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Online Dispute Resolution

Challenges for Contemporary Justice

Gabrielle Kaufmann-Kohler
Thomas Schultz

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**ONLINE DISPUTE RESOLUTION:
CHALLENGES FOR CONTEMPORARY
JUSTICE**

by

**GABRIELLE KAUFMANN-KOHLER
THOMAS SCHULTZ**

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CHALLENGES FOR CONTEMPORARY JUSTICE**

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ABBREVIATIONS

A.	Atlantic Reporter
AAA	American Arbitration Association
ABA	American Bar Association
ABTA	Association of British Travel Agencies
Admin L Rev	ABA Administrative Law Review
ADNDRC	Asian Domain Name Dispute Resolution Center
ADR	Alternative Dispute Resolution
AEDED	<i>Asociación Española para el Derecho y la Economía Digital</i> (Spanish Association for Law and Digital Economy)
AENOR	<i>Asociación Española de Normalización y Certificación</i> (Spanish Association for Standardization and Certification)
AGB	Alliance for Global Business
AGBG	<i>Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen</i> (German Act on General Terms and Conditions of Trade)
AGBGB	<i>Ausführungsgesetz zum Bürgerlichen Gesetzbuch</i> (German Implementation Act of the Civil Code)
Alb L J Sci & Tech	Albany Law Journal of Science & Technology
All ER	All England Law Reports
Am J Comp L	American Journal of Comparative Law
Am Rev Int'l Arb	American Review of International Arbitration
American University L Rev	American University Law Review
AmLaw Tech	The American Lawyer's supplement on IT and the law
Ann.	Annotated
APA	US Administrative Procedure Act
ASA	<i>Association Suisse d'Arbitrage</i> (Swiss Arbitration Association)
B U J Sci & Tech L	Boston University Journal of Science and Technology Law
B2B	Business to Business
B2C	Business to Consumer
BaKo	<i>Basler Kommentar zum Schweizerischen Privatrecht</i>
Berkeley Tech L J	Berkeley Technology Law Journal
BEUC	<i>Bureau Européen des Unions de Consommateurs</i> (European Consumers' Organization)
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)

BMP	Bitmap format
Brooklyn J Int'l L	Brooklyn Journal of International Law
Brooklyn L Rev	Brooklyn Law Review
B U Int'l L J	Boston University International Law Journal
Buff L Rev	Buffalo Law Review
BYU L Rev	Brigham Young University Law Review
Cal. App. 3d	California Appellate Reports, third series
Cal. App. 4th Dist.	Court of Appeal of California, Fourth Appellate District
Cal. Rptr.	California Reporter
C.F.R.	US Code of Federal Regulations
C2C	Consumer to Consumer
Cass. civ.	Decision of the French <i>Cour de Cassation</i> —Civil Chamber
Cass. com.	Decision of the French <i>Cour de Cassation</i> —Commercial Chamber
CEC	<i>Centre Européen des Consommateurs du Luxembourg</i> (European Centre for Consumers of Luxembourg)
CEDIDAC	<i>Centre du Droit de l'Entreprise</i> (Swiss Center for Company Law)
CEDR	Centre for Effective Dispute Resolution
CI	Consumers International
CIDR	Coalition of Internet Dispute Resolvers
Cir.	US Circuit Court
Clev St L Rev	Cleveland State Law Review
CLR	Commonwealth Law Reports
Comm. Ct	Commissary Court
CPR	Center for Public Resources Institute for Dispute Resolution
CRID	<i>Centre de Recherche Informatique et Droit</i> (Belgian Research Center for Computer Science and Law)
D. Del	District Court for the District of Delaware
D. Hawaii	District Court for the District of Hawaii
Del L Rev	Delaware Law Review
DG	Directorate General of the European Commission
Disp Resol J	Dispute Resolution Journal
DNS	Domain Name System
Duke L J	Duke Law Journal
Duke L & Tech Rev	Duke Law & Technology Review
E-commerce	Electronic commerce
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Committee of the European Communities
ECR	European Court Reports
EDI	Electronic Data Interchange
edn	Edition
E.D.N.Y.	District Court for the Eastern District of New York
E.D. Va	District Court for the Eastern District of Virginia

