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BUILDING THE SEAMLESS DISPUTE RESOLUTION WEB: A STATUS REPORT ON THE AMERICAN BAR ASSOCIATION TASK FORCE ON E-COMMERCE AND ALTERNATIVE DISPUTE RESOLUTION

Benjamin G. Davis†

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I. GENESIS OF THE TASK FORCE

When a transaction occurs in cyberspace, complex questions as to what law applies and what court has jurisdiction make resolving the dispute by legal means difficult, if not impossible. Concerned that the increasing complexity of jurisdictional questions was holding back the development of electronic commerce (“e-commerce”), the American Bar Association’s (ABA) Section on Business Law, Committee on the Law of Cyberspace Jurisdiction Project examined in great detail those jurisdictional issues. Starting in 1998 and culminating in July 2000, the project report examined a broad range of issues¹ and identified a menu of possible solutions to various jurisdictional challenges:

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1. American Bar Association, *Achieving Legal and Business Order in Cyberspace: Jurisdiction Issues Created by the Internet*, at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (last visited Apr. 4, 2002) (on file with the Texas Wesleyan Law Review).

- Establishment of a multinational “Global Online Standards Commission” to develop uniform principles and global protocols and standards;
- Development of new online forms of dispute resolution;
- Usage of programmable electronic agents (“bots”) to automate Internet transactions and protect consumers from websites that do not meet their personal standards.

As a result of the Jurisdiction Project’s attention to the role of dispute resolution in fostering e-commerce, there appeared to be a clear need for a neutral non-provider entity. The entity’s purpose would be to create a task force to study disputes in cyberspace and assist with the development of proposed protocols, guidelines and standards for dispute resolution as it relates to e-commerce and the Internet.

In September 2000, the ABA established such a Task Force to study the emergence of standards for the resolution of disputes arising from business to business (B2B) and business to consumer (B2C) e-commerce transactions. The Task Force consists of representatives from five ABA sections: Dispute Resolution, Business Law, Litigation, International Law and Practice, and Intellectual Property. Within its mission, the Task Force has examined the role of Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR), in particular, addressing disputes that result from e-commerce.

II. WHAT ARE ADR AND ODR

In contrast to the classic processes of ADR² (negotiation, mediation and arbitration, whether court-annexed or not, domestic or international) ODR is less familiar. Several of these ODR processes³ have emerged since 1996 in line with the development of the World Wide Web, and in particular since 1999. When thinking of ODR, it is important to keep in mind that the dispute resolution being done may regard disputes that are offline-generated as well as online-generated, entirely domestic (parties within one country) or international (in the sense of cross-border). In addition, the dispute resolution service pro-

2. Negotiation, mediation, arbitration, hybrid processes (such as arbitration of disputes about contract terms, final offer arbitration, “high-low” contract arbitration, med-arb, arb-med, minitrial, summary jury trial, ombudsman), domain name dispute resolution, court-annexed procedures (such as in arbitration, early neutral evaluation, mediation including a special master mediator), negotiated approaches to consensus building, approaches in environmental mediation, negotiated rulemaking, collaborative lawyering to name most of the approaches analyzed.

3. AMERICAN BAR ASSOCIATION, E-COMMERCE AND ADR TASK FORCE WEB SITE, at <http://www.law.washington.edu/ABA-eADR/home.html> (last visited June 3, 2002) (on file with the Texas Wesleyan Law Review) (describing processes). See also Lucille M. Ponte, *Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TULANE J. TECH. & INTELL. PROP. 55 (2001). Thomas Schultz et al., *Online Dispute Resolution: The State of the Art and the Issues* (E-Com Research Project of the University of Geneva), at www.online-adr.org/reports/TheBlueBook-2001.pdf (Dec. 2001).

vider may be integrated in the site of another company (such as an auction or industry marketplace site) and/or also act as a stand-alone provider for still other disputes. Thus, ODR is both a dispute resolution process as well as itself a component of e-commerce.

