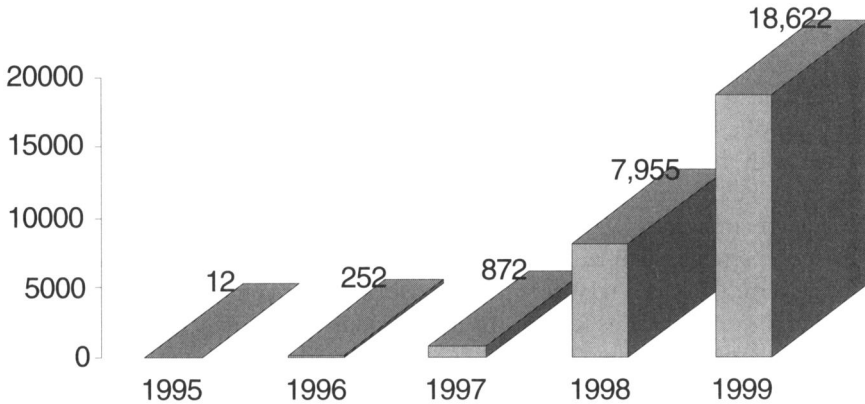


Figure 2.

Internet Related Complaints as a Percentage of All Complaints

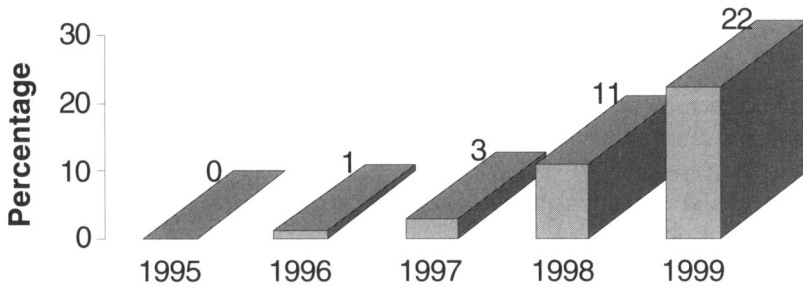


Figure 3.

Similarly, the Office of Fair Trading in the United Kingdom issued a report in March 2001 that indicated more than half of the Internet sites in Britain might be breaching E.U. and U.K. consumer law. The Office of Fair Trading conducted a “mystery surf” of 637 Web sites. The report noted that, although most of the sites provided basic contact details, fifty-two percent failed to provide easily accessible information on refund or exchange policies.³⁷

e-commerce, however, the most realistic short-term view is that the rate of improvement of existing Web sites will be slower than the rate of increase of (inadequate) new Web sites to the World Wide Web.

37. Press Release, Office of Fair Trading, Websites May Be Breaking the Law (Mar. 13, 2001), at <http://www.of.t.gov.uk/news/press + releases/2001/pn + 11-01.htm>.

III. MARKET RESPONSES TO CONSUMER CONCERNS ABOUT E-COMMERCE

A. THE DEVELOPMENT OF ODR AS A RESPONSE TO THE NEED FOR REDRESS IN THE E-COMMERCE MARKETPLACE

For B2B e-commerce, the Task Force believes technological innovation and the development of interoperable standards will help to facilitate the use of ODR as a means of cross-border dispute resolution. The Task Force is not nearly as comforted with the current and prospective realities of B2C e-commerce as we are in the case of B2B e-commerce. Nevertheless, as will be seen below, one very positive way is the growth of ODR providers to fill the potential "market" niche for ODR services, particularly in B2C e-commerce.

The term ODR is a relatively new phrase and may convey different things to different people. For this Report, the term ODR is used loosely to include the use of the Internet and other Web and computer-based technologies for facilitating ADR. For example, parties to a dispute may use the Internet in order to communicate with one another as part of a conciliation process. Alternatively, a neutral person might communicate with both parties via the Internet as part of a mediation or arbitration. Additionally, the Internet may facilitate the collection, transmission, and storage of information pertaining to the dispute. In certain circumstances, ODR involves dispute resolution where the parties may never meet in person, but may interact solely online.

ODR may be used, of course, to resolve disputes generated online as well as offline. ODR, as a process, may involve various types of dispute resolution including:

- dispute prevention (education, outreach, rating, and feedback programs);
- ombudsman programs;
- conflict management;
- assisted negotiation;
- early neutral evaluation and assessment;
- mediation/conciliation;
- mediation-arbitration (binding and/or non-binding);
- arbitration;
- expert determination;
- executive tribunals; and
- consumer programs (private, trade groups, quasi-governmental, and governmental).

Governments must be given substantial credit for the development of ODR. As evidenced by the third annual progress report of the U.S. Government Working Group on Electronic Commerce, released January 16, 2001, governments have shown considerable restraint in this area, acting primarily to promote "collaborative efforts among the private sector and consumer groups to develop and implement fair and effective ADR mechanisms for online transactions as one means of promoting consumer confidence and participation in electronic

transactions.”³⁸ In an important statement issued by the E.U. and the U.S. governments on December 18, 2000, the two governments committed themselves jointly to the use of ADR and ODR in the e-commerce arena: “Easy access to fair and effective ADR, especially if provided online, has the potential to increase consumer confidence in cross-border electronic commerce and may reduce the need for legal action. We, accordingly, agree on the importance of promoting its development and implementation.”³⁹

In this statement, the two governments went on to acknowledge that the issues of applicable law and jurisdiction will be “difficult to resolve in the near term,” emphasized the importance of global “self-regulatory programmes such as codes of conduct and trustmarks,” and recommitted themselves to the Organization for Economic Cooperation and Development (OECD) *Guidelines on Consumer Protection in the Context of Electronic Commerce* issued in December 1999.⁴⁰

The FTC also deserves substantial credit for its initiatives aimed at creating effective and trustworthy ODR mechanisms for B2C Internet transactions. The FTC, in partnership with the U.S. Department of Commerce, convened a major workshop on ODR in June 2000 and has been an active participant in international and U.S.-based dialogue on the topic.⁴¹ The FTC is also the major impetus behind econsumer.gov, an intergovernmental Web site meant to assist consumers in filing complaints related to global e-commerce transactions with the appropriate government consumer protection agency.

To some in the ADR community, the potential to resolve disputes in the e-commerce world, particularly B2C transactions, has provided a rare opportunity to design a conflict resolution model where none yet existed; for others, it has provided an opportunity simply to extend their existing tools and structures to a broader potential audience and customer base. Whichever is the case, the continued growth, development, and maturity of the ODR community is both a goal and precondition to the successful resolution and avoidance of disputes in cyberspace. Creative new dispute resolution tools such as “blind bidding”⁴² have

38. See Justin Kelly, *White House Report Signals Consensus on ADR for E-Commerce*, ADRWORLD.COM, Jan. 18, 2001 (quoting U.S. GOV'T WORKING GROUP ON ELECTRONIC COMMERCE, THIRD ANNUAL PROGRESS REPORT (2001)), at <http://www.onlineresolution.com/adrworldpress.cfm>. The progress report adds that, “alternative dispute resolution can be a practical way to provide consumers with fast, inexpensive, and effective remedies, and can reduce businesses' exposure to foreign litigation.” See *id.*

39. See Building Consumer Confidence, *supra* note 9 (emphasis added).

40. *Id.*

41. See Federal Trade Commission, Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions (updated Nov. 15, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments>.

42. So-called blind bidding is a dispute resolution process pursuant to which the parties to a commercial dispute submit their monetary offers and demands to an automatic system. Each party's offer or demand is not disclosed to the opposing side; rather, the computer software in various “rounds” compares each offer and demand. If one party's offer matches the opposing party's demand or is within a specified range, then the case is settled for the amount that is a match or for the average of the offer and demand where it falls within the specified range. Blind bidding is a highly efficient and beneficial method of ODR where interests of the parties involved are purely numerical. In the case where the parties' interests cannot be put into numerical terms, then a more “neutral-managed” ODR mechanism—arbitration or mediation—must be used.

been developed to serve particular niches within cyberspace, but there is also ample room within the unique environment of the Internet for the practice of traditional forms of ADR, such as negotiation, mediation, arbitration, conciliation, early neutral evaluation, expert determination, and the like.

In early 2000, the number of ODR providers grew apace alongside the growth of e-commerce generally.⁴³ Such companies provide a large palette of tools for the resolution of e-commerce disputes. The ODR community is, however, in large part, still in its infancy. In 2002, the number of ODR providers has contracted, with some companies ceasing to do business, some offering their domain names for sale, and others retaining Web sites that appear inactive. The establishment of a robust ODR industry clearly requires even greater growth and a more effective global reach, and just as clearly awaits greater financial, business, technological, and legal maturity.