EEJ-NET	European Extra-Judicial Network
EG BGB	<i>Einführungsgesetz zum Bürgerlichen Gesetzbuche</i> (German Act on Private International Law)
EC Human Rights	European Commission of Human Rights
Eur. Ct H. R.	European Court of Human Rights
EHRR	European Human Rights Reports
EPA	Environmental Protection Agency
EWHC	England & Wales High Court (reporter)
F. Supp.	Federal Supplement
FAA	Federal Arbitration Act
Fed.	Federal Reporter
FEDMA	Federation of European Direct Marketing
FINNET	Consumer Complaints Network for Financial Services
Fordham L Rev	Fordham Law Review
FRD	US Federal Rules Decisions
FRE	US Federal Rules of Evidence
FTC	US Federal Trade Commission
FTP	File Transfer Protocol
GBDe	Global Business Dialogue on electronic commerce
GIF	Graphics Interchange Format
Harv Bus Rev	Harvard Business Review
Harv J Law & Tec	Harvard Journal of Law & Technology
Harv L Rev	Harvard Law Review
Harv Negotiation L Rev	Harvard Negotiation Law Review
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HCOPIL	The Hague Conference on Private International Law
HTML	Hypertext Markup Language
HUP	Harvard University Press
I.L.M.	International Legal Materials
iADR	Internet Alternative Dispute Resolution
IBA	International Bar Association
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Center for the Settlement of Investment Disputes
ILSA J Int & Comp L	International Law Students Association Journal of International & Comparative Law
Ind L J	Indiana Law Journal
Int A L R	International Arbitration Law Review
Int'l Arb Rep	Mealey's International Arbitration Report
Int'l Lawyer	The International Lawyer
Int'l & Comp L Rev	International and Competition Law Review
IOC	International Olympic Committee
Iowa L Rev	Iowa Law Review
Iowa J Corp L	The Journal of Corporation Law (University of Iowa)
IP	Internet Protocol

IT	Information Technology
J Int Econ L	Journal of International Economic Law
J Int Arb	Journal of International Arbitration
J Small & Emerging Bus L	Journal of Small & Emerging Business Law
JILT	Journal of Information, Law and Technology
J Legal Stud	Journal of Legal Studies
J Marshall J Computer & Info L	John Marshall Journal of Computer & Information Law
JPG / JPEG	Joint Picture Group / Joint Picture Expert Group format
JRC	Joint Research Centre of the European Commission
LS Gaz	Law Society's Gazette
LGDJ	<i>Librairie Générale de Droit et Jurisprudence</i>
Lloyd's Rep	Lloyd's Report
Med-Arb	Mediation-Arbitration
Minn.	Supreme Court of Minnesota
MIT	Massachusetts Institute for Technology
N Ky L Rev	Northern Kentucky University Law Review
N M L Rev	New Mexico Law Review
N.W.	North Western Reporter
NADRAC	National Alternative Dispute Resolution Advisory Council, Australia
NAF	National Arbitration Forum
NC J L & Tech	North Carolina Journal of Law & Technology
NCAIR	National Center for Automated Information Research
NCPC	<i>Nouveau Code de Procédure Civile</i> (French New Code of Civil Procedure)
N.D.Ill	District Court for the Northern District of Illinois
Neb.	District Court for the District of Nebraska
Negotiation J	Negotiation Journal
NSI	Network Solutions Inc.
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
N.Y. Sup. Ct.	New York State Supreme Court
OASIS	Organization for the Advancement of Structured Information Standards
ODR	Online Dispute Resolution
ODR-XML	Online Dispute Resolution Extensible Markup Language
OECD	Organization for Economic Co-operation and Development
Ohio Northern L Rev	Ohio Northern Law Review
Ohio St.	Ohio State Reports
Ohio St J on Disp Resol	Ohio State Journal on Dispute Resolution
OJ	Official Journal of the European Communities
Or L Rev	Oregon Law Review
OUP	Oxford University Press
P.	Pacific Reporter
PDF	Portable Document Format

