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## GOVERNMENT-TO-CITIZEN ONLINE DISPUTE RESOLUTION: A PRELIMINARY INQUIRY

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### I. BACKGROUND: ONLINE DISPUTE RESOLUTION AND COMMERCIAL DISPUTES

Lawyers, government officials, and nongovernmental organizations have become fascinated with a new type of dispute resolution in recent years. Online dispute resolution (ODR) has been the subject of a vast number of reports, scholarly articles, and newspaper articles.<sup>1</sup> The term “online dispute resolution” refers to the use of information technology and telecommunications via the Internet (online technology), as applied to alternative dispute resolution (ADR). ADR, in this context, refers to dispute resolution other than litigation in courts and includes mediation, arbitration, and conciliation.

The fascination with ODR relates in part to a fascination with new forms of technology. The thought of resolving a dispute between parties in different corners of the globe using personal computers and an Internet connection is appealing. The fact that one might be able to sit at a computer in one’s pajamas and have a contract dispute mediated with an Internet merchant sounds quite attractive.

This Article first examines the use of ODR as a tool for private sector dispute resolution. It explores some of the reasons for a slower rate of uptake in business-to-consumer e-commerce disputes. The Article then suggests that a new and innovative use for ODR may be for public sector dispute resolution—between governments and citizens. The use of technology for public dispute resolution may promote access to justice in the administrative context.

ODR is simply about the use of new information management and communication tools for dispute resolution. It is essentially an offspring

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1. For a useful bibliography, see American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 469–77, annex b (2002).

of ADR; ODR deploys information technology and distance communication in the context of traditional ADR processes.<sup>2</sup> Like ADR, it can provide some of the same potential advantages over litigation: greater efficiency, greater party control, and lower costs. In fact, the introduction of online technology appears to increase these advantages of ADR over litigation in terms of cost, efficiency, and convenience.<sup>3</sup>

ODR has been the subject of debate and study, almost exclusively with reference to the private sector and business disputes.<sup>4</sup> E-commerce merchants, governments, and policymakers have focused on ODR as a means of resolving disputes arising between parties engaged in global e-commerce transactions. ODR has been highlighted as a means of resolving disputes in the global business-to-business market place (B2B) through the use of new online arbitration services. Similarly, for disputes arising between Internet businesses and consumers (B2C), or between two consumers (as in the context of a person-to-person transaction such

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2. Commentators have sometimes made a distinction between proceedings conducted exclusively online and proceedings “only” supported by different elements of online technology. In fact, there is no such clear-cut distinction. Today, all dispute resolution falls in the latter category to some extent, in the sense that online technology plays some role or other in most modern dispute resolution. Parties engaged in ADR, for example, will often use e-mail to communicate with one another or with a neutral third-party. Thus, whether a process can be called “ODR” is a matter of degree; there is a broad spectrum of ODR, with at one end proceedings using hardly any online technology and at the other end proceedings using a high degree of online technology. For this reason, it is more accurate to refer to ODR techniques or processes.

3. See COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 13 (2002); see also ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 19 (2001).

4. This can be inferred from the lack of articles and reports discussing ODR in the context of government-to-citizen dispute resolution. For reports discussing ODR and e-commerce, see, for example, American Bar Association Task Force, *supra* note 1. See also CONSUMERS INT’L, *DISPUTES IN CYBERSPACE: ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN CROSS-BORDER DISPUTES—AN INTERNATIONAL SURVEY* (2000), at [http://www.consumersinternational.org/document\\_store/Doc29.pdf](http://www.consumersinternational.org/document_store/Doc29.pdf); CONSUMERS INT’L, *DISPUTES IN CYBERSPACE 2001: UPDATE OF ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN CROSS-BORDER DISPUTES* (2001), at [http://www.consumersinternational.org/document\\_store/Doc517.pdf](http://www.consumersinternational.org/document_store/Doc517.pdf); Federal Trade Commission, *Public Roundtable: Dispute Resolution for Online Business-to-Consumer Contracts*, at <http://www.ftc.gov/bcp/altdisresolution/roundtable> (last modified Mar. 13, 2001); THOMAS SCHULTZ ET AL., *UNIV. OF GENEVA FACULTY OF LAW AND CENTRE UNIVERSITAIRE INFORMATIQUE, ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES* (2001), at <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>; Organization for Economic Cooperation and Development (OECD) et al., *Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution* (Dec. 2000), at <http://www.oecd.org/home> (providing access to conference papers).