The opportunity to create, invent, and put into practice new, as well as traditional ideas of dispute resolution, must be allowed to continue; the ODR community must be allowed to respond, without significant constraint, to the demands of the market it now serves. The Task Force agrees with the current government view that ODR must be allowed to develop, collaboratively to be sure, at its own pace. Nevertheless, from the viewpoint of the users of the systems—consumers, businesses, lawyers, and lay advisors—it cannot be said that the current situation is optimal. Indeed, some fundamental observations or assumptions about ODR services must be noted:

- The ODR community is, in most respects, still in its infancy, without a meaningful database of experience, information or analysis.
- No strong or significant business or “trade” association has emerged, around which the ODR community can coalesce, particularly on a worldwide basis.
- To date, consumers worldwide do not have great awareness of the existence of ODR as a means of resolving disputes generated online or offline. They are not, therefore, making decisions whether or where to transact online based on the availability of ODR.
- Existing ODR providers range from the old, respected, and financially stable to the new, unproven, and less capitalized. The ODR industry is currently in a state of flux and some providers will ultimately fail, as is natural in any new marketplace.
- Whether styled as a for-profit or as a nonprofit entity, each member of the ODR community is subject to all forms of market pressures and business and

43. Various reports provide lists of ODR Providers. See, e.g., UNIVERSITY OF GENEVA FACULTY OF LAW & CENTRE UNIVERSITAIRE INFORMATIQUE, ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES 96–102 (2001), at <http://www.online-adr.org/reports/TheBlueBook-2001.pdf> (last visited Oct. 22, 2002); CENTER FOR LAW, COMMERCE & TECHNOLOGY AT THE UNIVERSITY OF WASHINGTON SCHOOL OF LAW FOR THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ONLINE ALTERNATIVE DISPUTE RESOLUTION: AN ISSUES PRIMER (2000), at http://www.law.washington.edu/ct/files/2000_ADR_Online_draft.doc (last visited Oct. 22, 2002); CONSUMERS INTERNATIONAL OFFICE FOR DEVELOPED & TRANSITION ECONOMIES, DISPUTES IN CYBERSPACE: ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN CROSS-BORDER DISPUTES—AN INTERNATIONAL SURVEY 13 (2000), at http://cinternational.eval.poptel.org.uk/document_store/Doc29.pdf (last visited Oct. 22, 2002).

financial realities and can be expected to respond to those pressures and realities as any other business entity might respond.

- ODR for B2C transactions is intrinsically multi-jurisdictional and exceedingly complex, yet subject to severe financial limitations. Because many B2C disputes involve dollar values that are relatively low, it has been challenging for ODR providers to provide such services and to generate a profit.
- No guidelines or standards for ODR have emerged as a dominant code of practice within the ODR community.

These observations suggest two courses of action for the Task Force. First, the Task Force, and the organized bar generally, should encourage greater education and awareness of ODR along with other mechanisms for dispute prevention and resolution in cyberspace. Consumers should be made aware of ODR as one of an array of options that will instill increased confidence in the online marketplace. Business should also be apprised of the possible benefits of ODR as part of a comprehensive complaints handling and customer service program.

Secondly, the Task Force should help ODR providers develop effective codes of practice. To this end, the Task Force has developed a set of Recommended Best Practices by ODR Service Providers ("Recommended Best Practices"). These guidelines are not a code of practice, but, rather, recommend a set of best practices that may be incorporated into a code of conduct. As such, they represent the Task Force's view that certain types of disclosures should be made by ODR providers as a means of ensuring that consumers are (a) informed and (b) given a fair opportunity to understand the nature of an ODR provider's service before agreeing to participate in an ODR proceeding with the provider. It is our hope that such Recommended Best Practices will provide a useful tool for ODR providers and for consumers and merchants when assessing codes of practice that are developed.

Beyond the mere proliferation of ODR providers and supportive government attitudes, however, the Task Force is compelled to conclude that other tools necessary to assist the online consumer are still not in place, and that there are, in fact, existing structural failures in addressing the reasonable concerns of consumers on a worldwide basis.

B. USE OF TRUSTMARKS AND CODES OF CONDUCT BY INTERNET MERCHANTS

It is considered axiomatic that the creation of trust and confidence is the most critical factor for an online business to build and maintain satisfactory customer relationships. One approach to encourage consumer confidence has been for online sellers to commit to codes of conduct or "best practices" guidelines that have been developed by various "trustmark" organizations.⁴⁴ These institutions can

44. A "trustmark," sometimes called a "Web seal," is a label on a Web site indicating that a merchant commits to complying with a number of best business practices, including redress mechanisms. Consumer organizations, major accountancy organizations, trade or professional organizations such as Chambers of Commerce, and companies have developed Trustmark programs privately. They attempt to respond to various consumers' concerns such as privacy, childrens' advertising, security, consumer

validate the trustworthiness of an online business and thus reduce consumer uncertainty involved in a particular transaction.⁴⁵

In the case of a code of conduct dealing with privacy issues, for example, if a consumer visits a Web site and sees a trustmark, she can be assured that the Web site will disclose:

- the personal information that is gathered;
- how this information will be used;
- with whom the information will be shared;
- the choices available to him or her regarding how the collected information will be used; and
- the safeguards in place to protect this information from loss, misuse, or alteration.

From the merchant's perspective, trustmarks provide an instant graphic display that this Web site is committed to a series of "best practices," distinguishable from its online competitors who may not have made such a commitment. Trustmarks, along with their related codes of conduct, typically ensure that the merchant will observe best practices in the following areas:

- accuracy and accessibility of information;
- marketing practices;
- information about the merchant;
- information about the goods and services;
- information about the transaction;
- cancellation/return/refund policies;
- security;
- customer service and/or support;
- warranty;
- privacy;
- unsolicited e-mail; and
- complaints handling, redress or dispute resolution.

There is a wide range of codes⁴⁶ and the proliferation and diversity of such

protection, and more. For purposes of trustmark schemes, the merchant would use the trustmark on its Web site and commit to complying with the trustmark specifications. For an analysis of trustmark programs, see <http://econfidence.jrc.it>.

45. It has been suggested that the concept of a trustmark or Web seal first originated from a lecture on trust at Esther Dyson's PC Forum in March 1996, the notion being to bring to the Internet branded systems of trust such as the Underwriter Laboratories or Good Housekeeping "seals of approval." Two of the earliest online seals include TRUSTe, which began in June 1997, and the Better Business Bureau Online Reliability Seal. See Raphael Franze, *Privacy Standards for Web Sites: Web Seals*, INTERNET L.J., Feb. 5, 2001, at <http://www.tilj.com/content/ecomarticle02050103.htm>; Comments by the Council of Better Business Bureaus and BBBOOnline on the American Bar Association Task Force on E-commerce & Alternative Dispute Resolution's Draft Recommendations and Report 3 (June 11, 2002), at http://www.law.washington.edu/ABA-eADR/drafts/2002_04_05_Comments/BBBOnlineComments.pdf.

46. Trustmark/code of conduct programs vary considerably in their terms and operation. Some certify only particular aspects of online business, such as privacy, although others certify a broad range of issues including advertising, disclosures, contract terms and performance, and security. Most include provisions concerning internal and/or third-party dispute resolution, and some trustmark

codes⁴⁷ may have disadvantages as well as advantages. A healthy diversity and competition among the developers of trustmark/code programs *might* result in “a race to the top,” which would increase consumer choice and improve the overall standards of online selling. On the other hand, the lack of a clear set of minimums or overall benchmarking, coupled with the potential absence of monitoring and enforcement, may lead the consumer to doubt the value of all trustmarks and codes, or at least make him lack the essential knowledge as to which codes can in fact be trusted.

Governments (and international organizations) deserve praise for their work in this area. Of particular note are the following:

Australian Best Practice Model for Business

<http://www.ecommerce.treasury.gov.au/html/ecommerce.htm>

Canadian Framework for Consumer Protection for Electronic Commerce

<http://strategis.ic.gc.ca/SSG/ca01182e.html>

Dutch Model Code of Conduct

<http://www.ecp.nl/ENGLISH/index.html>

New Zealand Model Code and Report on Consumer Protection in E-Commerce

http://www.consumer-ministry.govt.nz/Model_Code.html

OECD Guidelines for Consumer Protection in the Context of Electronic Commerce

<http://www1.oecd.org/dsti/sti/it>

European Code of Conduct for On-Line Commercial Relations

<http://www.eurocommerce.be/index.jsp?ptp=tDetail>

[jsp&pci=156&ptl&=EN&pti=78](http://www.eurocommerce.be/index.jsp?ptp=tDetail)

CODEenglFINAL02.PDF

Numerous private sector trustmark organizations have developed codes of conduct and Web seals and currently offer their services to potential subscribers.⁴⁸ Trustmark companies have been organized in North America, Europe, and Asia targeting either a local or a truly international subscriber-base. These organizations have been inventoried at various sites.⁴⁹ Potential subscribers to the selected

organizations provide or monitor dispute resolution services involving their subscribers. Some programs certify only that the subscribers have accurately disclosed their own policies, although others certify that subscribers follow the trustmark organization's standards.

47. Codes may be international or national in scope, government or privately sponsored, based on for-profit and nonprofit models, applicable to specific industries or to all e-commerce, applicable to specific issues or a broad range of issues, and developed and operated by a single stakeholder or multiple stakeholders: consumer organizations, trade associations, or individual companies.

48. It appears that some organizations have developed codes of conduct, but offer these without any accompanying trustmark or Web seal. See, e.g., ICX, THE ICX PRIVACY CODE OF CONDUCT (2000), at http://www.icx.org.uk/resources/res_0452.htm (last visited Oct. 22, 2002).

49. See, e.g., GBDe-Consumer Confidence-Trustmarks Inventory, at http://consumerconfidence.gbde.org/t_inventory.html (last visited Oct. 18, 2002); Advertising Standards Authority Inc., Trustmark Inventory, at <http://www.asa.co.nz/trustmarks.htm> (last visited Oct. 18, 2002); The National Office for the Information Economy (NOIE), Web Seals of Approval: A Comparative Examination, at http://www.noie.gov.au/projects/consumer/roundtable/webseals_comparative_table.htm (last visited Oct. 18, 2002). In October 2002, the European Commission announced that it is planning a single trust mark scheme to ensure minimum standards of online consumer protection. See *EUY Backs*

trustmark program submit an online application, review and sign a license and related agreements, compare and conform their policies with those of the trustmark provider, and then receive a seal graphic with confidential instructions for electronically displaying the trustmark on the subscriber's Web site.

To be effective and credible, trustmark organizations must put into place mechanisms to establish and monitor the merchant's compliance with the trustmark program specifications. These might include random checks by the certifier, independent auditing or verification, self-certification by the merchant, and of course regular reporting by the merchant of relevant information. The consequences of a failure to comply with program requirements must also be specified.⁵⁰

The use of trustmark and Web seal programs appears to be a natural development in the world of online commerce. They are clearly a helpful mechanism for boosting consumer confidence in e-commerce and the Task Force stands behind their use. Indeed, as will be discussed below, we recommend their future use in connection with the provision of ODR services by the ODR community.