A. *Complaint Handling*

At the most basic level, companies provide customer service/complaint handling services (for example, of online companies, Amazon.com is highly regarded) through websites.

An emerging type of more third party site is the complaint site (examples are, PlanetFeedback.com, Baddealings.com, Ecomplaints.com). Customers of any company may post on the site their consumer complaint. Some of these sites are merely bulletin boards, while others will forward the complaint to the company concerned. Sites may encourage the company to post their responses to the complaint. Sites may delay posting the complaint pending the results of efforts to resolve the dispute. Posting would then only occur when it is clear that the complaint remains unresolved.

The theory behind such sites is that companies would prefer negative comments not to be posted, and they will thus act promptly with regard to resolving a complaint coming from one of these sites. Whether this is true is uncertain at this point.

In addition to these private sites, consumer protection organizations of fifteen nations, including the United States Federal Trade Commission, are participating in the multi-lingual e-consumer.gov website that tracks consumer complaints over unfair, deceptive, or fraudulent practices.⁴ In addition, the European Community has recently developed an Electronic Consumer Dispute Resolution site (www.ecodir.org) to provide extra-judicial dispute resolution.

B. *Automated Negotiation or Blind-Bidding Systems*

In these systems, settlement of monetary disputes is provided by a computer with an algorithm. In general, each party to the dispute submits its demand or, as the case may be, offer to the computer. Neither party can see what the other party has submitted. The computer examines the offer and demand and, depending on its programmed range for calculating agreement, advises the parties whether there has been settlement and, if so, at what amount. If the computer finds there is no settlement, the parties are so advised. As opposed to single blind-bidding, several blind bids (first, second, or third choices) or even ranges for bids may be used in these systems. Other than the

4. *FTC Cautioned on Consumer Website, Links to Online ADR Providers*, ADRWORLD.COM at <http://www.adrworld.com/database.asp> (Mar. 27, 2002) (on file with the Texas Wesleyan Law Review).

parties, there is no human intervention in this process. One example of this type of site is clicknsettle.com.

C. *Online Negotiation*

Parties may wish to avail themselves of online technology to negotiate their disputes that may have both monetary and other aspects (e.g., quality issues). At the most basic level, through email and instant messaging, parties can communicate. At a more advanced level, parties may take advantage of the more structured environments of ODR service providers. For example, squaretrade.com or onliner-resolution.com provide environments for online negotiation where parties access a personalized resolution room and attempt to negotiate a solution.

D. *Online Mediation*

Beyond negotiation, online mediation may be a stand-alone service or part of an integrated suite of dispute resolution services (e.g., squaretrade.com or webmediate.com). Depending on the site, the mediator may be selected by the ODR service provider, from the service provider's list of approved neutrals, or may be free to be chosen by the parties.

Typically the mediation will occur in a resolution room. Caucusing possibilities may be foreseen in the structure of the resolution room. The mediator can even have controls so that caucusing with one party will occur in one part of the mediator's screen while joint meetings are going on in another part of the screen. Onlineresolution.com and webmediate.com are examples of online mediation sites.

E. *Online Arbitration*

For online arbitration, resolution suites are created for the Arbitral Tribunal deliberations, party preparation, hearings, and document storage. Paper documents that the parties wish to submit can be scanned and then posted into the document room. Access to each room is determined by the Arbitral Tribunal and/or the case supervisor of the website. Conventional arbitration as well as domain-name dispute resolution may occur in these suites. Until recently, eresolution.com provided these types of services. The Inter Pacific Bar Association has recently developed such a site that also integrates video-conferencing technology (www.i-cass.org).

F. *Online Virtual Courthouses*

By attempting to emulate jury trials, websites such as icourthouse.com provide parties access to jury pools who hear a case online and render a virtual verdict. These types of efforts may be as-

sociated with mediation efforts such as in summary jury trials or minitrials.

