

Online Dispute Resolution and Avoidance in Electronic Commerce 1999

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Submitted by Christine Hart, LL.B.

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Executive Summary

Conflict is inevitable in human interaction, and commerce is no exception. The activities of buying and selling have always generated disputes about price, quality, time of delivery and many other terms. If these disputes could not be resolved between the participants, they could turn to the courts for a public resolution or, they could agree to submit to private dispute resolution, such as arbitration or mediation. It has always been more difficult to resolve commercial disputes when the parties reside in different political jurisdictions, for reasons of distance, cost, enforceability and the applicability of different laws. Electronic commerce has magnified those barriers and added a much greater expectation of speed and a wider range of cultural backgrounds and experience of those engaging in buying and selling transactions globally. It has also raised some new issues of anonymity, security, privacy, and constantly changing technology. It should not be surprising, therefore, that the Vendors have paid some attention to disputes in their efforts to persuade Internet "surfers" to "buy". They have first tried to minimize the problem by using "tried and true" strategies to avoid and prevent conflict as much as possible. They are now beginning to experiment with private online dispute resolution mechanisms. A few visionaries are exploring the very nature of how we communicate and trying out new pathways, seeking to understand better how we can communicate across large cultural and language gulfs. It is assumed, or perhaps hoped, that more effective communication will foster more and better resolutions of disputes. The next step is to include public dispute resolution in the debate and experimentation. Only then will the online dispute resolution realize its full potential as an integral feature of electronic commerce around the world. This paper examines the developments in dispute avoidance and online dispute resolution to date, and looks at the likely future of this area of commerce.

*Ms. Hart, a mediator, arbitrator and dispute process designer, is President of Accord/ hart & associates inc. She developed *Draft Model Guidelines for Court-Connected Mediation Programs in 1998* for the CBA, is the Lead Arbitrator for the Investment Dealers Association Arbitration Program, co-authored *Bypass Court: A Dispute*

Resolution Handbook, Butterworth's Canada (1996), and was Founding Director of the Ontario Court (General Division) ADR Centre Pilot Project.

PART I: Dispute Avoidance and Minimization in Electronic Commerce

A. Introduction

Despite forecasts of its multi-billion dollar potential, the online community is still in the pioneering era of electronic commerce. More profit is being made by selling advertising space on the "Net" and by promoting Internet stocks than by the online sale of goods and services to consumers. By mid-1998, only 4% of Canadians had made a purchase online. ¹The volume of public discourse on the subject has noticeably increased, however,

particularly during the recent holiday season when time-pressed consumers turned to their computers to help them gift shop. Did they buy or just browse? How did they assure themselves of the legitimacy of the merchant or the product? Did they save time over more traditional merchant - consumer transactions? Was it more convenient? How did they pay? How secure was their personal information in making the payment? Were there problems with delivery? What if the goods did not meet their expectations? How were complaints and returns handled? The answers to these and similar questions are only beginning to be collected, and credible analysis of the data is still on the drawing board. What can be examined, though, is the range of approaches being implemented by online purveyors of goods and services and their associations, (the "Vendors"), to encourage consumers to take the leap from "browse" to "buy".

The premise of this paper is that a strategic analysis of disputes, both potential and actual, has been employed by Vendors in seeking to overcome consumer resistance to actively engaging in electronic commerce. Consumer confidence is thought to produce sales, and a significant element in earning consumer confidence is in dealing with problems and concerns in acceptable ways. The varied responses to the dispute analysis will be examined, including policies and programs aimed at dispute avoidance or prevention, as well as adaptations of dispute resolution processes to the online environment. ²

Before moving on to the Vendors' dispute management strategies, a few words are in order about traditional dispute resolution in the physical world. Our civil justice system of resolving disputes is a fundamental underpinning of a stable, advanced society. We have, in large measure, substituted courts and litigation for wars and other power-based mechanisms for resolving disputes between citizens. The system has evolved to give the litigant his or her "day in court" in which to tell the judge about the events that led to the dispute. Elaborate rules of evidence and discovery govern this adversarial process, so lawyers are needed to guide the litigant. The complexity of the public court process and the time it takes to navigate have put it beyond the means of the average person. ³ Consequently, other private mechanisms for resolving disputes have been developed, both for business and consumer disputes. Most of these processes are not new, e.g. mediation and arbitration, and they do not supplant the civil justice system, but can operate quite effectively in conjunction with or in the shadow of the court system ⁴. They are collectively referred to as *Alternative Dispute Resolution* or *ADR*.

B. Barriers to Electronic Commerce

Internet use is expanding by leaps and bounds. Some of its attractions include those very elements that pose barriers for electronic commerce. Its anonymity appeals to us as window-shoppers, but it also means that neither the Vendor nor the consumer really know with whom they are dealing, or if they are legitimate. The global scope of the Internet is an invaluable asset for researchers, but it opens the possibility that the parties to an electronic transaction are half a world away from one another, operating in different cultures, with different laws and conflicting expectations. That the Internet is largely unregulated and free from the intrusion of governments and laws has great appeal for some users. The flip side is

that the Internet is not immune to fraud and deceit, and it is uncertain which national laws apply to a bi-national electronic transactions, and how they can be enforced in another country.

Two of the more significant barriers to purchasing on the Internet are privacy and security concerns. IBM highlights the payment security problem in reporting on a survey by Nordicity that indicates that 78% of Canadian Internet users are concerned about making their credit card payments on the Internet ⁵. Advances in encryption and other technologies have allayed those concerns to the extent that consumers are now adopting Internet Banking in increasing numbers, but the time may never come when Vendors can guarantee against the unscrupulous access or alteration of confidential information provided online. An array of approaches may be needed to offset that risk.

The other aspect of privacy that concerns consumers is the use to which their personal information may be put without their knowledge or consent. Technology is working against consumers here. Once an Internet user visits a Web site and leaves any personal information, either in concluding a transaction or, for example, in order to receive something the Vendor is offering, the user generates a data trail. That data can be readily collected by the Vendor in a "cookie" file and used for marketing purposes or sold to others without the user's consent.