The Task Force does not, however, believe that such merchant trustmark programs represent a magic solution to the consumer protection problem. As the previous statistics have noted, Internet users are measured in the hundreds of millions; Internet sellers are measured in the millions; and trustmarked sellers are measured in the thousands. As brick-and-mortar companies turn to "brick-and-click," and as new online sellers come to market, one can expect their rate of growth to be substantially greater than the rate of growth at which trustmark companies increase their subscriber base. The consumer clearly benefits from trustmark programs but, just as clearly, other efforts are needed, particularly in the educational and informational arenas. The recommendations of the Task Force also focus on these "other efforts."

IV. DISCUSSION AND RECOMMENDATIONS

Some of the major questions the Task Force has attempted to address include the following:

How to assure independence, neutrality, and impartiality in the ODR process?

The Task Force believes that ODR as an industry is still in the early stages of its development. Greater consumer education and information will help

E-Commerce "Trust Mark," REUTERS, Oct. 29, 2002, available at <http://zdnet.com.com/2100-1106-963748.html> (last visited Nov. 25, 2002).

50. For a useful assessment of the certification process, see EUROPEAN COMMISSION JOINT RESEARCH CENTRE, INSTITUTE FOR THE PROTECTION AND SECURITY OF THE CITIZEN, CYBERSECURITY SECTOR, E-COMMERCE AND CONSUMER PROTECTION: A SURVEY OF CODES OF PRACTICE AND CERTIFICATION PROCESSES, at http://www.jrc.cec.eu.int/download/ecommm_consprot.pdf (last visited Oct. 22, 2002). This report concluded that, "the aspects in which the codes of practice seem particularly exhaustive are identity of the offeror, order procedure, advertising and security. The aspects in which the codes seem to be mainly incomplete are related to server/host identity, code of practice properties and general trustmark properties." *Id.* The report also notes that in a survey of certifiers, out of twenty-six respondents "for a total of 6380 applications received, 73% of the webshops were granted the trustmark, 18% were rejected and the remaining 9% were under assessment." *Id.*

consumerers and businesses learn about ODR and understand what sort of features will provide for an independent, neutral, and impartial ODR process. The Task Force believes that the Recommended Best Practices is one possible tool that will contribute to this process. The Recommended Best Practices provide guidance on what types of information should be disclosed by ODR providers to ensure that parties are properly informed about the independence, neutrality, and impartiality of an ODR process. An emphasis on greater and more uniform disclosure mechanisms will help to educate and inform all stakeholders.

How to assure the financial viability of ODR providers?

The Task Force believes that at present, B2C ODR has not flourished due to lack of distinctly viable business models for the majority of ODR providers. A core reason for this situation is that, even with the cost efficiencies of ODR, the value of the goods or services purchased may be less than the cost of the ODR process to the consumer, and the merchant may be unwilling to subsidize the cost of the ODR process to any substantial degree because of the adverse incentive such a subsidy creates from the merchant's point of view. Thus, many of our recommendations emphasize the need for reinforcement of dispute prevention mechanisms as well as merchant complaints handling procedures. The ODR industry needs to develop; further research is needed to determine whether there are certain business models that will allow for the growth and success of the industry. As Internet businesses become more aware of ODR through increased education, they may begin to use ODR as part of their complaints handling program as well. There are some experiments underway by governmental entities in the United States and the European Union to provide government-sponsored ODR. These efforts are worthy experiments.

How to assure the ODR provider has the ability (jurisdictional and otherwise) to handle cross-border transactions?

The Task Force believes that greater education for Internet merchants, consumers, lawyers, and other stakeholders is one of the first and most necessary steps to facilitate cross-border e-commerce as well as cross-border dispute resolution. To this end, the Task Force has recommended the creation of an informational entity, the iADR center, that will provide a broad audience with information about applicable laws and regulations concerning e-commerce in different parts of the world as well as information about mechanisms (including ODR) for resolving disputes between parties that reside in different jurisdictions.

The Task Force believes that ODR providers, Internet merchants, and government-sponsored complaints handling or clearinghouses Web sites should, whenever possible, take into account the cross-border nature of e-commerce transactions. To this end, Internet merchants and ODR providers are encouraged to state clearly in which countries or locations they are willing to do business. In addition, the use of multilingual Web sites, complaints handling decoders, and ODR processes that account for language and cultural differences are to be encouraged. At the same time, the Task Force is cognizant that ODR providers are

still trying to establish viable business plans and therefore the development of robust cross-border capability may not be feasible for all ODR providers.

How to draft a set of procedural rules for effective ODR?

The Task Force has not drafted a new set of procedural rules for effective ODR. Rather, the Task Force has drafted a set of Recommended Best Practices that focuses on the nature and method by which information concerning an ODR provider can be disseminated and disclosed to parties. This set of best practices is meant to be used by consumers, merchants, and ODR providers as a means of assessing the various ODR codes of practice that are being developed as well as to assess whether a particular ODR provider's Web site provides enough information for parties to make informed choices about whether to use ODR to resolve their disputes.

A. THE ROLE OF INTERNET MERCHANTS IN PREVENTING AND RESOLVING COMPLAINTS ARISING FROM E-COMMERCE TRANSACTIONS

During the Task Force's outreach and research, it has become clear that there is currently no clear viable business model for the conduct of sustained and successful ODR operations, especially in the cross-border context. There is little publicly available data concerning the financial viability or success of ODR. Anecdotal evidence suggests that the ODR community, taken as a whole, is marginally profitable at best.

Ideally, customers would like to transact with reliable merchants and have satisfactory customer experiences. Problems with transactions, including Internet transactions, however, are inevitable, even with reputable merchants. When customers perceive problems, effective complaints handling by the merchant is more important than effective third-party dispute resolution. ADR and ODR may be good substitutes for litigation but are not substitutes for effective complaint management at the merchant level. Effective complaints handling also involves advance disclosure of information that facilitates customer complaints.

To this end, the Task Force recommends an increased focus by Internet merchants on more consumer education, coupled with a greater emphasis on disclosure of policies and practices on merchant Web sites. Some of the statistics and data outlined in Part II, above, indicate that: (a) consumers still have concerns about whether or not to transact online and (b) Internet merchants can improve the ways in which they are communicating with consumers. To this end, the Task Force's recommendations for Internet merchants focus on greater education, disclosure, and participation in trustmark or Web seal programs.

1. E-commerce businesses should place an enhanced emphasis on all stages of the B2C relationship, including dispute prevention, complaints handling, and effective methods of redress through ADR and ODR.

2. Internet merchants, governmental and nonprofit entities should place a greater emphasis on consumer education and the prevention of e-commerce disputes. The Task Force believes that it is better to reduce the number of consumer grievances that may arise from an e-commerce transaction rather than to focus solely on providing better complaints handling mechanisms for resolving grievances when they do arise.
3. Protecting consumers requires adequate standards and codes of conduct for e-commerce businesses. These may take the form of voluntary codes of conduct, government created codes, or co-regulatory codes. Internet merchants should be encouraged to participate in and subscribe to relevant codes of conduct. Often, this may involve participating in an e-commerce trustmark or merchant seal program. Such programs should ideally include a provision for third-party ODR services for unresolved complaints between consumers and the merchant.
4. Internet merchants should develop, or continue to improve on, their in-house complaints handling mechanisms, and educate consumers as to how to use these in-house procedures effectively.
5. For consumers, recourse to in-house complaints handling mechanisms is normally the first and best means to obtain redress from reputable merchants. Accordingly, consumers should be encouraged to utilize the in-house complaints handling mechanisms offered by reputable Internet merchants before resorting to third-party dispute resolution mechanisms.

Internet merchants are on the front line of dealing with consumer e-commerce complaints. Realistically, consumers often turn to a merchant and its in-house customer service department or complaints handling process first if a problem arises from an e-commerce transaction. The Internet merchant will have familiarity, data, and expertise that will allow it to provide effective complaints resolution processes for the consumer.

As for cost, a strong and professionally conducted in-house complaint resolution program is inherently less costly than the use of a third-party ODR or ADR service as a means of resolving consumer complaints. Trustmark programs (which may offer their own ODR or ADR services) or ODR providers should be available as an alternative if in-house complaints resolution does not resolve the dispute.

B. RECOMMENDATIONS RELATING TO ODR

With respect to ODR, the Task Force makes two principal recommendations, *first*, the adoption of a set of Recommended Best Practices. These Recommended Best Practices are meant to provide guidance to ODR providers, Internet merchants, and consumers when assessing whether a particular code of practice is effective. The best practices focus on the use of disclosure as a means of consumer education and empowerment. In this regard, the best practices focus on the types of information that should be provided to consumers by ODR providers. The

second recommendation is the creation of a structure or entity that acts to inform and educate lawyers, businesspersons, and consumers on relevant issues including ODR.

The first recommendation, developing a set of Recommended Best Practices, complies with our original mandate but reflects our conviction that an independently derived set of best practices will set an important benchmark against which emerging ODR codes of practice may be assessed. The primary goal is to ensure that the ODR provider's service is clearly and comprehensively presented to the consumer in a manner consistent with the Recommended Best Practices and in fact operates in the manner presented.

The second recommendation—pertaining to the establishment of a new entity that will educate and inform lawyers, businesspersons, and consumers—flows from our independent conviction that there are currently systemic problems that must be addressed before the consumer can be adequately protected in the online world.

1. Recommended Best Practices by Online Dispute Resolution Service Providers

The Task Force's Recommended Best Practices (included as Annex A to this Report) are intended to assist:

- organizations that provide ODR services (ODR providers), concerning disputes that occur online or disputes that lend themselves to being resolved online;
- individuals who serve as neutrals for ODR providers;
- customers of those services, whether personal consumers or businesses; and
- online merchants or marketplaces.