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as an Internet auction), ODR has been touted as a means of quickly resolving disputes between remote parties.

Remote disputing parties can use ODR to “meet” one another online and use a web portal, e-mail, or other forms of interactive communication (e.g., web conferencing) to resolve their disputes without having to go to court and choose a forum that may be geographically inconvenient for one or both parties. Third-party neutrals (often referred to as ODR Providers)<sup>5</sup> may or may not be involved in an ODR process. In other words, parties may resolve their disputes independent of a third-party mediator or arbitrator, or may choose to have a neutral party facilitate the proceedings.

ODR has been portrayed as particularly convenient and efficient where the parties are geographically distant because it obviates the need for traveling. In principle, ODR can be used both for disputes arising from online interactions or transactions and for disputes arising offline. However, it may be particularly apt for e-commerce disputes, where it is logical to use the same medium (the Internet) for the resolution of disputes, and where the parties are frequently located far apart. Recourse to ODR (and other forms of ADR) is also seen as a convenient way of sidestepping the complex jurisdictional issues that may arise with litigation over e-commerce disputes, particularly those involving cross-border B2C transactions.<sup>6</sup>

The presumption that ODR is convenient and efficient pertains especially to disputes over transactions that are of the “high-volume, low-cost” type. For example, when Internet merchants are engaged in volume sales and have a certain number of disputes arising with customers, it may make sense to offer an ODR service. This can be achieved, for example, by contracting with a third-party ODR Provider that offers mediation services to resolve disputes between the merchant and its customers.<sup>7</sup> Because online transactions between businesses and

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5. The term “ODR Provider” is often used to refer to a company or entity that offers ODR services and that retains individual neutrals to engage in ODR activities.

6. This progress report adds, “alternative dispute resolution can be a practical way to provide consumers with fast, inexpensive, and effective remedies and can reduce business exposure to foreign litigation.” See Justin Kelly, *White House Report Signals Consensus on ADR for E-Commerce*, ADRWORLD.COM, Jan. 18, 2001, at <http://www.onlineresolution.com/adrworldpress.cfm> (quoting LEADERSHIP FOR THE NEW MILLENNIUM DELIVERING ON DIGITAL PROGRESS AND PROSPERITY THIRD ANNUAL REPORT, U.S. GOV'T (2001)).

7. Nonprofit trade associations, such as the Better Business Bureau, offer such services to their members. See, e.g., BBBOnline, at <http://www.bbbonline.org> (last visited Jan. 12, 2004). In this

consumers are often of this sort, ODR has been highlighted as a preferred avenue for consumers who seek redress from Internet businesses with which they have dealt.<sup>8</sup>

## II. THE FAILURE OF COMMERCIAL ODR IN BUSINESS-TO-CONSUMER E-COMMERCE TRANSACTIONS

Despite the novelty of ODR, has it been a success? At present, there is a lack of reliable data on the volume of disputes (arising online or offline) that have been resolved using an ODR process. Moreover, ODR Providers (which, at present, are almost exclusively private business entities) may be reluctant to disclose information about their business models and financial situation because of the number of existing competitors.

While there has been a great deal of academic and governmental interest in ODR, the emphasis on the private sector may be misplaced to some extent. To date, there appear to be few truly financially viable ODR efforts in the commercial sector.<sup>9</sup> Some commentators have noted that ODR continues to gain acceptance, but the evidence is still anecdotal. Moreover, ODR's acceptance may be related to its potential use for resolving offline disputes, or for providing enhanced processes for existing forms of ADR, rather than because it is being used for cross-border e-commerce disputes.<sup>10</sup>

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regard, the Better Business Bureau is adapting existing offline dispute resolution services and bringing them online. New ODR Providers also provide services to Internet merchants and market places. Squaretrade.com, for example, is an ODR Provider that works with eBay, an Internet auction site, to offer mediation services for disputes arising between eBay buyers and sellers. eBay subsidizes the cost of SquareTrade, making it an affordable option for its customers.