A recent example at an Information Technology Law Conference brought home the significance of the increasing digitization of information and its application to new markets. A map-making company gave a demonstration of how, by using publicly available information, it could pinpoint and picture every parcel of land in the province, providing the additional information of who owned it, for how long, the purchase price, the assessed value and the annual taxes. It does not take much imagination to understand how this public information might be put together with previously private information to enhance its potential market, and why consumers might want a measure of control over how that information is used.

Canadians have not been silent on the issue. In an Angus Reid survey taken in July, 1998 ⁶, nine in ten Canadians strongly disapproved of companies trafficking in information about their private lives without their consent, and ninety-four per cent felt that it important to have safeguards to protect personal information on the Internet.

The Province of Quebec is the only Canadian jurisdiction that has made its protection of privacy legislation apply to the private, commercial transactions. However, Canada was the first country to adopt a voluntary national standard. In 1996, Canada adopted the Canadian Standards Association's (CSA) *Model Code for the Protection of Personal Information*, which was developed by businesses, consumers and governments. That standard now forms the basis for Bill C-54, the *Personal Information Protection and Electronic Documents Act*, introduced in Parliament on October 1, 1998. If passed, the law would apply to commercial activities involving personal information, holding the commercial entities accountable for its use. On passage it will immediately cover the federally regulated sector, including

broadcasting, telecommunications, and banking. Three years later it will govern all commercial transactions in Canada.

C. Consumer Purchasing Online

More consumers are making purchases online than was the case a year ago, but an examination of those purchases tells its own story. As recently reported in *Consumer Quarterly*:

According to research carried out for the Office of Consumer Affairs (Electronic Commerce Quantitative Report, Decision Resources Inc., June > 5, 1998), consumers who do shop on the Internet buy things from companies they are familiar with and have dealt with before. Purchasers are more likely to be male, have higher household incomes than average and see themselves as financial risk takers. The most popular Internet purchases are computer software and hardware, books and magazines, and CDs or cassettes. The research also shows that consumers cite three reasons for buying something through the Internet: the transaction involves little monetary risk, they buy from a previously known vendor, or they can't find the product or service through their usual retailers. Internet shoppers are quick to point out, though, that they are aware of the risks in buying online, see those risks as a trade-off for getting the product or service they want, and accept the responsibility for their transaction.⁷

The research portrays these *early adopter* consumers as a fairly timid lot. Despite their incomes and propensity for risk-taking, they buy from someone they know, unless what they want is just not available there. The lesson seems clear that to create a wave of more aggressive online consumers, Vendors will have to take what is essentially foreign and unfamiliar for most people, address their concerns about this new medium, and imbue it with a familiarity that inspires confidence. What follows is a discussion of some of strategies Vendors have initiated to do just that, their features, and how they differ from more traditional approaches in the physical world of buying and selling. Their common denominator is disputes: preventing them, minimizing them and resolving them.

D. Dispute Avoidance and Prevention Strategies

1. Certification

Certifying that a product or service meets a certain standard is not a new approach. The Good Housekeeping Seal of Approval is so well-known that the phrase has entered the language as denoting anything that has achieved a credible standard of approval. What is different about certification on the Internet is what it is applied to - concepts and technologies, and how it is accessed.

(a) Digital Security Certificates

Security is the number one consumer concern - one which is holding back the online purchase of goods and services on the Internet, and one that will undoubtedly produce a multitude of disputes for vendors if solutions are not found. Consumers are worried about: confidentiality of information provided, ensuring the integrity of the payment made,

and authenticating the reputability of the merchant or service provider to ensure that what is purchased will actually arrive, and if there is a problem the merchandise can be returned or a complaint handled in a responsible way.

A segment of the financial services sector has developed a voluntary certification response to these concerns. It is a standardized industry-wide protocol specification designed to secure payment transactions and authenticate the parties involved in the transactions on open networks like the Internet. **Secure Electronic Transaction or "SET"**, first announced in 1996, was developed by Visa and MasterCard in collaboration with a consortium of leading technology companies including Microsoft, Netscape, RSA, VeriSign and others. ⁸

The essential elements of SET are digital certificates that amount to a digital credit card for consumers, and a certification authority that ensures that merchants meet the standard, confirmed by the issuance of a SET mark. To date the consumer certification is up and running and more than 1.5 million digital certificates have been issued. Corporate partners include financial institutions such as the Royal Bank of Canada and Bank of America, and other large corporations such as British Telecommunications, AT&T, Texas Instruments and America Online.

No merchant has yet been awarded the SET mark since the certification testing service is still not available. The certification testing to meet the SET standard is carried out by Tenth Mountain, a company formed by the payment card brands. Once the application and the merchant pass the certification testing, a SET mark is awarded. The roll-out of the testing will be first to consumers, then merchants, then Certificate Authority applications, then Payment Gateway applications.

The SET certificates that are issued after testing serve as digital identification that can authenticate the cardholder consumer or identify the merchant as a valid Visa, MasterCard, American Express, Diners Club or other payment card merchant - much as an individual signature or the card decal in the window does in a more traditional store.

What a SET cardholder certificate in combination with SET-compliant wallet application software for use on the personal computer from which Internet purchases are made does for the consumer is provide a higher level of security for the payment portion of the Internet transaction. It does not enable secure access to browsing or account inquiries. Other security options are available for that type of use such as SSL (secure socket layer) encryption for an entire Web site. The Web sites of most large Vendors will have both.

Under the SET protocol it is the cardholder or merchant software application which is responsible for determining whether or not to trust a certificate, based on the Certificate Revocation List that is maintained by the card brand certificate authorities e.g. Visa and MasterCard, and distributed to the consumer or merchant at the time of enrollment.

While the SET protocol, and others involving the issuance of digital security certificates, do not seek to provide any assistance to consumers in disputes arising from electronic transactions, they are beginning to overcome the trust barrier that was standing in the way

of commerce on the Internet. A number of Canadian banks are now offering Internet banking and consumers are flocking to sign up for these services. It is too soon to draw the conclusion that if the certificate is issued by a Canadian bank, consumer confidence is restored, but it is a development worth watching.

(b) Privacy Policy Certification

A second certification response, known as **TRUSTe**, is "an independent, non-profit, privacy initiative dedicated to building users' trust and confidence on the Internet, and in so doing, accelerating growth of the Internet industry."⁹ It is recognized that consumers are reluctant to share personal information over the Internet because of concern over how it will be used. TRUSTe addresses those concerns by means of a formal information privacy policy, the issuance of a seal of approval or "trustmark" attached to the participant's Web site and an assurance process to ensure participants are abiding by their stated policies.