Actions taken by ODR providers consistent with these Recommended Best Practices may (a) take the form of codes of conduct, codes of practice, best practices statements, protocols, and similar statements; (b) be reflected in the operation of their Web sites and in material posted on their Web sites; or both. The exact form is secondary. The primary points are that the ODR provider's service is clearly and comprehensively presented to the consumer in a manner consistent with the Recommended Best Practices and in fact operates in the manner presented.

These Recommended Best Practices contain many principles applicable in both B2B and B2C disputes. They particularly are intended, however, to enable consumers to make intelligent choices concerning ODR providers, to help give them confidence in the efficacy of ODR and therefore in B2C commerce generally, and to encourage consumers to use ODR as a means of obtaining resolution of their complaints.

These Recommended Best Practices are also not primarily directed to the codes of conduct, best practices statements, and similar protocols of online merchants or marketplaces (although they may find the Recommended Best Practices useful).

Other private and governmental entities have proposed merchant guidelines and best practices for consumer protection in the context of e-commerce; this Task Force does not purport to duplicate their efforts.

It is not the primary goal of these Recommended Best Practices to set minimum substantive standards of best practice. The approach taken by these Recommended Best Practices is based mainly on the use of disclosure and addresses both the adequacy of the means whereby the disclosure is given and the subject matter of the disclosures.

The Task Force believes that the types of disclosures outlined in the recommendations will help to instill confidence and trust in the new ODR industry and marketplace. As the Commentary indicates, ODR providers will need to take into account the size of their own business operations.

It is recognized, however, that the fact of comprehensively listing and organizing the topics for disclosure has the effect of setting substantive standards. It is also acknowledged that, when individual ODR providers come to the act of formulating disclosures that are readily available publicly and easily compared with those of other ODR providers, a natural effect of a disclosure-based system is to press ODR providers in the direction of setting strong substantive standards. These effects are intended. In addition, a Commentary area follows each of the sections of these Recommended Best Practices and those commentaries indicate, among other things, substantive standards that are encouraged. Hence, as a practical matter, the approach in these Recommended Best Practices is unavoidably a mixed system of recommended disclosures and substantive practice standards.

Nevertheless, the intention is to rely mainly on disclosure. There are several reasons for this disclosure-based approach:

- The ODR community as a whole is quite new and has not generated a sufficient database of information on which to base confidently extensive substantive standards particularly applicable to ODR.
- Different ODR providers focus on different markets (service, product, merchant type, geography, etc.) and a single set of substantive standards may not be appropriate in all cases.
- The ODR community lacks a clear business model or models for sustained profitable operations and appears to be evolving so as to develop such models. Premature standard setting may retard that evolution.
- From the point of view of the Bar, a consumer's decision to use an ODR provider (or to make an online purchase taking into account availability of an ODR mechanism) is a contract decision. A central issue in any contract decision between a vendor (the merchant or the ODR provider or both) and a vendee (the consumer) is whether the vendee has sufficient information on which to make an informed and intelligent choice. The Bar is not a consumer protection regulatory agency. Its proper concern is more with the fairness of the various processes involved than with the appropriateness of the substance, as might be more the proper concern of a regulatory agency.

- Disclosure has an important enforcement consequence in that, under U.S. law, if a business fails to adhere to the public disclosures it makes concerning its services, it may, under many circumstances, be engaged in an unfair or deceptive act or practice in or affecting commerce under section 5 of the Federal Trade Commission Act.⁵¹ This is also the case under the consumer protection laws of many states and non-U.S. jurisdictions.

The Recommended Best Practices are not designed to be a one-size fits all set of recommendations. The appropriateness of the recommendations and the manner in which they are implemented must be balanced against the individual nature of the services and business model of the ODR service provider. The Task Force is also mindful that there will be cost and resource implications linked to implementation of various best practices—including, for example, increased time and resource allocations to collect and disseminate certain types of data. On balance, however, the Task Force views disclosure of certain data and material affiliations of the ODR provider as an important means to instill consumer confidence in ODR.

Individual ODR service providers will have to factor in the nature of the ODR services they provide when considering how to implement a regime of best practices. Similarly, it may be difficult to implement certain best practices retrospectively with respect to data or information about an ODR service provider's previous business activities, affiliations, or caseloads. The Task Force acknowledges that retrospective application presents certain concerns. The Recommended Best Practices are focused mainly on prospective application and implementation. The document is forward looking rather than backward looking.

2. Creation of iADR Center

The Task Force has expressed above its conviction that there are systemic failures in the B2C arena. In our view, one of the largest problems is the absence of many structures pursuant to which consumers and businesspersons can obtain the information necessary to make informed choices about e-commerce and ODR.

To a considerable degree, these problems relate to the fact that e-commerce is global in nature, although law and language are territorial in nature. Moreover, B2C transactions are inherently small in nature and the issues of redress and dispute resolution must necessarily be dealt with in a fashion that addresses this constraint.

To this end, the Task Force has spent a considerable amount of time assessing what sort of entity or institutional structure might provide for greater consumer education on a worldwide basis, as well as what sort of an entity might assist consumers in gaining redress or access to redress mechanisms in the online marketplace.

51. 15 U.S.C. §§ 41–58 (2000).

a. Options Considered

The Task Force has considered six different entities that might serve to facilitate and promote the use of ODR by consumers, as well as to enhance consumer trust in e-commerce. The range of entities included:

- Global Online Standards Commission (GSOC);
- Newly Funded ODR Trustmark Issuing and Administering Entity;
- ODR Trade Association;
- Dispute Clearinghouse;
- Third-Party Auditors; and
- Informational Entity (“iADR Center”).

In considering the range of entities, that Task Force considered a variety of factors including:

- whether the entity should be high profile (may attract controversy) *versus* low profile (may avoid controversy);
- whether the entity should have government funding and involvement *versus* no government funding or involvement;
- whether the entity should have a certification or regulatory structure (may attract controversy and be difficult to implement on multi-jurisdictional basis) *versus* purely informational structure (non-controversial and easy to implement);
- whether the entity should piggyback on existing structures (may suffer from existing prejudices or perceived biases) *versus* creation of new entity (potentially free of bias).

i. Option One: Global Online Standards Commission (GOSC)

The ABA Jurisdiction in Cyberspace Report recommended the creation of a Global Online Standards Commission. The GOSC would be a high profile, inter-governmental entity. It would operate on a worldwide basis and issue binding ODR standards. The enforcement of binding standards might involve a trust-mark program.

Global Online Standards Commission

Pros	Cons
Clear, unambiguous, independently derived, and binding ODR standards.	Negotiation of intergovernmental agreements would be inherently difficult and time-consuming.
Potentially strongest possible enforcement mechanisms.	Controversial to some because of perceived “loss of sovereignty.”
Presumably would include broad input from consumer, business, legal, and government communities.	Runs counter to public statements of U.S. and E.U. governments advocating “self-regulatory” structures.

ii. Option Two: ODR Trustmark Entity

The ODR Trustmark Entity would be a high profile, purely independent entity operating on a worldwide basis. The Trustmark Entity would establish ODR guidelines and issue and administer an ODR trustmark program for ODR providers. The entity would have the authority to “pull” the trustmark in appropriate cases and would thus have a certification, auditing, and enforcement role over ODR providers.⁵²

ODR Trustmark Entity

Pros	Cons
Clear, unambiguous, and independently derived ODR standards.	Uncertain funding, particularly for the broad purposes intended.
Reasonably effective enforcement mechanisms.	May be perceived as “too much, too early” in the life of the industry.
System could build on experience of merchant trustmark system, which is already widely accepted in e-commerce.	May be perceived by some ODR providers as interference (goes beyond creation of aspirational principles).
System would easily tolerate broad input from consumer, business, legal, and government communities.	

iii. Option Three: ODR Trade Association

An ODR Trade Association would be established by the industry itself. Administrators of an ODR Trade Association would establish industry-approved ODR guidelines and administer the ODR trustmark to member companies. The Trade Association would be free to decide the level of enforcement but would presumably have the authority to “pull” the trustmark in appropriate cases.

Pros	Cons
ODR standards potentially clear and unambiguous, but not independently derived and not necessarily adequate.	Uncertain potential for establishment and funding because industry as to date failed to create an effective, independent trade association.
Reasonably effective enforcement mechanism.	System may be perceived as unlikely to encourage or accept input from consumer groups and other stakeholders.
System is consistent with merchant trustmark system, which is already widely accepted in e-commerce.	Standards may be perceived as inadequate because they are “industry generated.”
Strong potential to tolerate violations of standards by dues-paying member organizations; no coverage of non-members.	

52. The ODR Trustmark and Trustmark Entity were first discussed in the Task Force’s preliminary concept paper circulated in May 2001. See AMERICAN BAR ASSOCIATION TASK FORCE ON E-COMMERCE & ALTERNATIVE DISPUTE RESOLUTION, DRAFT PRELIMINARY REPORT & CONCEPT PAPER (2001), available at <http://www.law.washington.edu/ABA-eADR/drafts/2001.05.21draft.html> (last visited Oct. 22, 2002).

iv. Option Four: Dispute Clearinghouse

New or existing high-profile entities would act to receive consumer complaints from around the world and to refer these disputes to internally “certified” ADR/ODR providers.

Pros	Cons
Dispute clearinghouses would give consumers a practical and accessible opening venue for resolution of disputes.	ODR standards or criteria for certification would not necessarily be made public and may not be adequate.
Potential for reasonable effective enforcement mechanisms.	System may be perceived as unlikely to encourage or accept input from consumer groups or other stakeholders.
Potential for adequate ODR standards.	Standards may be perceived as inadequate because they are industry-generated or generated by some sort of trade association.
Strong potential for multiplication of clearinghouses and some potential for degradation of standards and toleration of violations.	

v. Option Five: Third Party Auditors

No new entity is created; instead, professional independent auditors would audit ODR providers to ensure compliance with Generally Accepted ODR Standards.