8. The European Union and the United States committed themselves jointly to the use of ADR and ODR for e-commerce transactions in December 2000 when they issued a joint statement on this topic. The statement included the following language: "Easy access to fair and effective ADR, especially if provided online, has the potential to increase consumer confidence in cross-border electronic commerce and may reduce the need for legal action. We, accordingly, agree on the importance of promoting its development and implementation." *European Union in the U.S., Statement of the European Union and the United States on Building Consumer Confidence in E-Commerce and the Role of Alternative Dispute Resolution* (Dec. 18, 2000), at <http://www.eurunion.org/partner/summit/Summit0012/ECommerce.htm>.

9. See American Bar Association Task Force, *supra* note 1, at 436-37 ("The establishment of a robust ODR industry clearly requires even greater growth and a more effective global reach, and just as clearly awaits greater financial, business, technological and legal maturity.")

10. UNITED NATIONS CONFERENCE ON TRADE AND DEV. (UNCTAD), E-COMMERCE AND DEVELOPMENT REPORT 2003, ch. 7, at 181-82 (2003), at [http://www.unctad.org/en/docs/ecdr2003ch7\\_en.pdf](http://www.unctad.org/en/docs/ecdr2003ch7_en.pdf). For the years 1999 to 2003, UNCTAD notes:

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Thus, it may be premature to view ODR as a solution for consumer (or business) difficulties. The widespread use of ODR in relation to B2C transactions faces major hurdles. Some of these hurdles are primarily legal in nature. For example, European jurisdictions prevent the application of ODR (or ADR generally) if the business seeks to curtail recourse to the court system by consumers *before* a dispute has arisen by requiring binding online arbitration rather than permitting consumers to litigate.<sup>11</sup>

Other hurdles may be more a function of psychological, cultural, and social factors, such as wariness and a lack of “Internet literacy” on the part of many consumers.<sup>12</sup> Additionally, the parties—particularly in conciliation and mediation processes—may dislike ODR processes because of the loss of cues and interaction available through face-to-face processes.

More generally, the problem with using ODR relates to the economics of ODR. Why is this? First, consumers may have no interest in resolving disputes over relatively small transactions. For example, if a consumer purchases a fifteen-dollar compact disc online, the cost of mediating a dispute between buyer and seller may be greater than the cost of the product itself.<sup>13</sup>

One company, Onlineresolution.com, charges a minimum of fifty dollars per hour (with a minimum of two hours) to each party for

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While some ODR providers have gone out of business, other companies and projects have taken their place. For example, three years earlier there were 24 ODR companies, of which 11 had gone out of business by March 2003. In addition, most major ADR organizations, such as the American Arbitration Association and the International Chamber of Commerce, have started or are planning to start to use ODR.

*Id.* The report further notes that “ODR is growing in use not only because there is growth in online activities and online disputes but because ODR can also be employed for traditional offline disputes.” *Id.* at 185.

11. See CHRISTOPHER KUNER, LEGAL OBSTACLES TO ADR IN EUROPEAN BUSINESS-TO-CONSUMER ELECTRONIC COMMERCE, at <http://www.kuner.com> (last modified Apr. 5, 2002).

12. See generally Nora Femenia, *ODR and the Global Management of Customers' Complaints: How Can ODR Techniques Be Responsive to Different Social and Cultural Environments?* (Dec. 12, 2000), at <http://www.mediate.com/articles/femenia.cfm>; see also Jeanne M. Hamburg, *Negotiating Across Cultures in the New Millennium*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS 57, 60–62 (James R. Silkenat & Jeffery Aresty eds., 2d ed. 2000).

13. Consumers have various types of injurious experiences—some are perceived and others unperceived. More generally, only a segment of consumer injuries become what one would label complaints or disputes. Scholarly commentators often refer to a “dispute resolution pyramid” with only a segment of injuries rising from being unperceived injurious experiences to formal disputes that call for the use of ADR or litigation. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11–36 (1983).

disputes under ten thousand dollars.<sup>14</sup> After the initial two hours, the rate for each additional hour is fifty dollars.<sup>15</sup> ODR Providers must also invest in a technological platform for their services, which involves an initial capital investment and possible ongoing technology licensing fees. Thus, merchants may have a disincentive (as may ODR Providers) to provide ODR services for disputes relating to low-cost consumer products or services.