The fundamental principle of the TRUSTe program is that once appropriate disclosure of a Web site's privacy policy is made, and there is independent assurance that the policy will be adhered to, the consumer will be able to make an informed decision about whether or not to provide personal information. Its goal is to give the individual the power over what happens to his or her own information online.

The TRUSTe licensing program requires participating Web sites to disclose their information gathering and dissemination practices and at the very least to disclose:

- what type of information is gathered,
- how that information is used,
- who shares that information,
- whether consumers can request that their information not be used or shared,
- whether information can be updated later, and
- whether requests to be deleted from the participant's database will be honoured.

Potential licensees must also agree:

- to display the trustmark on their home page that discloses their policies,
- not to monitor e-mail or other communications to third parties except as required by law,
- to live up to their stated privacy policies even after the site leaves the TRUSTe program, unless is obtained directly from the user, and
- to cooperate with all TRUSTe reviews and audits.

If these privacy principles are met, the trustmark is issued for use in conjunction with the participating Web site. Clicking on the mark will bring immediate disclosure of the policy to the consumer's screen.

Up from approximately 30 Web sites a year ago, there are now hundreds of TRUSTe participants, including Vendors of every size and background. The program maintains a current list on its Web site so that consumers can verify the validity of a TRUSTe trustmark at any time

The TRUST.e program employs several means by which participating site compliance with the stated policies is assured:
initial and periodic reviews of the site,
submitting personal information itself to participant sites,
random site audits by official auditors to check for adherence to program principles, and
feedback from online users to the TRUSTe Watchdog site with an assurance that all reported privacy concerns will be pursued.

If one of these means indicates potential or actual non-compliance by a participating Web site, the TRUSTe program employs an escalating investigation against the site. Potential sanctions include penalties, another audit or revocation of the participant's trustmark license. A year ago, the program indicated that extreme violations would be referred to the Federal Trade Commission in the United States for fraud and/ or deceptive practices prosecution, or breach of contract litigation could be pursued. Inquiries as to what would happen if the breach happened in Canada went unanswered. Now, the TRUSTe privacy seal program has expanded into Europe, and there are a number of changes on the dispute resolution front.

Significantly, informal resolution is included for the first time. TRUSTe, in accordance with DR best practices, requires consumers to first contact the Web Site they have a complaint about to voice the complaint and give them the opportunity to resolve the issue. If that fails, TRUSTe will facilitate a resolution between the consumer and their licensee. If that fails, they move into the escalating investigation phase. Extreme violations are referred to "the appropriate law authority. TRUSTe may pursue breach of contract or trademark infringement litigation against the site".¹⁰

U.S. companies are thought by the European Union (EU) to have inadequate data protection laws, and until recently the U.S. federal government has encouraged self-regulation of privacy practices among Web sites and the electronic commerce industry in general, rather than introducing privacy laws. That changed to some extent after a U.S. Federal Trade Commission (FTC) survey which showed that only 14% of the randomly selected Web sites had any privacy policy at all, and only 2% of those had what could be called a comprehensive policy.¹¹ The FTC has now recommended that further incentives are needed for businesses to self-regulate, and that legislation is needed to regulate the collection of information from children. U.S. companies are reportedly "labouring mightily to head off the potential legislation"¹². It would seem that they prefer a private sector solution, rather than the legislative option that the Canadian government is pursuing.

The EU Data Protection Directive, in force as of October 25, 1998, requires very strict protection of personal information, including a mechanism to obtain consent before using personal data, and one for regulating the export of data outside the EU. U.S. companies doing business in Europe will be obliged to adopt privacy standards that conform to the Directive. The TRUSTe program has recognized their need and is working to translate the privacy standards into meaningful recommended guidelines for its licensees, which will ensure compliance from country to country.

2. Money Back Guarantee

Offering the consumer a money back guarantee, an old retailing strategy that has worked successfully for physical merchants for decades, has also found its niche on the Internet. The names are familiar - T. Eaton Co. Ltd.¹³ Sears Canada Inc. See footnote 14 ¹⁴, J. Crew¹⁵, and L.L. Bean¹⁶, for example. These merchants have built their reputations for reliability on the strength of their guarantees and have evidently decided not to tinker with a good thing.

The companies that offer the money back guarantees for merchandise ordered online do go further than they do for telephone or fax transactions. Most of them also explicitly reassure their customers as to the security of their personal and payment information in the course of the purchasing transaction. The Sears Canada Inc. Web site speaks of "our secure web server" and "encrypted transmission with your browser to collect your personal and payment information". J.Crew answers the question: Is it safe for me to use my credit card? by saying: "Our web site is secure. We use the Secure Socket Layer Protocol to ensure that ordering information is sent directly to J.Crew,, and that only J.Crew can decode it."¹⁷

These companies clearly recognize the consumer's reluctance to offer personal and credit card information online despite the use of the most secure encryption technology, and offer alternative payment mechanisms. Their Web sites make it very easy to download and fill out an order form, using product information from the site, then to print it and fax it for more secure ordering. None of them accept ordering by e-mail as it is considered insecure.

There also appears to be some tacit recognition of the uncertainty as to which law applies to Internet transactions. L.L. Bean will not accept orders from outside the United States online, although it will by fax or telephone. Sears Canada Inc.'s Web site acknowledges that it does business primarily in Canada and that it is limited in what it can ship outside the country.

3. Security Guarantee

Another approach in addressing consumer concerns about security of private information is to provide a security guarantee. At one end of the range is Ticketmaster Canada Ltd.'s explanation of the security it offers and its pledge of support for "the aggressive efforts of the interactive industry's leading companies in developing better tools, technologies and standards facilitating electronic commerce via the Internet's World Wide Web. As enhancements are introduced they will be incorporated into our Web site."¹⁸

At the other end of the range is Amazon.com's Safe Shopping Guarantee¹⁹ that for any unauthorized use of the consumer's credit card resulting from a purchase through its secure server that is not covered by the credit card provider, it "will reimburse you for the remaining liability, up to a maximum of fifty dollars U.S." (the typical deductible charged by most banks).