Third-Party Auditors

Pros	Cons
Avoids controversies related to creation of a new entity.	Who’s the client? Who pays? Who will be the auditors?
Allows fully independent, professional auditors to render professional opinion on compliance with standards.	Are the standards of a type that can actually be audited? Who sets the standards? Can the auditors carry out their function under a multiplicity of standards?
Separates entirely the standards-creation process from the standards-enforcement process.	Who reads the opinion? Who acts to enforce violations?
May be strong perception that this system lacks enforceability and accountability.	

vi. Option Six: Informational Entity (iADR Center)

Low profile, purely independent entity operating on a worldwide basis which establishes ODR guidelines and either (a) simply lists for consumers ODR providers that self-certify they meet those standards, or (b) issues and administers a formal ODR trustmark system with auditing and enforcement powers. It would

give greater weight to consumer and ODR education efforts, at least initially, than to certification and enforcement.

Pros	Cons
Clear, unambiguous, and independently derived ODR standards.	Uncertain funding.
Because of concentration on education and information, may avoid controversy.	Lesser attention to enforcement may be of concern.
Limited enforcement mechanisms (in case of (a) or reasonably effective enforcement mechanism in case of (b)).	In case (a), question is whether self-certification (without auditing) is a credible means of compliance with standards.
Consistent with U.S. and E.U. public statements on ADR, consumer protection, and use of technology.	

b. Recommendation: Creation of the iADR Center

After considering a number of alternative structures, the Task Force recommends the creation of an educational and informational entity—referred to as the iADR Center. The Task Force concluded that the iADR Center is most likely to gain traction with various stakeholders including government entities, Internet merchants, ODR service providers, and consumers at this juncture.

Given the divergence of legal rules concerning consumer protection, jurisdiction, and choice of law in the United States and other countries, it would be difficult at present to envision creating an entity, such as a Global Online Standards Commission, that would have prescriptive, regulatory, or enforcement jurisdiction. Jurisdictional complexity is thus a barrier to creating an international treaty based entity to regulate ODR providers.

By recommending the creation of an informational entity, the Task Force is not stating that the other options are without merit. To the contrary, there is certainly room for entities such as a dispute resolution clearinghouse as well as an ODR Trade Association and Trustmark Entity. The Task Force believes, however, that the most timely and useful entity at this stage, given the nascent stage of ODR, is an informational entity. As the ODR industry grows, these other entities may emerge to help provide further oversight and accountability when there is a robust ODR marketplace.

At present, the Task Force recommends the creation of a Web-based entity that would perform the following tasks:

- disseminate information concerning the Recommended Best Practices, along with information concerning existing ODR codes of practice;
- list and provide information concerning the available ODR/ADR service providers available for the resolution of e-commerce disputes;
- develop and/or disseminate sample complaints handling, privacy and best practices forms, codes, standards, and guidelines; and
- provide all information on a multilingual basis via the World Wide Web.

This entity should effectively address our one major factual conclusion:

- There is no organized nonprofit educational/informational effort to assist consumers, businesspersons or lawyers on a worldwide basis at this time.⁵³

Indeed, we believe that a well-organized, multilingual, worldwide, educational, and informational effort will:

- perform a function that is not now being performed;
- (because it would be Web-based) require relatively little in the way of funding;
- be consistent with official statements of the U.S. and E.U. governments;
- advance the interests of businesspersons and lawyers, as well as consumers;
- be commensurate with low-value B2C-type transactions; and
- encourage participation by the legal community on a worldwide basis in B2C transactions.

At this stage, the Task Force's recommendation is conceptual. Additional work and assessment will need to be done to create an iADR Center. The Task Force has given preliminary thought to some of the basic structural and organizational issues relating to the creation of the entity. It recognizes, however, that a next step would be a feasibility study to examine in greater detail how one would create an iADR center and the tasks necessary to achieve such an objective.

Type of entity

The Task Force recommends that the iADR Center be created as a private nonprofit organization as opposed to a governmental or a quasi-governmental organization. Given the informational nature of the Center's core mission, it seemed more appropriate and feasible to create a non-governmental entity that had no regulatory authority. A nonprofit entity (as opposed to a private for-profit entity) would also avoid tax issues with respect to any funds received or administered by the organization.

An alternative model was discussed of creating an association involving regional or national centers feeding into a parent organization. The International Chamber of Commerce is a nonprofit organization that operates along the associational model. This would involve creating or organizing a larger number of entities and thus would be more expensive to create. There is, however, no reason why the iADR Center could not evolve toward the associational model if that were an appropriate response to external conditions.

Staffing and Oversight of an iADR Center

The Task Force recommends the creation of a board of directors with an international composition. It also suggests that a certain portion of seats on the

53. We distinguish our recommendation from the *Euroguichets*, which provide information and advice only to E.U. consumers (not worldwide and not to lawyers) and from *econsumer.gov*, which dispenses some advice, but is primarily an enforcement tool. See Consumer Protection—European Consumer Infocentres (Euroguichet), at http://europa.eu/int/comm/consumers/policy/euroguichets/index_en.html (last visited Oct. 22, 2002); ECONSUMER.GOV, ABOUT ECONSUMER.GOV, at <http://www.econsumer.gov/english/index.html> (last visited Oct. 22, 2002).

board might be reserved for specific categories of representatives, such as consumer groups, ODR service providers, traditional ADR providers that have branched into ODR, etc. In addition to a board of directors, the iADR Center should have an advisory board comprised of experts in areas relevant to the work of the Center, including consumer protection, ODR, and technology, for instance. As for staffing, the Task Force believes that there needs to be several lawyers who would work to create the material and information disseminated by the iADR center, as well as administrative support staff, to help with outreach activities.

Funding of iADR Center

There are multiple sources for funding the initial startup phase for an iADR Center. Governments might consider funding such a project. Business organizations that represent Internet merchants and engage in a large amount of B2C e-commerce transactions will also benefit from the iADR Center and thus have an incentive to help create such an entity. Additionally, there are private foundations and philanthropic organizations that might have an interest in further planning and development towards an iADR Center. The Task Force recognizes, however, that the iADR Center needs to be independent from any outside interests or constituencies and should avoid any perceived conflicts of interest. Thus, funding from multiple sources may be desirable to create a sense of independence and impartiality. Merchants, consumers, and ODR service providers need to feel that the iADR Center is trustworthy in order to benefit from the existence of an informational Web site and center.

In the future, however, the iADR Center would have to consider a revenue model of some sort in order to be self-sustaining on an ongoing basis. Fees might be charged for more in-depth information or research, for example, provided to merchants. Ultimately, the creation of a trustmark program or certification process might be one way of ensuring the continuity of the iADR Center.

Service to be provided by the iADR Center

What Materials would the iADR Center provide?

The Task Force examined a range of information gathering and publication services the iADR Center might provide. The Task Force's analysis was guided by the following four attributes: whether the service was essential or optional and inexpensive or expensive to provide/create.

	Essential	Optional
Inexpensive	1	3
Expensive	2	4

The most essential and least costly services the iADR Center could provide include:

- Updating of governmental recommendations, codes, reports relating to best practices for ODR service providers and Internet merchants.

- Recommended Best Practices and related Commentary (to be updated as revised by the Board of Directors, Advisory Board, or other related group of experts).
- Brochures or other educational material relating to topics such as:
 - description of basic information regarding ADR/ODR mechanisms and options;
 - dispute avoidance techniques; and
 - other alternatives for dispute resolution (e.g., small claims court, ombudsman).

A second category of information that was perceived as essential, but perhaps more expensive to collect and update, includes:

- links to relevant resources on the Web for consumers, including governmental entities, consumer organizations, etc; and
- list of ADR/ODR providers and pertinent contact information.

A third category of information that is optional and inexpensive includes:

- glossary or relevant Internet and e-commerce terms and a list of definitions; and
- standard forms developed for filing complaints online and for other consumer-related transactions.

Finally, information that is optional and potentially expensive to collect and publish includes:

- metrics or statistics relating to e-commerce and consumer protection;
- links to relevant resources on the Web for consumers, including governmental entities and consumer organizations; and
- summaries of relevant consumer protection legislation from around the world that is updated regularly and summarizes for consumers and lawyers.

The Task Force is mindful that a listing of ADR and ODR providers may create a perception that the iADR center endorses certain providers. Thus, more careful consideration needs to be given to whether any sort of listing is practical and, if so, what sort of disclaimers and information would need to be posted on a Web site to ensure that no endorsement was implied.

Another possible function the iADR Center could serve is to provide feedback to the public on the quality of service offered by various ODR service providers. This could be done through providing a mechanism for filing a complaint with the relevant provider. Alternatively, a chatroom or bulletin board could be created where users could post their feedback. This has potential drawbacks, however, as persons might post messages containing negative feedback as a way of harming another business. The iADR Center might also be exposed to the added costs of

some level of monitoring of the chatroom or bulletin board or to liability for failure to do so adequately.

Addressing further the issue of the ODR trustmark/code of practice scheme that was first raised in our May 2001 concept paper, the Task Force believes that the iADR Center may be able, at a future date, to administer a code of practice and trustmark scheme. At the outset, and depending on funding, the iADR Center would rely largely on self-enforcement tools such as self-certification and reporting from ODR providers as a means of providing information.

The Task Force accepts that not all members of the ODR community would necessarily adopt the iADR Center's trustmark. The large, early entrants to the practice of ODR may already be committed to particular codes of practice that are otherwise quite acceptable. Nevertheless, the newer, smaller ODR providers may find that it would be useful to adopt and accept an iADR Center trustmark scheme because it would provide them with an important measure of credibility in terms of their prospective user-base.