G. *Trustmarks/Seals*

One of the main issues in doing business/purchasing online is determining who is a reliable counterpart. Companies with established brands can use that brand awareness as a means to develop their image of reliability and credibility. Companies can also associate with reliable and credible companies so as to achieve relational branding and enhance their image (for example, squaretrade.com's association with www.ebay.com).

In addition, in another form of relational branding, trustmarks or seals have developed by which websites (the evaluated website) are judged by the trustmark owner as to whether they are in compliance with certain standards or guidelines of the trustmark. If the evaluated website is judged to be in compliance, typically for a fee, that website may purchase the right to place the symbol of the trustmark owner (*i.e.*, the trustmark or seal) on its web page for a period of time. As noted by their names, the trustmark's goal is to instill confidence in doing business with that site, particularly for consumers. Truste.org is an example of such a seal or trustmark. Another example is squaretrade.com which integrates a seal program as part of its service offering.

Each trustmark has its own standards and guidelines. Therefore, one trustmark may focus on privacy issues while another might focus on advertising.⁵ One must therefore review the trustmark's site to know for what the trustmark purports to stand.

III. INITIAL WORK OF THE TASK FORCE

The ABA Task Force began its work in early 2001, by holding public meetings in New York and San Diego in an effort to gain a deeper understanding of the issues arising from disputes in cyberspace. The Task Force has reached out to a broad range of governmental and non-governmental organizations, dispute resolution providers, consumer organizations and other stakeholders in order to hear from a diverse set of viewpoints.

From the outset, the Task Force has engaged in international outreach. The Task Force has used its website (<http://www.law.washington.edu/ABA-eADR>) and email news list, as well as four online surveys, as a means of gathering input and commentary from a broad audience. The surveys are aimed at consumers, policymakers, busi-

5. A recent study of seven major trustmarks determined that none of them seriously integrated means of redress for consumers (*i.e.*, dispute resolution). See Assafa Endeshaw, *The Legal Significance of Trustmarks* (2001) (paper on file with the Author).

nesses and providers of online dispute resolution (ODR). The surveys are translated into several languages for further outreach.

The Task Force has sought and continues to seek information from interested individuals and groups on: (1) the core features of an effective dispute resolution process for both B2B and B2C e-commerce disputes; and (2) examples of useful models on which to base guidelines or processes, including codes of conduct, existing complaint resolution procedures, and useful analogs in the brick and mortar context. The Task Force is interested in ideas that contemplate an array of languages and legal contexts.

IV. TASK FORCE DRAFT PRELIMINARY REPORT AND CONCEPT PAPER OF MAY 21, 2001

After its winter meetings, the Task Force prepared a draft preliminary report and concept paper and sought comments on the draft. The report outlined some of the broad concepts and goals that the Task Force hopes to achieve.

One key concept of that report was the ODR Trustmark. The ODR Trustmark would be designed to provide a common ODR symbol backed by a generally accepted unifying set of principles. The ODR Trustmark Entity could provide a centralized forum for dealing with the changing world of ODR. The concept paper referred to one entity. There remained, however, a question as to whether multiple entities globally might offer ODR Trustmark services.

As noted in the concept paper, the Task Force imagined the creation of a special kind of Trustmark aimed at ODR Providers. The ODR Trustmark would provide a common symbol that would ensure adherence to a shared set of guidelines or procedures and would also provide enforcement mechanisms. The ODR Trustmark Entity, for example, could review and monitor the activities of providers in connection with the issuance and maintenance of the ODR Trustmark. The ODR Trustmark Entity could revoke trustmarks in the event that a provider does not adhere to certain principles or procedures. The ODR Trustmark Entity could also design and create some sort of funding or insurance mechanism that could be built into the ODR process.

As noted above, the issue of whether one entity or multiple entities would serve as ODR Trustmark entities is an open question. Similarly, there is a question as to whether existing entities (online or offline ADR providers for example, but also industry and consumer groups, etc.) might be well placed to offer the trustmark service in the ODR context.