Amazon.com goes further than most online merchants and enshrines its security guarantee and its privacy policy in its customer "bill of rights". It enables the consumer to opt in or out of its subscriptions and updates. It also asserts that it does not sell or rent information about its customers to third parties, and provides an e-mail

address: never@amazon.com for those who wish to ensure that their information is never shared in the future. This approach has obviously worked to instill confidence in consumers about purchasing online from Amazon.com, as its book sales in both Canada and the United States have been one of the success stories of commerce on the Internet.

4. Other Guarantees

As in the physical marketplace, merchants on the Internet tailor their guarantees to their products. Compact discs can be duplicated so money back guarantees are not practical. Online purveyors of CD's such as Tower Records instead offer to replace returned items with other CD's of similar value. Tower Records also says more than most about dispute resolution on its Web site.²⁰ It asks for a thorough description of a shipment problem and undertakes: "We will do whatever it takes to solve your problem". On international orders where the wrong CD was shipped, it simply says e-mail us and: "we'll work it out".

5. Try Before You Buy

A strategy used by vendors of software on the Internet to overcome consumer resistance to making a purchase, is to offer a pre-purchase trial. It can take a number of forms, but a typical offer is made by *PC Law*. It is software providing accounting and time-keeping for lawyers. The potential purchaser is invited to download a demo of the software from the Web site²¹ to get a full understanding of the capabilities and the ease of use of the program.

The e-Warehouse is an online merchant site where many software publishers sell their products. As well as being a licensee of the TRUSTe program and offering a 100% satisfaction guarantee, it enables any purchaser to try software downloaded from its Web site for 30 days. Upon the customer's request within 30 days, together with the receipt and a certificate that the software has been deleted from the purchaser's system, a full refund will be provided.²² This example falls somewhere between a money back guarantee and a try before you buy initiative because of the instantaneous nature of the delivery. The Certificate of Deletion addresses the practical problem that the software may easily be duplicated and then returned, and basically relies on the honour system to ensure compliance.

6. Codes of Ethics and Standards of Practice

All of the foregoing approaches used by online merchants to build consumer trust in electronic commerce are based on ethical behaviour. For example, only the most reputable merchants are willing to stand behind the quality of their products to the extent of offering a full refund if the customer is not satisfied. The Canadian Direct Marketing Association (CDMA) has taken that several steps further and codified the ethics and standards of practice of its members as they relate, *inter alia*, to commerce over the Internet.²³ The CDMA Code, which is appended as Appendix I, covers such subject areas as product safety, marketing to children, and protection of the environment. It adopts as its standard for the protection of personal privacy the principles of the Organization for Economic Co-operation and Development (OECD). The seven principles of personal privacy adopted are:

Give consumers control over how information about them is used,
Provide consumers the right of access to information,
Enable consumers to reduce the amount of mail they receive,
Control the use of information by third parties,
Safely store information about consumers,
Respect confidential and sensitive information, and
Enforce the provisions of the code.

E. Is Prevention or Avoidance Enough?

There will always be some products or services that do not give satisfaction - even if purchased from the most reputable Vendors. Strategies such as guarantees and certification will avoid or minimize the potential conflict arising from such deficiencies, but there will still be differences of opinion as to what or who caused the deficiency, and smaller Vendors may not be in a position to automatically absorb the loss. The issues also become more problematic as the cost of the product or the complexity of the service increase.

In the physical world of commerce, vendors of expensive consumer products and complex services work hard at developing a relationship with their customers because they understand that the confidence inspired by the relationship is likely to lead to the purchase of more or higher value goods and services. One facet of enhancing that "relationship" is offering an acceptable, low cost means of resolving disputes that may arise with the customer about the product or service. These programs have proliferated in recent years. Examples include the Canadian Motor Vehicle Arbitration Plan (CAMVAP) for purchasers of automobiles, the Canadian Banking Ombudsman for customers of Canadian banks, the Law Society of Upper Canada's Pilot Mediation Program for the resolution of certain complaints against lawyers, and London Life's Customer Satisfaction Process offers external arbitration to its customers with issues that cannot be resolved internally.

Online Vendors have a few additional hurdles in seeking to build the all-important relationship with their customers, such as the lack of person-to-person contact and the scope of the potential market, but they too are beginning to develop dispute resolution programs. Not surprisingly, the first initiatives are to adapt programs that already exist for their customers. Examples are the Investment Dealers Association of Canada Arbitration Program for disputes between dealers and their clients, including those who have traded electronically, the Canadian Banking Ombudsman program, which covers complaints arising from electronic banking, and the Association of Shareware Professionals (ASP) Ombudsman service which is available to assist consumers resolve any problems with ASP members. These programs were not designed for the Internet and they employ physical world ADR approaches, principally arbitration and mediation.

What follows is a brief examination of the spectrum of physical world ADR approaches, a necessary background before considering how they may be effectively adapted for the Internet.

PART II: Dispute Resolution Online

F. ADR Explained

Alternative Dispute Resolution, and more recently, *Appropriate Dispute Resolution*, or just *Dispute Resolution* ("DR"), is a way of describing a number of different processes that are used to resolve issues or differences outside the trial process offered by the courts. Since the courts are themselves offering forms of mediation, neutral evaluation and even arbitration, the *alternative* in ADR has been changed to *appropriate*. These ADR processes may be categorized in many ways. Using the degree of intervention by a third party who is a stranger to the dispute, ADR processes range from no intervention in one-on-one negotiation, to non-decision-making intervention in a facilitation or a mediation, to advisory decision-making intervention in a neutral evaluation, to partial decision-making intervention in a fact finding, to full decision-making intervention in an arbitration. An outline of the main ADR processes as they appear on the intervention continuum appears below.

ADR Continuum

Negotiation Facilitation Mediation Neutral Evaluation Fact Finding Arbitration

1. Ombudsman

Ombuds, as they are coming to be called, play a facilitative role in fostering communication between disputing parties. It can take many forms - from securing needed information, to bringing the parties together to talk, to actually mediating a resolution. What is essential is that they are impartial as between the disputing parties and that confidentiality is maintained.