Pepp Disp Resol L J	Pepperdine Dispute Resolution Law Journal
PGP	Pretty Good Privacy protocol
PIL	Private International Law
PKI	Public Key Infrastructure
PNG	Portable Network Graphics
Proc.	Proceedings
Q. B. Div.	Queen's Bench Division
REDC	<i>Revue Européenne de Droit de la Consommation</i>
Rev Arb	<i>Revue de l'Arbitrage</i>
R.I.	Supreme Court of Rhodes Island
Rich J L & Tech	Richmond Journal of Law and Technology
RIDC	<i>Revue Internationale de Droit Comparé</i>
RIW	<i>Recht der Internationalen Wirtschaft</i>
RO	Official Reporter of the Swiss Supreme Court
Rutgers Computer & Tech L J	Rutgers Computer and Technology Law Journal
S C L Rev	South Carolina Law Review
S.D.N.Y.	District Court for the Southern District of New York
S/MIME	Secure Multipurpose Internet Exchange protocol
SANCO	European Commission's Directorate General for Health and Consumer Protection
Santa Clara Computer & High Tech L J	Santa Clara Computer and High Technology Law Journal
Santa Clara L Rev	Santa Clara Law Review
SCSél	<i>Loi fédérale sur les services de certification dans le domaine de la signature électronique</i> (Swiss Law on Certification Services in the Field of Electronic Signature)
S.D.N.Y.	Southern District of New York
Series A	Publications of the European Court of Human Rights; Judgments and Decisions
Series B	Publications of the European Court of Human Rights; Pleadings, Oral Arguments and Documents
SiG	<i>Gesetz zur digitalen Signatur</i> (German Digital Signature Act)
SME	Small and Medium Enterprise
SMTP	Simple Mail Transfer Protocol
SOAP	Simple Object Access Protocol
SPIDR	Society of Professionals in Dispute Resolution
SSL	Secure Sockets Layer
Stan L Rev	Stanford Law Review
Syracuse L Rev	Syracuse Law Review
Swiss PIL Act	Swiss Private International Law Act
TACD	Transatlantic Consumer Dialogue
Temple L Rev	Temple Law Review
Tex Wesleyan L Rev	Texas Wesleyan Law Review
Touro L Rev	Touro Law Review
Tul J Tech & Intell Prop	Tulane Journal of Technology & Intellectual Property
Tulsa L J	Tulsa Law Journal

U Chi Legal F	University of Chicago Legal Forum
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U Pa L Rev	University of Pennsylvania Law Review
U.S.C.	United States Code
UC Davis Law Rev	University of California, Davis, Law Review
UCITA	US Uniform Computer Information Transaction Act
UDDI	Universal Description, Discovery and Integration Protocol
UDRP	Uniform Domain Name Dispute Resolution Policy
UETA	US Uniform Electronic Transactions Act
UMA	US Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review
URL	Uniform Resource Locator
U.S.P.Q.	United States Patents Quarterly (BNA)
Va J L & Tech	Virginia Journal of Law and Technology
Vill L Rev	Villanova Law Review
W3C	World Wide Web Consortium
WAI	Web Accessibility Initiative
Whittier L Rev	Whittier Law Review
WIPO	World Intellectual Property Organization
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Report
Wm and Mary L Rev	William and Mary Law Review
WSDL	Web Service Description Language
XML	Extensible Markup Language
Yale J of L & Tech	Yale Journal of Law and Technology
Yearbook Comm Arb'n	ICCA Yearbook Commercial Arbitration
ZPO	<i>Zivilprozessordnung</i> (German Civil Procedure Act)

FOREWORD

by

Ethan KATSH

*Professor of Legal Studies and Director, Center for Information Technology and Dispute Resolution,
University of Massachusetts, Amherst.*

THIS BOOK IS A MOST SIGNIFICANT AND WELCOME CONTRIBUTION TO THE LITERATURE about online dispute resolution (ODR). In both the online and offline worlds, there are no shortages of disputes. It can, however, be argued that there is a shortage of dispute resolution approaches and processes. Online dispute resolution allows the technological capabilities of the Internet to be directed at the challenge of responding to disputes. ODR has great potential and, while it has been employed thus far mostly for disputes arising out of online activities and transactions, it will find growing numbers of applications in offline contexts.

The need for and use of ODR in disputes arising in cyberspace is easy to understand. When parties are at a distance, jurisdiction may be unclear and access to courts impractical. This explains why most of the applications of ODR thus far have been in contexts such as e-commerce or the domain name system. Yet, as they are developed and tested, the tools and resources of ODR will be increasingly applied in more traditional disputing contexts as well.

While the inaccessibility of courts to disputants in online activities may be clear, the reality is that courts are not particularly accessible for offline disputes either. The most recent study of the Federal courts in the United States showed that in 1962, 11.5 per cent of all civil cases in federal court went to trial. In 2003, that number had dropped to 1.8 per cent. While there are five times as many civil cases today, the number of civil trials has declined from a high of 12 529 in 1985 to 4 569 in 2002.¹ Negotiation, mediation and arbitration are commonly referred to as *alternative* dispute resolution but they are more accurately categorized as the *primary* forms of dispute resolution.