At this stage in the life of the ODR community, there is little overall data and little, if any, indication that ODR providers are not comporting themselves with anything other than "best practices" as they see them. It would always be possible, of course, if a body of complaints and adverse information should emerge, that the aspect of enforcement could, and should, be strengthened with the use of a trustmark and code of practice.

3. Execution and Enforcement of ODR Outcomes: Importance of Dispute Prevention Mechanisms as an Alternative

a. Execution and Enforcement in ODR

During the consultation period, the Task Force received numerous comments concerning the problem of enforcement of outcomes or decisions reached through an ODR process. If an ODR provider has no means to obtain compliance from a merchant or party that has agreed to participate in dispute resolution, a consumer will have to seek a judicial remedy in order to enforce an agreement. One exception to this is where a trustmark or Web seal provider also provides ODR services for a merchant. The seal or trustmark provider will be in a position to revoke the seal or trustmark in the event that a merchant does not comply with a specific agreement reached with a consumer. Alternatively, it may be able to invoke other types of remedial sanctions for merchant non-compliance.

As the Best Practices for ODR Service Providers indicate, some ODR providers will implement mechanisms to provide effective enforcement of outcomes, although others will have business models that do not contemplate involvement in enforcement of outcomes. As the Best Practices indicate, ODR providers need to disclose what, if any, involvement they will have in enforcement up front so parties are aware, at the outset, of the ODR providers role (or lack of role) in enforcement.

The economics of dispute resolution are typically different for B2B and B2C disputes. That is to say, the two classes of relationships are a rough proxy for large-dollar versus small-dollar transactions (although there are certainly

exceptions), and for repeat-player versus one-off relationships, and between sophisticated versus unsophisticated parties.

The business community has long been involved in traditional ADR processes in resolving B2B disputes and, for these parties, ODR is essentially a change in venue rather than in approach. B2B ODR would thus not represent a major shift, and the choice for the parties between ODR and traditional ADR would be dictated by considerations of economics and convenience, informed by the relative importance they ascribe to face-to-face interaction. Ordinarily, B2B actors would not participate in any dispute resolution process (including litigation) if the economics or other importance of the controversy did not justify the expense.

Most of these attributes of B2B dispute resolution are different in the B2C context. B2C disputes are not traditionally resolved by ADR,⁵⁴ although there has been a recent trend for business parties to attempt to provide for mandatory arbitration. Because many B2C disputes are often over transactions of small dollar value, the economics of dispute resolution mitigate against any external dispute resolution process at all. Although ODR may reduce the costs of conducting ADR, the cost even of online mediation is likely to exceed the amount in controversy.⁵⁵ Online arbitration is ordinarily far more expensive, and therefore even less likely to be a cost-effective solution in relation to the amount in controversy.⁵⁶

b. Enforcement

The end product of a successfully concluded ADR process (i.e., one that resolves the dispute) is either (a) an agreement, in the case of a non-binding process, or (b) an arbitral award. This stage is, unfortunately, a far cry from a complete resolution, as a dissatisfied party can breach the contract or decline to comply with the arbitral award. Such non-compliance may put the prevailing party in a similar position to its starting point if the cost of vindicating its post-ADR rights would exceed the amount originally in controversy. This is possible even when the parties are not geographically remote; the probability increases with distance, and grows the more when national boundaries are crossed. In this latter respect, a breach of the agreement arising out of a consensual ADR resolution (in (a)) calls for its own legal action for breach of contract, often without the prospect of recouping attorneys' fees and costs; likewise, following a party's refusal to comply with an arbitral award (in (b)), the process for recognition and enforcement is hardly the quick

54. The notable exception being Magnuson-Moss warranty disputes.

55. For example, the largest-scale ODR program is on eBay, but the cost of the ODR process is underwritten by eBay rather than the disputant parties; absent this subsidy, few auction disputes would warrant even the relatively modest costs charged by the ODR Provider. See Square Trade, Help-Dispute Resolution: Case Filing and Responding, at http://www.squaretrade.com/cnt/jsp/hlp/help_odr_case.jsp;jsessionid=xudixnmh1?vhostid=tomcat1&stmp=squaretrade&cntid=xudixnmh1#odr (last visited Oct. 18, 2002).

56. Where the dispute is not self-contained but rather subject to aggregation by private (i.e., class action) or governmental action, the business party would naturally view the amount in controversy differently from the consumer, and be concomitantly willing to bear all, or virtually all, of the expense of the ADR process. It is on this foundation that the AAA Due Process Protocols are based, and the courts have generally required such cost allocation as a condition of enforcing mandatory arbitration clauses in the B2C context.

and inexpensive process that one might want. And, even after pursuing judicial remedies in either case, execution of a resulting court judgment is by no means automatic. Moreover, there are abundant traps for the unwary, a few of which warrant specific mention in the international context: (i) failure to use the Hague Convention on Service of Judicial and Extra Judicial Documents Abroad; (ii) failing to take account of provisions of law in the jurisdiction of the losing party (particularly if that party is a consumer) that the local courts may deem to be mandatory law;⁵⁷ and (iii) disregard of local laws that make the subject matter of the dispute inarbitrable⁵⁸ or provide for mandatory jurisdiction of local courts.⁵⁹ Thus, successful enforcement of an ADR result incorporates the concerns described in the section of this Report regarding jurisdiction and applicable law.

All of the foregoing highlights the desirability that ADR providers make enforcement easier and more harmonized. One procedural mechanism that has been put into force in at least one foreign jurisdiction (Buenos Aires, Argentina), and which was discussed in the drafting process of the recently completed Uniform Mediation Act (but rejected), is that the parties to a mediation conditionally vest the mediator with the additional mantle of arbitrator so that, if an agreement is reached, the mediator can render an arbitral award embodying the parties' agreement. This metamorphosis eliminates at least the need to prosecute, from the beginning, an action for breach of the agreement reached in mediation, and allows the party seeking enforcement to proceed directly to the procedure for recognizing and enforcing an arbitral award. Such an approach is particularly useful in an international dispute because recognition and enforcement of arbitral awards is available under a number of international conventions, and harmonizes the enforcement procedure by consolidating the end products of ADR into a common form. Another option, in some instances, is to require the parties to put into escrow each party's consideration in the transaction that is the subject of the dispute, so the escrow agent can distribute the assets in accordance with the ADR result. A third option allows for parties to a settlement agreement to provide in the settlement agreement that in case there is non-performance of the settlement agreement the parties agree to have an arbitrator appointed for the sole purpose of drafting an award that converts the settlement agreement into an arbitral award on agreed terms or award by consent.

The ADR providers can take additional steps in regard to sellers that have trustmark accreditation because repeated refusal to comply with settlements or awards would be cause to revoke the seller's right to display the trustmark.

57. See, e.g., *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000*, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, at L 178/7 (June 8, 2000), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/L_178/L_17820000717en00010016.pdf.

58. For example, under Italian law, a dispute involving the validity of a registered intellectual property right requires the participation of the Procurator General, and therefore is probably not arbitrable even *inter partes*.

59. For example, the constitution of Brazil long provided that a Brazilian citizen had the unconditional right to have any legal case against him heard by a Brazilian court; this meant that recognition of an adverse foreign judgment or arbitral award was all but impossible.

Unfortunately, this remedy is asymmetric (no such sanction can be levied against buyers unless they also happen to be trustmarked sellers), and underinclusive (many sellers are unaccredited).

c. Least-Cost Solution

Based upon available data, which suggest that a significant majority of B2C disputes feature the consumer's goal to rescind the transaction and obtain a refund,⁶⁰ the least-cost solution would not be any form of post-dispute resolution at all, but rather preclusion of the dispute *ab initio* through the use of an escrow service provider. This solution is very low-cost (typically, two percent of the transaction), and is designed to effect the very remedy most often sought by the consumer party in a B2C dispute. In transactions within the United States, this solution has been largely eclipsed by the credit card charge-back, which achieves the same result for the consumer without the two percent fee, as sellers commonly accept payment by credit card. Further, in the case of eBay, the dispute resolution regime breaks into separate categories because eBay provides its own anti-fraud insurance; this means the escrow option is available to address customer dissatisfaction with a delivered but non-conforming product only, although the ODR option (also subsidized by eBay) provides a mediation forum. And, most recently, the U.S. Postal Service has launched a program called "Pay@Delivery" to facilitate online auctions: this process conditions release of payment to the seller upon delivery of a package to the buyer with a USPS-issued bar code affixed by the seller.⁶¹

The situation outside the United States is quite different because of the smaller proportion of transactions involving credit card payments. Furthermore, the charge-back system currently in use in the United States does not exist in all countries. Therefore, the least-cost preferred vehicle for enhancing consumer confidence, particularly in international B2C commerce, would appear to be fostering greater use (and widespread availability) of the escrow service option.⁶² Within the United States, use of a credit card for payment with the ability to access the credit card charge-back mechanism is also desirable for consumers.

60. The National Consumers League report on e-commerce fraud indicates that forty-one percent of online auctions disappoint the buyer, where they receive the wrong item or nothing at all. The report also deplores consumers' unfamiliarity with escrow services. See Online Auctions, Buyers, Sellers Need Auction Education, at <http://nclnet.org/shoppingonline/onlineauctions.htm> (last visited Oct. 18, 2002).

61. See U.S. Postal Service, USPS Payment Services, at <http://www.usps.com/paymentservices/pspaymnt.htm> (last visited Oct. 18, 2002).

62. Quite without statistical validity, limited data adduced by one of the Task Force members indicate that even repeat-player business sellers on eBay are unfamiliar with the escrow service available on that site. On inquiry, we learned that eBay does not require its sellers to accept an escrow transaction even if the buyer bears the entire cost of the escrow service.