2. Mediation and Mediation Models

Mediation is generally understood to be a confidential "process in which the parties to a dispute meet with an impartial third person, a mediator, who helps them settle their differences" ²⁴. "The mediator assists the participants to negotiate a consensual and informed resolution of the issues in dispute" ²⁵. "The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties" ²⁶. Decision-making authority rests with the parties.

That there are at least two quite different models of mediation adds an element of confusion to the meaning. The more traditional model is usually called *interest-based mediation* because it focuses primarily on reconciling the disputing parties' interests underlying their stated positions. Their *interests* include such motivations as needs, desires, concerns, or fears. For example, Ms. X's stated *position* is that her company will never agree to forgo the penalty in a systems integration contract, but her *interest* is a concern that the systems integrator will walk away four years into a five-year contract, leaving behind an unusable system and a shell company to sue. Obviously, if a satisfactory, going-forward agreement is negotiated which addresses the issue of financing, X's position may well change. The work of an interest-based mediation is a back and forth process of

communication, both in joint sessions of all parties and the mediator, and in separate caucus sessions between the mediator and one of the parties, seeking a mutually acceptable resolution. In the example given, an acceptable resolution would likely reconcile Ms. X's *interest* in the satisfactory completion of the systems integration, and the systems integrator's *interest* in nailing down what *satisfactory* means.

In another, more evaluative model of mediation, the mediator gives the parties, either in individual caucuses or jointly, a right's-based opinion as to the likely outcome of the case if it were to proceed to trial. The mediator still does not decide the outcome, but rather, gives the participants some information based on his or her substantive experience in the area of law, that may inform their subsequent negotiations. They also may choose to ignore it. This evaluative type of mediation is also called *neutral evaluation or case evaluation*.

Courts in Canada that are using mediation use the interest-based model of mediation that does not engage the mediator in making a right's-based evaluation of the case. Private mediators use one or both models, or a hybrid model, depending on their expertise and on the needs of the case. It is not uncommon for an interest-based model to be employed for most of a mediation. However, if at the end of the allotted time the parties have reached an impasse and cannot find their way through to agreement, a mediator with expertise in the subject-matter of the case may give his or her view as to how it is likely to turn out if it goes to court, or he or she may not. It depends on whether the mediator thinks that the opinion will help bring the parties to resolution, or whether it will just polarize the parties by identifying a winner and a loser. Whatever the situation, a skilled mediator will rarely introduce an opinion as to the outcome early on in the process. Once the mediator has declared a view, the party on whom it falls less favourably will typically lose trust in the mediator, bringing the process to an end.

3. Arbitration

Arbitration is a method of resolving a dispute in which the parties to the dispute ask an independent third person, the arbitrator, to listen to their facts and arguments and to make a decision how the dispute should be resolved, and what remedy, if any, should be imposed. The *hearing* of the facts and arguments by the arbitrator may be in person, by conference call or in writing.

4. Arbitration and Mediation Contrasted

There are significant differences between arbitration and mediation which are obviously important to bear in mind in choosing which process is appropriate for the dispute under consideration. The further you move along the ADR Continuum from negotiation to arbitration, the less control the parties to the dispute have over the outcome. For example, an arbitration award is an outcome which is imposed by the arbitrator after the parties are duly heard in an adversarial process, much like a trial. The parties have given the power to decide that outcome to a third party, the arbitrator.

By contrast, a mediated settlement is a consensual outcome. The mediator has no power to impose a solution, but rather assists the parties, in an informal, confidential setting, to maximize their negotiation opportunity, and to forge a durable resolution that is grounded in each of their interests. Throughout the mediation the parties retain the power to decide the outcome for themselves. It is their agreement to the mediated settlement that makes it binding. They also retain the power not to agree. The resolution statistics vary depending on the type of mediation programs offered, but the generally accepted range of resolution rates in mediation is between 60% and 80% of the cases brought to mediation.

G. Online Dispute Resolution Projects

The first experiments with actually providing dispute resolution online were begun not by Online Vendors, but by joint ventures of educational institutions, research foundations and organizations of neutrals. Although there are projects in Australia and France, the most well-known North American sites are:

Cyber Tribunal, 1998, University of Montreal, ²⁷

The Virtual Magistrate, 1995, National Center for Automated Information Research, Cyberspace Law Institute and American Arbitration Association, ²⁸ and

Online Ombuds Office, 1996, National Center for Automated Information Research, University of Massachusetts, Center for Information Technology and Dispute Resolution ²⁹.

1. Cyber Tribunal

The sole Canadian initiative, Cyber Tribunal, got its start in June, 1998. It offers, in both French and English, voluntary mediation and arbitration processes to resolve disputes arising in cyberspace for parties who agree to be bound. The only type of disputes that it exempts from its ambit are ones requiring decisions on issues of a public nature. The project is based on the premise that conflict in cyberspace is inevitable, and the traditional means of state law will not be able to control it effectively. Since no state has the sole power to set the rules or standards or to say how they are applied, new, effective rules can be agreed to by the parties. Cyber Tribunal's aim is that its dispute resolution mechanisms "contribute, at least in part, to the determination of rules of conduct and processes by which the rules of the cyberspace game are applied", and that the existence of such mechanisms "will be an obligatory component of cyberspace transactions".

Its mandate also includes the development of dispute prevention initiatives, but the only one implemented to date is a voluntary code of conduct for Vendors who subscribe to and post on their Web sites the Cyber Tribunal Seal. The Seal commits the Vendor to submitting any dispute with a consumer to the mediation process and, if necessary, to arbitration. In portraying the advantages of the Seal for Vendors it states:

Cyber Tribunal helps to make electronic commerce more secure by offering conflict resolution mechanisms. It contributes to creating a climate of trust in electronic exchange.

So far, only two Vendors have signed up.

On the dispute resolution side, Cyber Tribunal is promoting mediation, with arbitration as a fallback. That is in line with the general trend toward mediation that has been mentioned in several recent studies ³⁰. At Cornell University, David Lipsky and Ronald Seeber report in: "The Use of ADR in U.S. Corporations" that mediation is preferred to arbitration in all types of disputes. "Interpretation of the survey data suggests that corporate respondents see the use of mediation as widely applicable, while arbitration usage is more targeted to certain types of disputes" ³¹. Evaluations of mediation projects involving consumers tell a similarly positive story about mediation. A strong majority of participants in the Ontario Court ADR Centre Pilot Project were satisfied with the mediation at the Centre, even if their cases did not settle, and more than 95% said they would try mediation again. ³²

While the Cyber Tribunal Web site speaks of novel ways of resolving disputes, not much detail is given. The processes apparently take place entirely online, but nothing is said about how this would be different from a more traditional mediation or arbitration in the physical world. Nor is any information given about disputes actually processed by the program.