As noted in the concept paper, the ODR Trustmark Entity would be a centralized source for the collection of data and information con-

cerning ODR Providers (potentially worldwide). This would provide for more effective enforcement mechanisms.

As presented in the concept paper, the ODR Trustmark was one possible end product that the Task Force has been considering. In addition, the Task Force contemplates the following end products:

- White Paper

The Task Force is drafting a larger White Paper that will summarize and review the various initiatives that are underway to develop standards or protocols for ODR in the B2B and B2C context. The Task Force White Paper will not only provide a comprehensive survey of ODR related initiatives, but also it will identify and comment on the emerging consensus that is developing around certain minimum standards relating to ODR.

The White Paper is to contain a detailed bibliography and an analysis of the data that the Task Force has gathered from its surveys as well as its independent studies of ODR provider websites, trustmark programs, and other e-commerce initiatives. It is anticipated that the Task Force will provide stakeholders and the public with valuable data concerning ODR.

- Model Disclosure Provisions for ODR Providers

The Task Force is preparing a checklist and model disclosure provisions for ODR providers concerning issues such as security, record retention, confidentiality, and conflict of interest. These model provisions would provide useful reference material for ODR providers as they assess the extent to which their website provides meaningful disclosures to consumers or businesses. Furthermore, the model disclosures will also assist end users (*i.e.*, parties to a dispute) when trying to understand the benefits and risks related to using a particular ODR Provider. The model disclosure provisions will be included as an appendix to the Task Force White Paper.

- Educational Materials

The Task Force also considers it important to provide educational materials to end users—both consumers and businesses (especially smaller to medium size business entities that may be unfamiliar with ADR and ODR). These materials could take the form of educational brochures on ODR as well as website content for ABA sponsored websites such as the Cyberspace Committee's Safeshopping.org.

V. OUTREACH OVER THE SUMMER AND FALL 2001

Subsequent to the broad dissemination of the Draft Preliminary Report and Concept Paper, the Task Force held additional meetings in London, Paris, and Washington D.C. this past summer in order to re-

ceive feedback from domestic and international parties. Additional outreach was made to Latin America, Africa, the Middle East, and Asia.

Many of the comments stressed the need to reconcile the ODR providers desire for flexibility as the ODR form of dispute resolution emerges with the need for trustworthy dispute resolution in e-commerce for consumers, business, and government.

After reviewing the comments and suggestions received on the draft preliminary report and concept paper, and consistent with the American Bar Association's international outreach, the Task Force has sought out other bar associations to examine whether joint approaches to the issues being addressed might be developed. This past fall, representatives of the International Bar Association and the Inter Pacific Bar Association participated in the Task Force internal meetings in Seattle and contact has been made with the Inter American Bar Association.

VI. EMERGING IDEAS

A basic need has been perceived for an organized educational/informational effort to assist consumers and business worldwide. The modalities of providing a well-organized, multilingual, worldwide, education and informational effort are being examined by the Task Force. One concept has been to develop an entity or designate an entity to take on such a task.

The Trustmark Entity from the concept paper has evolved and there appear to be four separate notions being examined: principles, ranking/evaluation, the trustmark, and the entity. These four separate notions can be viewed as aspects of a fully functioning trustmark entity. Whether all or part of these aspects should be put in place at all, should be put in place now, and/or should be put in place in a staged process are being examined.

Principles: In addition to the education component, principles appear to be emerging as a baseline outcome of the Task Force's work. The Task Force is in the process of drafting principles for the types of disclosures that ODR providers should provide. These disclosures address subjects such as:

- Basic information and policies (to be provided in clear, complete, identifiable and accessible format);
- Requirements for participation;
- Developments of online systems;
- Training in the use of the online systems;
- Costs and Funding;
- Impartiality—relationship to other organizations, selection processes of neutrals, ethical standards for neutrals;

- Confidentiality: Concerning information about participants provided to the ODR Provider; Privacy Policies; Confidentiality Concerning Specific Proceedings; Confidentiality Concerning both Participants and Proceedings, Transparency;
- Qualifications and Responsibilities of neutrals;
- Providing a reasonable and fair opportunity to be heard;
- Accountability for ODR providers and neutrals; and
- Enforcement.