Gabrielle Kaufmann-Kohler and Thomas Schultz understand that processes of dispute resolution are inherently informational processes. Negotiation, mediation and arbitration all involve the exchange and evaluation of information. The processes differ from each other in the manner in which the information is exchanged and in the weight given to some information. In mediation, for example, parties are encouraged to be creative and flexible in evaluating information. In arbitration, on the other hand, the third party can declare some information more persuasive and more authoritative than some other information.

¹ A. Liptak, 'U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says', *New York Times*, 14 December 2003, p. 1.

ODR is an exciting field because it is a field of discovery in how to apply emerging and powerful informational resources. The Internet is a means of communication, as anyone who uses email knows. The Internet becomes a more powerful and interesting phenomenon when the processing power of computers is added to the delivery of information. The more we are able not simply to deliver information but to deliver technological capabilities for managing the flow and evaluation of information, the more we acquire a resource that is different from simple tools like pens and flip charts that already have a role in various dispute resolution processes. As we begin to interact with machines at a distance, we will not necessarily *replace* arbitrators or mediators but we may *displace* them, in the sense that they will have an ally, something that may change their role and eventually become robust enough to be considered a 'fourth party'.

A recent report of the National Research Council points out that it was new informational and navigational tools, not simply better ships, that allowed the European sailors of the 15th century to venture away from the sight of land and sail across oceans. The report also points out that until change happens it is easy not to recognize the limits of the informational systems that are embedded in familiar and existing methodologies. In the dispute resolution field, we appreciate the value of face to face meetings but we are, as the authors of this book demonstrate, also learning that we will be able to pursue the goal of dispute resolution in new ways as new ways of using information are presented to us.

As ODR develops, we will need perceptive observers like the authors of this book to alert us about a whole range of perceived constraints that may no longer be constraints. Already, for example, we have a variety of communications capabilities for allowing parties to interact online in between face-to-face meetings. We are at the beginning of understanding that there will be many different kinds of 'screen to screen' interactions in addition to or, at times, in lieu of face to face meetings. The screen, used very simply, may only display information, but the screen can also be the 'space' where the skill of the third party and the expertise of the fourth party are reflected.

Many inefficiencies in working with disputants who are in different places might be labeled 'tolerated inefficiencies'. We are accustomed to them and have accepted many of them as inevitable. The network, however, changes significantly our ability to overcome these 'tolerated inefficiencies'. As we grow more comfortable with the network, we realize that certain parts of how third parties traditionally handle disputes should be reevaluated. Consider, for example, the process of monitoring performance or enforcing the terms of an agreement. Currently, it is the responsibility of the parties to make known any problems that might occur. New options, however, become available when channels of communications stay open after the agreement has been reached and various communication tasks can begin to be handled by the 'fourth party'.

Monitoring performance has never been a very efficient process because efficient methods of data collection and distribution have not been easy to employ. If a scheduled payment has not arrived, for example, should one call the other party? Should one alert the mediator? Should the mediator call the other party? One aspect of an agreement in the

future will be to employ a web site to monitor enforcement. If payments are required at intervals, automatic reminders can be sent. Boxes can be clicked on to indicate that a payment has been sent or some other action has been done. Obviously, the complexity of monitoring tools will have to be appropriate to the complexity of the performance required. Certainly, however, a 'legal watchman' or early warning system of non-performance will be quite useful.

The medium's visual capabilities provide a whole range of additional intriguing possibilities for alerting us to change and to the direction of change. Images and numbers can be employed to show change in ways that are not possible with text. Increases and decreases can be demonstrated visually through changes in size, shape or color. In the monitoring context, for example, lack of performance might send a red flag to the attorney for one of the parties. This could be an actual image of a red flag and the red flag, if ignored, could grow larger over time, something that would be both meaningful and attention getting.

Symbols like a red flag remind us that text itself can fall into the category of a 'tolerated inefficiency.' Text is often inefficient compared to the spoken word and text can be inefficient compared to various forms of visual communication. There are many images online but we are still not very effective in employing modes of visual communication. As bandwidth increases, however, it can be expected that new applications employing both image and sound will become available.