Cyber Tribunal has four mediators listed on its roster and eight arbitrators, but there is no indication whether and to what extent its free dispute resolution service has been utilized. Inquiries were not answered by the time of writing.

2. The Virtual Magistrate

The creators of the Virtual Magistrate (VM) sought to explore the feasibility of fast, low-cost dispute resolution online to lay the foundation for "a self-sustaining online dispute resolution system as a feature of contracts between system operators and users and content suppliers" ³³. The VM was designed for users of online systems with complaints against system operators about messages, postings, etc., but it will accept any type of complaint, including defamation, invasion of privacy, and copyright infringement, with the sole exception of billing or financial issues between users and systems operators.

Complaints are e-mailed to Villanova Center for Information, Law and Policy, either using the form they have developed or not ³⁴. The American Arbitration Association (AAA) administers the random assignment to the panel of qualified arbitrators and the arbitration contract. Users may access the program without payment, but must agree to be bound by the outcome and sign a waiver that absolves the project from any liability. A listserv/newsgroup ("grist") with password access is established for each case, and that is where all participants post their communications concerning the case. Private e-mail communications with the arbitrator are possible, but only with his or her consent. They are then made to a private e-mail address. Once assigned, the arbitrator must agree to being available online for the next three business days. The briefs from each side are e-mailed to the arbitrator, who may decide the case after reading them, or ask for more information.

The decision is based on the material supplied by the parties, the AAA's procedural rules, liberally construed, general principles of fairness and whatever combination of laws and standards he or she considers appropriate. It is hoped that a new body of cyberlaw will develop. The decision is rendered within three days of the receipt of all necessary information and is posted on the grist for the parties. It is also posted for the public unless

the arbitrator decides otherwise, although the proceedings leading up to the decision remain confidential. The decision may require a system operator to delete, mask or otherwise restrict access to the message, file or posting that was the subject-matter of the complaint. The most serious penalty is to deny a person access to the online system.

Enforcement of the decision practically depends on the support of the system operators, although the decision may be enforced in a court and through international conventions in the same manner as other arbitration decisions made under the AAA Rules.

To date only one decision has been made under the program. Recent contact with its Executive Director elicited the information that the project is moribund at this stage. "We never did attract any cases that we could decide" ³⁵ .

3. Online Ombuds Office

The Online Ombuds Office (OOO), although sharing some of VM's backers and aims, has a very different program design. It offers mediation to help parties resolve any disputes originating online, as well as being a public resource for information about dispute resolution online. Part of its goal was to develop and road-test a set of DR tools and protocols for use in cyberspace. The Center for Information Technology and Dispute Resolution has overall responsibility for the OOO, and includes an online mediator on its staff and a pool of volunteer mediators.

Since mediation is outside the personal experience of many, the OOO Program has posted a full transcript of a mediation for educational purposes. Reviewing it can give the potential user a good idea of what to expect in the process itself. Parties in disputes mediated by the OOO participate in the program voluntarily and without cost. Although no guarantees are given, every effort is made to ensure their confidentiality. Communications between the mediator and the parties are typically by e-mail, and the interest-based model of mediation is used. Any resolution resulting from the mediation is a binding contractual commitment because the parties agree to it.

The OOO mediation program has had considerably more take-up by users than the VM arbitration program. Although total numbers of cases since its inception in 1996 are not disclosed, they were reported to be about 40 to the end of 1997, typically involving " a Web site developer and a local newspaper, a game developer and a programmer, a listserv owner and a listserv participant, and online activists using the same word to describe their activities" ³⁶. OOO recently embarked on its largest scale pilot project to date with two online auction houses, eBay.com ³⁷ and up4sale.com ³⁸. They expect to mediate between 200 and 250 disputes arising out of online auctions during the two-week trial period. ³⁹ They are also mediating disputes over domain names and for those associated with the World Organization of Webmasters.

H. Why so few cases?

The three programs outlined above have not done their own evaluations so there is no specific data to point to potential reasons for their relative success or failure. It is still very

early in the history of online DR and too soon to predict how it will evolve from here. It is curious, however, that none of them seem to be overrun with cases even though there is no cost to the consumer to participate.

Conflict certainly exists on the Internet. This week there are reports of the Maekawa⁴⁰ case in Japan and the Colorworks⁴¹ case in Pennsylvania. Both deal with the question of what law applies to Internet activities of individuals or corporations domiciled outside the jurisdiction of the court. The Japanese court convicted a man of distributing obscene images over the Internet even though his computer transmitting the images was in the United States, because he intended the images to be viewed by Japanese citizens. The case is similar to the Liberty Net case in Vancouver in 1996. They both suggest that if you are targeting a jurisdiction, even if you are outside it, the court will assume jurisdiction over the activity. In the U.S. case, the court was asked and declined to take jurisdiction over a Vancouver company. It was alleged that its domain name infringed the trademark of a Pennsylvania company merely by its registration and the posting of its Web site on the Internet. The court said that was not enough to subject a party domiciled in one state to the jurisdiction in another. "There must be something more to demonstrate that the defendant directed his activity toward the forum state."⁴²

Why are these cases being decided by the courts and not by online dispute resolution mechanisms? Will that change? Disputes over Internet subjects are no different from disputes in the physical world. They involve people, and they will use whatever mechanism for resolving the disputes that meets their needs. When a field is new and the road marks are few, there is often a greater need for public precedents that can show the way. Because ADR is private and contractual, it cannot generate a decision with the precedential power of a court, or bring together unwilling parties. Nor does it have the power to deprive anyone of his or her freedom, as the courts do. The role of the courts will never be supplanted by ADR, either the physical or the online variety.