ANNEX A

RECOMMENDED BEST PRACTICES BY ONLINE DISPUTE RESOLUTION SERVICE PROVIDERS

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I. SCOPE AND APPROACH

A. SCOPE

These Recommended Best Practices are intended to assist:

- Organizations that provide online dispute resolution services (ODR providers), concerning disputes that occur online or disputes that lend themselves to being resolved online;
- Individuals who serve as neutrals for ODR providers;
- Customers of those services, whether personal consumers or businesses; and
- Online merchants or marketplaces.

The term “online” refers to the use of the Internet or related communications technologies (such as e-mail, videoconferencing, or interaction via a Web site or chatroom) as the primary method of communication during a transaction or related dispute resolution proceeding.

Actions that are taken by ODR providers consistent with these Recommended Best Practices may (a) take the form of codes of conduct, codes of practice, best practices statements, protocols and similar statements; (b) be reflected in the operation of their Web sites and in material posted on their Web sites; or both. The exact form is secondary. The primary points are that the ODR provider’s service is clearly and comprehensively presented to the consumer in a manner

that is consistent with the Recommended Best Practices and in fact operates in the manner presented.

These Recommended Best Practices are not intended for traditional, face-to-face dispute resolution services, though the basic principles may apply in both online and offline environments.

These Recommended Best Practices contain many principles that are applicable in both B2B and B2C disputes. However, they particularly are intended to enable personal consumers to make intelligent choices concerning ODR providers, to help give them confidence in the efficacy of ODR and therefore in B2C commerce generally, and to encourage consumers to use ODR as a means of obtaining resolution of their complaints.

These Recommended Best Practices are also not primarily directed to the codes of conduct, best practices statements, and similar protocols of online merchants or marketplaces (although they may find the Recommended Best Practices useful). Other private and governmental entities have proposed merchant guidelines and best practices for consumer protection in the context of electronic commerce, and this Task Force does not purport to duplicate their efforts. However, with respect to ODR, the Task Force does believe that it is important for online merchants and marketplaces to disclose: (1) the existence of pre-dispute ADR/ODR clauses; (2) the nature of the online merchant's dispute resolution process, including customer service and use of formal ADR/ODR processes; (3) any contractual relationships with ADR/ODR providers; and (4) information to educate their customers about ADR/ODR methods.

B. APPROACH

It is not the primary goal of these Recommended Best Practices to set minimum substantive standards. The approach taken by Recommended Best Practices is based mainly on the use of disclosure and addresses both the adequacy of the means whereby the disclosure is given and the subject matter of the disclosures.

It is recognized, however, that the fact of comprehensively listing and organizing the topics for disclosure has some effect in setting substantive standards. It is also acknowledged that, when individual ODR providers come to the act of formulating disclosures that are readily available publicly and easily compared with those of other ODR providers, a natural effect of a disclosure-based system is to press ODR providers in the direction of setting strong substantive standards. These effects are intended. In addition, a "Commentary" area follows each of the sections of these Recommended Best Practices and those Commentaries indicate, among other things, substantive standards that are encouraged. Hence, as a practical matter, the approach in these Recommended Best Practices is unavoidably a mixed system of recommended disclosures and substantive practice standards.

Nevertheless, the intention is to rely mainly on disclosure. There are several reasons for this disclosure-based approach:

1. The ODR community as a whole is quite new and has not generated a sufficient database of information on which to base confidently extensive substantive standards particularly applicable to ODR.

2. Different ODR providers focus on different markets (service, product, merchant type, geography, etc.) and a single set of substantive standards may not be appropriate in all cases.
3. The ODR community lacks a clear business model or models for sustained profitable operations and appears to be evolving so as to develop such models. Premature standard setting may retard that evolution.
4. From the point of view of the Bar, a consumer's decision to use an ODR provider (or to make an online purchase taking into account of availability of an ODR mechanism) is a contract decision. A central issue in any contract decision between a vendor (the merchant or the ODR provider or both) and a vendee (the consumer) is whether the vendee has sufficient information on which to make an informed and intelligent choice. The Bar is not a consumer protection regulatory agency. Its proper concern is more with the fairness of the various processes involved than with the appropriateness of the substance, as might be more the proper concern of a regulatory agency.
5. Disclosure has an important enforcement consequence in that, under U.S. law, if a business fails to adhere to the public disclosures that it makes concerning its services, it may, under many circumstances, be engaged in an unfair or deceptive act or practice in or affecting commerce under section 5 of the Federal Trade Commission Act (15 U.S.C. §§ 41–58, as amended). This is also the case under the consumer protection laws of many states and non-U.S. jurisdictions.

II. TRANSPARENCY AND ADEQUATE MEANS OF PROVIDING INFORMATION AND DISCLOSURE

- A. All information and disclosures, regardless of form, should be accurately and completely stated, should be presented as clearly and simply as the substance permits, and should present the most important points in an appropriately conspicuous manner.
- B. All information and disclosures presented electronically should employ identifiable and accessible formats.
- C. All information and disclosures on the Web sites of ODR providers not related to individual cases should be printable and able to be downloaded electronically.
- D. If the ODR provider handles a substantial number of B2C disputes, regular periodic statistical reports should be published online that permit a meaningful evaluation of the proceedings and that respect the confidentiality of the participants and the individual proceedings.
- E. With respect to other disputes, particularly those resolved by arbitration, participants should be encouraged to allow the decisions to be published with any confidential or propriety information deleted.

COMMENTARY: ODR providers are encouraged to use tables, charts, graphs and similar formats that facilitate analysis and comparisons by consumers. These summary reports should include, for example, (a) number of cases received, resolved,

and pending; (b) the number of cases resolved in favor of the business; (c) the number of cases resolved in favor of the consumer; (d) average length of time the proceeding was pending; and (e) average costs, if any, to consumers.

It is understood that ODR providers' existing case management systems may not be capable of generating detailed statistical data, and that it may be costly to develop such systems. This Recommendation therefore is prospective in nature, and recognizes the financial and practical concerns involved. It is recommended that until new systems are developed, ODR providers publish reports that, at a minimum, relate (1) the number of total cases; (2) the number of cases resolved in favor of the business; and (3) the number of cases resolved in favor of the consumer.

With respect to Section II.D, an annual report is suggested as a minimum. However, quarterly or semi-annual reports followed by a consolidated annual report are encouraged.

III. MINIMUM BASIC DISCLOSURES

ODR providers should disclose the following minimum level of information:

- A. Contact and organizational information. This includes:
 1. A mailing address, including physical location, not just a post office box number;
 2. E-mail address, and
 3. Jurisdiction of incorporation or registration to do business.
- B. Terms and conditions and disclaimers;
- C. Explanation of services/ADR processes provided
 1. Description of the types of services/processes provided (e.g., mediation, arbitration, early neutral evaluation, blind bidding);
 2. Published rules of procedure for all services/processes provided;
 3. Nature of the outcome of each service/process and its legal consequences (e.g., whether binding or non-binding on each party), and an explanation of further possible avenues of action (e.g., appeal); and
 4. If the ODR provider or an individual neutral is engaged in legal services such as client counseling and advocacy, or is affiliated with a law firm or other organization that provides such services, identify the methods employed to separate neutral services and legal services to avoid conflicts of interest.
- D. Affirmation that the ODR proceeding will meet basic standards of due process, including (1) adequate notice to the parties; (2) an opportunity for the parties to be heard; (3) the right to be represented or to consult legal counsel at any stage of the proceeding; and (4) in an arbitration, an objective decision based on the information of record.
- E. Any prerequisites for accessing the service, such as membership, or geographic location such as residency in a particular country or state.

- F. Any minimum value for the dispute to be submitted to the ODR provider for resolution.

COMMENTARY: This section is intended to set forth the basic minimum level of information without which it would be difficult for a consumer to make a reasonable decision to participate in the service offered by the ODR provider. Each of the remaining sections is intended to present the additional information that ODR providers should, in the view of the Task Force, make available as a matter of best practice.

Among the intended principal effects of the procedures that are disclosed are the following: All disputants should be given a reasonable and fair opportunity to be heard. The ODR proceedings should be perceived as treating all parties at least as equitably and fairly as a formal government administrative or legal procedure. Published rules of procedure should clearly ensure that all parties' rights are protected. There should be no unreasonable barriers to access, including unreasonable costs, geographic, linguistic or other barriers. In this regard, ODR providers should look to existing offline protocols for guidance (e.g., AAA Consumer Due Process Protocol, ABA Managed Care Protocol, or protocols of industry associations, etc.). With respect to Section III.A, the listed contact and organizational information is often lacking either entirely or partially, on ODR provider Web sites. This puts the consumer in the unacceptable position of not knowing exactly who the party is with which the consumer is contracting.

IV. USE OF TECHNOLOGY AND THE ONLINE ENVIRONMENT FOR DISPUTE RESOLUTION

ODR providers should disclose:

A. Specific Disclosures Regarding Current Technology

1. Systems requirements (hardware and software) for using the ODR provider's service.
2. Any limitations on accessibility to ODR systems, such as hours of operation or specific methods of access.
3. If they employ systems that accommodate the disputants' differences in language and culture and, if so, what these are and how they function.
4. Any specific electronic techniques offered to enhance the efficacy of ODR and, if so, what these are and how they function.
5. If they provide techniques for accessibility to persons with disabilities or with low levels of literacy, and, if so, what these are and how they function.
6. If they employ security to ensure the identity of the participants and to preserve confidentiality and privacy of the participants and, if so, what they are and how they function.
7. If they have back up and arrangements for alternative emergency access.

B. Specific Disclosures Regarding Training in Use of Online Systems

ODR providers should disclose:

1. If they educate potential participants in online procedures to help assure access to all users, and if so, by what means (such as through provision of instructions, tutorials, help files, and support personnel via e-mail or telephone).
2. If they provide training in the use of the ODR system to neutrals.
3. If they provide training in adapting the neutrals' skills to the online environment (such as training to help overcome the challenges of communicating without face-to-face meetings).