This book is particularly important in providing perspectives on online arbitration, the dispute resolution process that is most embedded in a formal legal infrastructure. Arbitration provides disputants with finality in that every case ends with a decision. Finality is achieved, however, only if the parties know that a decision can be enforced in court, if necessary. For this to occur, certain formalities in the arbitration agreement and in the process must be followed. This makes arbitration quite different from mediation and negotiation where almost anything the parties want is acceptable. While this book will be recognized for its analysis of the novel qualities of the online environment that make dispute resolution processes necessary, its discussion of the challenges facing arbitration are the most extensive that we currently have.

We cannot hope, in any environment, to suppress conflict completely. Indeed, and perhaps surprising to some, that would not even be a particularly desirable goal. The existence of conflict can be a sign of trouble, or it may be a sign of, and an inevitable consequence of, a vibrant and competitive environment. Conflict can be an obstacle to creativity and entrepreneurship, or it can motivate and energize. We do need to be aware of how high a level a conflict exists in cyberspace, and how and why conflicts are occurring, but what should concern us most about our emerging online environment is not that disputes exist or even that lots of disputes may exist. More troublesome than encountering conflict online is that, as we have been putting in place wondrous and easily accessible resources for working, selling, learning, and playing online, we have neglected to design systems for dealing with disputes that would arise. Fortunately, as this book describes, this situation is changing.

Disputes may be inevitable but high levels of disputes are not inevitable. Technology is easily understood as being an aid for buying and selling, for learning, and for managing commercial enterprises. This book will enhance our awareness of how technology can help us respond to problems and conflicts.

PREFACE

THIS BOOK IS A STUDY OF ONLINE DISPUTE RESOLUTION (ODR) FROM A DUAL PERSPECTIVE. On the one hand, it is an analysis of the ODR movement, its origins, goals, components, and evolution. This analysis is based on a forensic observation of the present state of play. Some of the results of this observation are published as annexes, in the form of a survey of the services offered by 54 ODR providers and of interviews with representatives of some of the main providers. The purpose of these annexes is to provide the interested reader with the underlying factual information. On the other hand, this book is a review of the legal framework governing ODR, which primarily involves an examination of existing arbitration and mediation laws and rules as they are applied to online processes.

Because of the central role that the Internet and dispute resolution play in contemporary society, this book should appeal to all those with an interest in dispute resolution, recent developments in arbitration and mediation, e-commerce and international trade, globalization, interactions between information technology and law, and the regulation of cyberspace.

This book is the final product of an interdisciplinary research project conducted by the Private International Law Department of Geneva University Law School and the Informatics Center of the same university. The project was financed by the Swiss National Research Fund. It started in late 2000 and ended late 2003. It gave rise to an interim report published in October 2001 entitled 'Online Dispute Resolution: The State of the Art and the Issues'.² These initial results were tested on the occasion of an expert colloquium held in Geneva in November 2001.

The project was initiated and directed by the first author, who teaches international dispute resolution at Geneva Law School and also practices international arbitration. It was co-directed in its first phase by Professor Jürgen Harms, then Director of the Informatics Center of Geneva University. The research fellows associated with the project over the years are primarily the second author, as well as Dirk Langer and Vanessa Manarin, both of Geneva University Law School, Jarle Hulaas, Vincent Bonnet, David Billiard, Karima Boudaoud, and Michael Gagnebin, all of the Informatics Center. Derek McKinley and Eleanor Loukass provided editorial assistance. This work is the product of

² This report is available on the research team's website <www.online-adr.org>.

joint research; it reflects ideas and follows up on prior work of the first author, but was primarily drafted by the second author, Thomas Schultz, who is presently also completing a doctoral thesis on the role of ODR in the regulation of e-commerce.

A number of people have provided valuable information and support, which proved indispensable for the completion of this project. First of all, we would like to express our appreciation to the representatives of the ODR providers who kindly agreed to share their experience and inside knowledge with the research team: Steve Abernethy (SquareTrade, San Francisco), Brian Hutchinson (ECODIR, Dublin), Gregg Hunt (Chartered Institute of Arbitrators, London), Debi Miller-Moore (American Arbitration Association, Washington), Colin Rule (Online Resolution, Boston), and Vincent Tilman (Eurochambres, Brussels).

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Finally, we gratefully acknowledge the copyright permissions for the screenshots reproduced in this book, which were granted by ECODIR (Figure 1 case log for an online negotiation and Figure 2 proposal chart during assisted negotiation); Cybersettle (Figure 3 automated negotiation); Claim Room (Figure 4 automated negotiation and Figure 5 online mediation); and American Arbitration Association (Figure 6 case summary in online arbitration).

Geneva, July 2004

G.K.-K. and T.S.