Other factors may play a role in the lack of utilization of the dispute resolution programs online. Their existence may not be well known. By their very nature, it is difficult for them to get their success stories out for potential users to hear about them. What they do is confidential. They may not have been in existence long enough to earn the trust of consumers. Or, as is most likely, their voluntary nature is acting as a barrier to their utilization⁴³. The experience of voluntary mediation programs is that there is very little take-up. The mediation process is unfamiliar to most people, and consequently they are unlikely to volunteer for it. There are probably also effectiveness issues. A voluntary program will not easily attract the *hardball player*, or the person whose interest it is to delay resolution, or the person who thrives on the anonymity of the Internet.

The Online Ombuds Office may be leading the way to the next stage in the development of online DR by making it look like many familiar consumer complaint programs in the physical world. OOO has captured the interest of several Vendors in portraying their online auctions as credible and worth doing business with more than once. Because it is a pilot project it is low risk for the Vendors, with the potential advantage of building relationships and trust that will lead to increased business online. Also, because the Vendor has already agreed to

be bound by the outcome, the consumer concerns about effectiveness of a voluntary DR program are minimized. It is an interesting experiment, and the publication of the results in a non-attributable way may well provide some of those success stories that the online dispute resolution programs have been lacking. Those, in turn, should help persuade more Vendors, who are interested in building trust and relationships with their online customers, to participate. There are still major hurdles, such as how do you make the online DR programs self-sustaining, but the direction seems sound.

I. Evolution of Online Dispute Resolution

The more complex challenge is to develop a variety of ADR processes that consumers will use and that work as part of an *effective* global dispute resolution framework which includes the courts of many jurisdictions. This may happen within identifiable trading zones such as NAFTA, or it may happen as a result of uniform law initiatives of new combinations of countries. These DR processes will not only adapt to Internet realities, but they will capitalize on the new possibilities those realities present. It is not enough to enable people to communicate in writing instantaneously. So much of the appeal of mediation, for example, is that it enables people to tell their story in ways that they feel "heard". What ways can we replicate that online? How do we identify and understand different cultural, language and legal expectations that have an impact on perceptions in a dispute? Or can we design a completely new communication paradigm that enables us to understand one another's perspectives, even though we live continents apart. We are only just beginning to tackle these issues. Whatever the outcome(s), it is bound to be an interesting journey.

Technology will certainly play a part in the new DR. Currently, individuals can communicate over the Internet in writing, by voice and by video conferencing. Experience with those three modes in the non-Internet world reinforces that each of these, on its own, has limitations in resolving disputes. A flexible combination of all three, depending on the nature of the dispute, may provide some of the answers. Also, inevitably, as Internet use increases and our skills evolve, we may find new ways of using these technologies or new protocols or expectations that change how we think about disputes and what are acceptable and effective ways to resolve them.

The barrier that is most problematic is largely invisible, although it may reveal itself in body language. That is the cultural barrier. People often have completely different understandings of the same word in the same language. The difficulty multiplies when different languages, backgrounds and laws are added to the mix. A great many disputes grow out of misunderstandings and different perceptions that are permitted to fester unresolved for too long. The truly ground-breaking work will be in finding ways to address those differences and to foster understanding across the cultural barriers. Cyber Tribunal is right when it puts forward one of its advantages as being situate in a jurisdiction with people conversant in two highly evolved, but very different systems of law - civil and common law. Significantly, it is the knowledge of the people that is the advantage, and not the technology.

Some work is already being done that may eventually lead to the new DR paradigm. The University of Massachusetts held *Cyberweek*,⁴⁴ the first-ever online dispute resolution

conference in November, 1998. For five days over 700 participants could post and receive messages, observe and comment on role plays of hypothetical disputes put on by Cyber Tribunal, use a new, interactive decision-making tool and other conflict resolution support software under development, participate in and vote on substantive issues such as confidentiality, and try out DecisionRoom, *an innovative online "space" for meeting and resolving problems* See footnote 45 45 . As yet there has been no thoughtful analysis of the collaboration at the *Cyberweek* conference, but the organizers have kept the Web site active as a centre for ongoing discussion and information exchange. It is well worth a visit.

In Canada, we have started to explore new ways of resolving some of our own intractable conflicts. One of these is through the electronic commons Web site which can be found at www.candesign.utoronto.ca. Its "Canada By Design" Visionary Speaker Series holds out great promise:

Through the powers of speech at the live events and the reach of video and digital technologies in the online discussions and Web site, the convenors have stimulated an unprecedented conversation on a topic that will affect us all: the future of Canada as linked to its policies on the new media. How should we, how can we shape a knowledge nation, that will confer opportunities and benefits upon all ⁴⁶ .

While this effort is not strictly online dispute resolution, it is representative of many initiatives in which people are grappling with complex problems, such as the very nature of democracy itself, and seeking new ways to communicate and inform through the Internet. The underlying premise, or perhaps it is a hope, is that if people can be given the tools they need to understand an issue, they will be able to find a way to resolve it.

J. Ramifications for Electronic Commerce

This paper began with the premise that a consideration of disputes and how to avoid or manage them had been a central focus of Vendors in persuading "browsers" to "buy", thereby becoming online consumers. Their early efforts related to avoidance or minimization, through improved security technology, certification, and privacy and service guarantees. While these have undoubtedly been effective to reduce avoidable disputes, conflict still proliferates.

Some Vendors are now showing signs of participating in independent, online dispute resolution programs, to which they direct their customers as a resource if problems arise. It is not for all disputes. Fraud is commonly exempted. Nor is it a first-line response. Up4Sale's dispute resolution page is a good example. In accord with conflict resolution process design best practices it advocates using "exhaustive efforts" to work out your differences with another Up4Sale member before resorting to the resources listed on the page. ⁴⁷ Implicit in its adoption, however, is a recognition that it reflects well on the Vendor if an online dispute is resolved in an acceptable manner.

Electronic commerce is growing and will continue to do so. The Vendors' efforts to avoid disputes or categories of disputes with consumers have undoubtedly played a part in that growth. So far, the ability to resolve disputes online has not had much take-up and

correspondingly little impact on the growth. That may change with some Vendors seeing it as a benefit to offer their type of consumer. It is too early and there is too little data to draw any firm conclusions.