The terminology used for describing these principles of disclosure is a key question being examined. Principles, guidelines, standards, protocols, a code of practice, or a code of conduct are terms being examined to come up with the phrase that would accurately capture the essence of what is proposed in a manner that is globally compatible and acceptable.

Ranking: Once principles are presented, they may receive wide acceptance, thus becoming global standards. If the principles do receive such widespread acceptance, then the measurement of whether principles are being adhered to is an expected consequence of that acceptance. Who would evaluate/rank providers to determine whether the providers adhere to those principles is an issue under examination.

Trustmark: Once broadly accepted principles are developed, and some evaluation of adherence to those principles is done in a reasonable manner, the utility of a trustmark being established becomes of increasing interest. The trustmark serves as a “shorthand” for the type of review involved in reading detailed disclosures of a provider. A trustmark has an inherent enforcement mechanism and can also be linked with national forms of enforcement such as consumer protection agencies. Again, who would provide such a trustmark in a credible manner is an issue under examination.

Entity: With principles, ranking and a trustmark, the establishment of an entity (or integration in an existing entity) charged with further pursuing those activities at near or longer term is being examined. In a near-term view, an entity might be designated or take upon itself to nurture the evolution of principles and provide the educational effort that has been found essential. Such an entity would leave to others the issues of ranking/evaluation and trustmarks. At a longer term, rankings/evaluation and trustmarks might be integrated in such an entity’s work. The contours of this evolution is an issue which remains under examination.

VII. THE WAY FORWARD

After these meetings and drawing on the suggestions and comments provided, the Task Force is now drafting a final report together with the other end-products (White Paper, Model Disclosure Provisions for

ODR Providers, and Educational Materials) mentioned above. This report will be the subject of widespread dissemination to bar associations and interested parties prior to its submission for consideration to the ABA in August 2002.

VIII. CONCLUSION

As recently as March 2002, the Federal Trade Commission held meetings with interested parties on ODR and its integration in the work of e-consumer.gov. As soon as June 2003, the United Nations Economic Commission for Europe is holding a forum in Geneva to address ODR and its role in Europe and in economies in transition. At any time over the past four years, varied private, public, business, consumer, governmental, regional, and multilateral entities around the world have been and are thinking and writing about dispute resolution and its roles in e-commerce.

Law professors around the country and around the world in the dispute resolution field are integrating ODR in their offerings on ADR to ensure that the next generation of lawyers are fully prepared to use these technologies as they evolve. In fact, in March 2002, as part of the ADR Cyberweek 2002 of the University of Massachusetts, Center for Information Technology and Dispute Resolution and sponsored by Texas Wesleyan University School of Law, law students from ten schools in Australia, Canada, France, New Zealand, the United Kingdom, and the United States squared off against each other in the first International Competition for Online Dispute Resolution. Students negotiated without leaving their rooms, let alone their countries. Their efforts (they can be viewed at <http://eroom.onlineresolution.com>, username: ICODR, password: ICODR) are an interesting indication of what can be done now, let alone in a future of greater bandwidth.

The ABA Task Force's work will hopefully spearhead the emergence of a coordinated global vision of online dispute resolution in e-commerce—providing flexibility, innovation and permanence. As we work on this, one senses that the tissue or architecture of a worldwide online dispute resolution structure is being brought forth—its basic requirements as well as its responses to cultural specificities.

A merger of terrestrial ADR and online ODR activities appears inevitable. More broadly however, with the advent of the use of online technologies in traditional dispute resolution in courts, I do wonder whether we will see a further integration of ODR, ADR and traditional court proceedings worldwide in a manner heretofore only glimpsed as we work towards our common goal to provide fair, impartial and neutral dispute resolution—in short, justice—for all. Thus, in our lifetimes, our task will be to build the truly seamless dispute resolution web.