To a large extent, consumers (and many businesses) want the benefits of so-called “rule of law” without having to incur the associated costs. In this context, one could define rule of law as the concern for ensuring that the dispute resolution mechanism complies with principles of due process; i.e., that decision-making is non-arbitrary, non-capricious, predictable, and transparent.<sup>16</sup> Thus, even with ODR, concerns of due process remain prominent.

Consumers, however, may want due process at an affordable price. This has lead organizations such as the American Bar Association to recommend that merchants who wish to enhance consumer confidence in e-commerce transactions improve complaint handling procedures rather than investing in ODR processes.<sup>17</sup>

A related issue is funding: consumers may want low-cost schemes but the ODR Provider needs to cover its costs and deter frivolous complaints. Who should pay arbitrators or mediators in cases involving consumer small claims? Consumers may be unable or unwilling to foot their bill or even a substantial part of it—especially when the dispute is over a small purchase or the claim is of a low value.

Funding appears to be the crux of the problem. There are several ways that ODR can be funded, including user fees (bilateral or

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14. eBay.com, *Dispute Resolution Overview*, at <http://pages.ebay.com/services/buyandsell/disputeres.html#service> (last visited Jan. 12, 2004).

Disputes under \$10,000 (and non-monetary disputes desiring Experienced Neutral services) are handled by the Online Resolution’s Experienced Neutrals Panel. To begin, complete a Dispute Information Form. Online Resolution will then seek to contact the other party. If the other party is agreeable to participating, Online Resolution will charge by Visa or MasterCard a \$50/hour fee for each participant for up to two (2) hours of dispute resolution services. Total: \$100 per party. Beyond this 2 hour minimum, fees are \$50/hour from each party. If the other party does not agree to the selected process, there is no charge and your information is deleted from our system.

*Id.* See Onlineresolution.com, *About Us: Costs for ADR Services*, at <http://www.onlineresolution.com/costs.cfm> (last visited Jan. 12, 2004).

15. Onlineresolution.com, *supra* note 14.

16. Julia Hörnle, *Disputes Solved in Cyberspace and the Rule of Law*, J. INFO. L. & TECH. 2001, at <http://elj.warwick.ac.uk/jilt/01-2/hornle.html> (last visited Jan. 12, 2004) (work in progress).

17. American Bar Association Task Force, *supra* note 1, at 442–43.

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unilateral), membership fees, and external sources.<sup>18</sup> The bilateral fee model involves both parties to a dispute (e.g., merchant and consumer) paying for the ODR services. The problem with the bilateral user fee model is that for small- or medium-sized claims, the costs may be too high for the claimants (especially if the claimant is a consumer).

By contrast, if the fee model is unilateral (one party agrees to underwrite the cost of the dispute resolution), or based on membership,<sup>19</sup> only one party pays. In the B2C context, the merchant is the paying party. This raises questions about the independence of the ODR Provider. If an ODR Provider is being retained or hired by the merchant, questions may be raised about the independence of the neutral parties—because they are dependent, to some extent, on the merchant for their fees and livelihood.<sup>20</sup>

Of course, there are ways to ameliorate the independence problems raised by the merchant paying for the ODR process. For example, numerous small claims of the same kind could be merged into one relatively large claim for treatment by the ODR Provider. However, some ameliorative strategies will raise further problems. For instance, were an ODR Provider to meet its costs through substantial sponsorship from business, its ability to act independently and impartially—and just as importantly, its ability to be *seen* as acting independently and impartially—might well be compromised.

The unilateral fee model, however, is used in many contexts. Many merchants belong to merchant trust mark programs, such as the Better Business Bureau, that offer arbitration services to members in disputes arising with customers. Merchants display a certain membership seal in their physical store, or a web seal or trust mark online, as a sign that they

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18. Thomas Schultz, *An Essay on the Role of Government for ODR, Theoretical Considerations About the Future of ODR*, ADRONLINE MONTHLY, Aug. 2003, at 6, at <http://www.ombuds.org/center/adr2003-8-Schultz.doc>.

19. In this context, dispute resolution is a service offered by one party to its clients or customers. The dispute resolution service is made available on the basis of membership in a trade or professional association.

20. Schultz, *supra* note 18, at 7.

The trouble with this model is that it raises problems of independence. If one party pays exclusively or much more than the other party for a dispute resolution, a real or at least a perceived bias inevitably appears. It is a form of business affiliation that should be avoided, because it lessens trust, and maybe also the quality of justice.