The real change will come when users perceive online dispute resolution as being a better and more effective option for redress than other alternatives available to them. That might be because of new engagement or enforcement protocols agreed to by participating countries, or it might be because of new ways of looking at disputes between people speaking different languages, having different cultural backgrounds and with different levels of access to technology. Courts themselves may take on some of the attributes of online DR.

So far, the experiments and debate have taken place principally in the realm of private disputes. The next step will inevitably be to explore how the resolution of public disputes can be facilitated, harnessing the advantages of the Internet to overcome some of the disadvantages of physical world dispute resolution, such as distance and cost. Given our geography and our bi-cultural history, Canada should surely be in the forefront of these initiatives. When that happens, online dispute resolution will emerge as an essential thread in the fabric of electronic commerce, the one that will turn the global dream into a reality.

Footnotes

Footnote: 1 1. Electronic Commerce Quantitative Report, Decision Resources Inc., June 5, 1998 as quoted in Consumer Quarterly, November, 1998, Vol. 3, No. 3 at p.2.

Footnote: 2 2. This paper builds on an earlier one prepared for Industry Canada in March, 1998: C.E. Hart and M.G. Cochrane, ADR in Electronic Commerce: Enhancing Safety, Security and Reliability in Electronic Commerce and Online Dispute Resolution: Two Case Studies.

Footnote: 3 3. Ontario's Civil Justice Review Task Force determined in its First Report, 1995, Table 3, p.144 that the duration of the average trial in Toronto was three days, and the average cost per litigant of preparing for and engaging in that trial was \$38,200 plus disbursements.

Footnote: 4 4. Examples include the Investment Dealers of Canada Arbitration Program for disputes between dealers and their clients, and the Ontario Court (General Division) Mandatory Mediation Program which requires all civil, non-family litigants to submit their case to mediation prior to discovery.

Footnote: 5 5. e-business, IBM newspaper insert, February, 1998, at p. 3

Footnote: 6 6. Consumer Quarterly, Winter, 1999, Industry Canada, at p. 1

Footnote: 7 7. Supra, endnote 1 at p. 2.

Footnote: 8 8. The Verisign website (<http://www.verisign.com>) was very helpful in providing much of this information.

*Footnote: 9 9. Much of the material on TRUST.e is drawn from its website:
<http://www.etrust.org>*

Footnote: 10 10. http://www.etrust.org/webpublishers/pub_faqs.html

Footnote: 11 11. LeMay, T., "How Private are Retail Web Sites?", National Post, March 24, 1999, at p. D9

Footnote: 12 12. Supra, Endnote 11.

Footnote: 13 13. <http://www.eatons.com>

Footnote: 14 14. "If you are not completely satisfied with your purchase, Sears will refund your money." <http://www.sears.ca/guar.htm>

*Footnote: 15 15. "We'll gladly make an exchange or refund at any time and for any reason."
<http://www.jcrew.com/cgi-bin/jnpc?session.ition-id=customerservice&node-id=guarantee>*

Footnote: 16 16. "We do not want you to have anything from L.L. Bean that is not completely satisfactory."
<http://www.llbean.com/about/guarantee.noframes.html>

Footnote: 17 17. *Supra*, Endnote 12

Footnote: 18 18. <http://info.ticketmaster.ca/tminfo/tminfo-index.htm>

Footnote: 19 19. <http://www.amazon.com/exec/obidos/subst/help/bill-of-rights.html/2597-0416692-334959>

Footnote:
20 20. <http://www.towerrecords.com:80/prd.1/pgen.H5K360CCG3G/help/problems-help.html;t=d=>

Footnote: 21 21. <http://www.pclaw.com/>

Footnote: 22 22. <http://www.ewarehouse.net/cust-sup.htm>

Footnote: 23 23. <http://www.cdma.org/new/ethics.html>

Footnote: 24 24. G. Chornenki and C. Hart, *Bypass Court: A Dispute Resolution Handbook* (Toronto: Butterworths, 1996) at p. 79

Footnote: 25 25. Landau, B., Submission to Mandatory Mediation Committee of a Coalition of Canadian Mediation Organizations, Toronto, 1998, at p. 3.

Footnote: 26 26. S. Goldberg, F. Sander, N. Rogers, *Dispute Resolution: Negotiation, Mediation and other Processes* (Boston: Little, Brown and Company, 1992) at p. 103

Footnote: 27 27. www.cybertribunal.org

Footnote: 28 28. www.law.vill.edu.

Footnote: 29 29. www.umass.edu/dispute

Footnote: 30 30. *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, Report to the Chair, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, by the U.S. General Accounting Office, August, 1997, at p. 3

Footnote: 31 31. <http://www.ilr.cornell.edu/ICR/NEW/execsum.html>

Footnote: 32 32. *Court-based Mediation for Civil Cases: An Evaluation of the ADR Centre*, Julie Macfarlane, November, 1995, <http://acjnet.extn.ualberta.ca/docs/minagont.html>

Footnote: 33 33. *Supra*, footnote 11

Footnote: 34 34. Submitted to: vmag@mail.law.vill.edu. Form found at: vmag.law.vill.edu:8080

Footnote: 35 35. Robert Gellman, Privacy and Information Policy Consultant, March 25, 1999.

Footnote: 36 36. Rifkin, J. & Katsh, E., "Resolving Disputes Online: A New Service is Created", *Mediation News*, Spring, 1998, Vol.17, No.2, p.21

Footnote: 37 37. <http://pages.ebay.com/aw/safeharbor-support.html>

Footnote: 38 38. <http://www.up4sale.com/dispute.htm>

Footnote: 39 39. Ethan Katsh, Co-Director, March 24, 1999.

Footnote: 40 40. "Internet Activity Jurisdiction Scrutinized", D. Atkin, Financial Post, March 24, 1999.

Footnote: 41 41. B.C. Firm Wins Domain Name Case", D. Atkin, National Post, March 25, 199, p.C16.

Footnote: 42 42. *Supra*, Endnote 41.

Footnote: 43 43. *Supra*, Endnote 32, at p. 72, s. 4.

Footnote: 44 44. <http://umass.edu/dispute/cyber.html>

Footnote: 45 45. <http://.sbs.umass.edu/alee/cyberweek/agenda2.htm>

Footnote: 46 46. www.candesign.utoronto.ca/ab_intro.html

Footnote: 47 47. www.up4sale.com/dispute.htm