COMMENTARY: Section IV addresses the current technological practices of the ODR provider. However, ODR providers are encouraged to disclose their policies and plans for encouraging and incorporating new technological advances into their ODR processes.

The technological area is one in which context sensitive help files and tutorial can be the most effective mean of providing meaningful information and disclosure to consumers. The use of such techniques is encouraged.

V. COSTS AND FUNDING

ODR providers should disclose:

- A. All costs of the process, what portion of the cost each party will bear, and the terms of payment.
- B. In B2C disputes, if there is no cost to the consumer, or if the costs are subsidized, the source of the funding.
- C. In B2B disputes, if the costs will not be borne equally by the parties, explain the distribution.

COMMENTARY: Costs of an ODR process should not be so high as to foreclose the opportunity to resolve a dispute; cost should be commensurate with the value of the dispute, while taking into account the need to avoid frivolous claims. Investment in and costs of operating the ODR service, as well as a reasonable profit, also should be considered in setting the costs of the dispute.

VI. IMPARTIALITY

ODR providers must disclose all matters that might raise a reasonable question about the impartiality of the ODR provider or its neutral(s). Specifically ODR providers should disclose the following:

- A. Relationship to Others Concerning Providing ODR Services
 1. If the ODR provider provides ODR services under a contractual relationship with other organizations, such as merchants, trade associations, etc.

2. If the ODR provider provides any referral compensation (referral fees, rebates, commissions, etc.), and if so:
 - a) to whom it is paid, and
 - b) the amount of the compensation or the basis for calculating the amount of the compensation.
 3. An ODR provider shall take reasonable steps to cause its neutrals to disclose whether the neutral or a person closely affiliated with the neutral (e.g., spouse, relative, or business partner, etc.) has any conflicts of interest, including but not limited to:
 - a) Any direct personal, business, professional or financial relationship with a party or its representative;
 - b) Any direct or indirect interest in the subject matter or outcome of the dispute, including contingent fee arrangements; and
 - c) Any personal knowledge that the ODR provider or neutral has of facts relevant to the dispute.
- B. Selection Process of Neutrals
1. How individuals are selected to become part of the panel of neutrals eligible to handle disputes.
 2. How a particular neutral is selected to handle a particular dispute.
 3. The process by which neutrals are required to certify that they have no conflicts of interest and have disclosed all matters that reasonably might affect impartiality with respect to a particular dispute.
 4. Procedures for disqualification of a neutral for cause.
- C. Ethical Standards for Neutrals
1. Identify and/or link to the ethical rules by which the neutrals are bound.

COMMENTARY: Impartiality of ODR providers: This section suggests that an ODR provider should disclose the existence of contractual relationships to provide ODR services on a continuing or repetitive basis to or involving a particular organization. For example, if a merchant contracted with and pays an ODR provider to arbitrate disputes between the merchant and its customers, that relationship should be disclosed so customers are aware of it. This Recommended Best Practice does not suggest that an ODR provider must disclose every party to whom it previously has provided ODR services, training programs, etc., which would be overly burdensome and perhaps contrary to the confidential nature of ADR. Further, this Recommended Best Practice is intended to be prospective if for financial and practical concerns it is not possible to capture and disclose information about existing contractual relationships. ODR providers should use their best efforts to apply this Recommended Best Practice retrospectively, where feasible.

Impartiality of neutrals: This section affirms as a substantive standard that all neutrals must act impartially and must disclose any conflicts of interest. It is understood that even if an ODR provider has a contractual relationship to provide

ODR services on a continuing or repetitive basis to a particular organization, the neutrals assigned to individual disputes arising under this contractual relationship will be bound by the same substantive standard to act impartially and disclose any conflicts of interest. If the neutrals are bound by a published set of ethical rules, ODR providers are encouraged to post the full text of such rules, or at a minimum include a link to a page where the full text is posted. If the parties wish to know more about the selection process of a neutral in general or for a particular matter, that information should be available.

VII. CONFIDENTIALITY, PRIVACY, AND INFORMATION SECURITY

ODR providers should be prohibited from disclosing any personally identifiable information without the party's affirmative consent. ODR providers should disclose:

- A. Confidentiality Policies Concerning Information About Participants Provided to the ODR Provider
 1. Their general privacy policies.
 2. If they are members of any Privacy Seal or Privacy Trustmark program(s) and if so, provide a link to the program.
 3. If customer information may be released by the ODR provider, and the circumstances under which that information may be released.
 4. If any ODR proceedings being conducted by the neutrals are monitored by the ODR provider, and under what circumstances.
 5. If the ODR provider reviews customer information as part of a quality control process, and who conducts the review.
 6. If the ODR provider's Web site uses technological means to identify the participant and/or track the participant's online behavior (e.g., session cookies, persistent cookies, Web-bugs, clear gifs, and the like), and whether the ODR providers provides an opt-out opportunity.
- B. Confidentiality Concerning Specific Proceedings
 1. The scope of confidentiality accorded to the ODR proceedings, including mediated settlement agreements and arbitration decisions, and the basis for protection from disclosure.
 2. If arbitration decisions will be published, the manner and location of publication, and any limitations on accessibility (e.g., subscriber-only access).
 3. If aggregate data without personally identifying information will be released.
- C. Confidentiality Concerning Both Participants and Proceedings
 1. Records retention/disposition policy, particularly concerning retention of information concerning individual participants, as well as records related to specific proceedings.

2. What forms of security for all online processes, particularly from theft or disclosure of information provided by participants and information or documents related to specific proceedings.
3. What kinds of security mechanisms have been put in place to safeguard participant information.

COMMENTARY: ODR users frequently question the privacy commitments of ODR providers prior to engaging in the ODR process. ODR providers are encouraged to identify the laws, regulations, standards and/or guidelines regarding privacy (data protection) and information security applicable to them or to which they voluntarily adhere. Examples of such standards or guidelines are those of TRUSTe and BBBOnline. Examples of privacy (data protection) laws are the Gramm-Leach-Bliley Act in the United States, the Personal Information Protection and Electronic Documents Act (PIPEDA) in Canada, and the laws of the various Member States of the European Union resulting from the transposition into national law of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data. ODR providers should consider that (1) privacy laws often contain information security requirements; (2) privacy and information security requirements may also stem from consumer protection and telecommunications laws; and (3) strong requirements in these areas may derive from sub-national laws, such as state or provincial laws.

With respect to Section VII.C, ODR providers are encouraged to state specifically whether they employ SSL or SET protocols, a Virtual Private Network, or other means to protect data in transmission, whether they employ a fire-wall and anti-virus software, and what back-up practices and other technological and non-technological means of providing information security they employ.

VIII. QUALIFICATIONS AND RESPONSIBILITIES OF NEUTRALS

A. *Responsibilities*. Neutrals Shall:

1. Disclose all conflicts of interest and act with impartiality and independence;
2. Adhere to applicable ethical guidelines of their jurisdiction and any other guidelines specified by the ODR provider;
3. Act promptly and manage the dispute effectively; and
4. Maintain communication with the parties.

B. *Qualifications*. ODR Providers Should Disclose:

1. The minimum qualifications required for inclusion on the ODR provider's panel of neutrals, such as education level, lawyer/non-lawyer, prior ADR experience and the like.
2. The qualifications (including ADR training, degrees or certificates, level of experience, and areas of expertise) of individual neutrals.

3. If the ODR provider provides additional training for neutrals, and the type of training provided.
4. If they require that their neutrals have had training specifically with respect to use of the online medium (and how it differs from traditional face-to-face ADR) and the technology used by that ODR provider.

COMMENTARY: With respect to Section VIII.A, possible sources of disclosure standards regarding conflicts of interest are the American Bar Association, the American Arbitration Association, the CPR/Georgetown Legal Ethics Commission, the Association for Conflict Resolution (ACR (formerly SPIDR, AFM and CRE-net)), and the International Bar Association Ethics for International Arbitrators.

IX. ACCOUNTABILITY FOR ODR PROVIDERS AND NEUTRALS

ODR providers should disclose:

A. Accountability for Neutrals

1. What steps they take to require neutrals to fulfill their responsibilities promptly, maintain communication with the parties, and comply with the stated ethical guidelines.
2. If they provide a process to allow participants to file complaints for neutrals' failure to comply with the above requirements.
3. If they provide an appeals process for arbitral decisions rendered by the neutrals.

B. Accountability for ODR Providers

1. If they comply with published guidelines, such as the guidelines of relevant trustmarks, and the full text of (or link to) of any such guidelines or trustmark requirements.
2. If they provide a process for participants to file complaints concerning the ODR services rendered, both with the ODR provider itself, and with any relevant external organizations (such as trustmark providers).
3. If compiled, provide the percent of cases in which the parties are satisfied with the process.

COMMENTARY: ODR providers should display all relevant trustmarks.

X. ENFORCEMENT

ODR providers should disclose:

- A. If they provide any assistance in enforcing any agreement, award or decision reached or rendered through an ODR process.
- B. Whether they cooperate with law enforcement officials so instances of fraud can be detected and prosecuted.

COMMENTARY: With respect to X.A., some ODR providers may determine that enforcement is best left to the parties and courts. Other ODR providers may

determine that it is in their best interest to have their awards enforced, and therefore may choose to provide assistance in a manner that does not affect the ODR provider's neutrality. For example, at the request of the prevailing party, an ODR provider may provide certified copies of awards and other documents for use in seeking enforcement before a national court. Further, some ODR providers may agree to send a reminder letter to a party that has not complied voluntarily with an award. But if an ODR provider renders assistance, the type and extent of that assistance should be disclosed, and any related costs.

As part of their periodic disclosure ODR providers are encouraged to provide statistical information regarding the experience participants have had in enforcing prior decisions rendered by the ODR provider.

XI. JURISDICTION AND CHOICE OF LAW

ODR providers should disclose the jurisdiction where complaints against the ODR provider can be brought, and any relevant jurisdictional limitations.

ANNEX B

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