*Id.* 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 TUL. J. TECH. & INTELL. PROP. 55, 67 (2001).

adhere to a code of business practices. These practices include participation in ADR or ODR if a dispute arises.

SquareTrade, another ODR Provider, has partnered with the Internet auction site, eBay, to provide negotiation and mediation services for buyers and sellers involved with eBay auctions. The cost to a consumer or user of the auction site is only fifteen dollars. eBay underwrites this program and pays SquareTrade the rest of its fees.<sup>21</sup> Similarly, many companies that operate offline require consumers to participate in mandatory arbitration proceedings in the event that a contractual dispute arises. In such circumstances, the merchant may pay the arbitration fees for the proceeding.

Another potential issue is a tension between transparency and confidentiality. Prospective parties to B2C transactions will tend to want information from ODR Providers on how previous disputes have been handled, including the outcomes and reasoning applied. Transparency at this level will help meet the general need for prescriptive guidance. Yet, actual parties to disputes will frequently want the nature and outcomes of the ODR proceedings kept confidential. Encouraging transparency between the parties will buttress the integrity of the proceedings.

Businesses are often reluctant to participate in ODR as well. In some circumstances, businesses may ignore online complaints. One reason why they can do this is because there is no clearly established online customer community that can collectively react to questionable business practices.<sup>22</sup> At present, businesses may find that providing a strong in-house complaints handling system may be more cost effective than

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21. SquareTrade offers additional ODR services outside of the eBay context. These cost more money for end users. It offers online mediation services for buyers and sellers of real estate, for example. The cost for such a service is \$175.00 plus mediation fees of \$100 per hour per party. Such mediations typically last three to six hours. See SquareTrade.com, *Help—Dispute Resolution*, at

[http://www.squaretrade.com/cnt/jsp/hlp/re\\_fees.jsp?jsessionid=3xpaxuxel1?vhostid=chipotle&stamp=car&cntid=3xpaxuxel1#cost](http://www.squaretrade.com/cnt/jsp/hlp/re_fees.jsp?jsessionid=3xpaxuxel1?vhostid=chipotle&stamp=car&cntid=3xpaxuxel1#cost) (last visited Jan. 12, 2004). While this may be cost effective for real estate disputes involving property valued in the thousands of dollars, such a model is less attractive for B2C e-commerce disputes.

22. See Rufus Pilcher, *Trust and Reliance—Enforcement and Compliance: Enhancing Consumer Confidence in the Electronic Marketplace* 115 (2000) (unpublished J.S.M. thesis, Stanford University), at <http://www.oecd.org/dataoecd/0/18/1879122.pdf> (discussing collective punishment by a seller's customer community and its absence in e-commerce: When not only the defrauded individual consumer refrains from repeat transactions with a merchant, but all or at least a large group of consumers boycott that merchant, the threat of a sanction will be considerably more powerful. As a consequence of such coordinated approach, a merchant who cheats one consumer risks to deprive it from future revenues of potential dealings with *all* consumers. This mechanism is known as *collective punishment*.)

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resorting to an outside ODR Provider.<sup>23</sup> Additionally, studies have revealed that Internet merchants are not necessarily conforming to best practices with respect to handling consumer e-commerce complaints.<sup>24</sup>

Finally, less costly alternatives to ODR exist for consumers including (at least in the United States) the use of credit card charge-back mechanisms and Internet escrow services as a means of securing payment and performance of e-commerce contracts.<sup>25</sup> Such mechanisms may also be more effective for ensuring that merchants comply with various outcomes rather than relying on the merchant to voluntarily comply with a mediated settlement. With a credit card, for example, if a U.S. consumer/cardholder has a legitimate contractual dispute with the merchant, the loss will be passed back to the merchant.

In the future, ODR techniques may become more common in the e-commerce context. As ODR Providers offer a range of services for online and offline disputes, the cost of providing B2C ODR may decrease as the overall market for ODR grows. Moreover, ODR may be appropriate for some types of consumer claims, such as insurance claims, where automated settlement software has been used to create settlements between insurance companies and consumers.<sup>26</sup> At present, however, it is difficult to predict the future of B2C ODR, especially given the lack of statistical and financial information that is publicly available. Rather than B2C, the demand for ODR in the private sector may emerge for B2B disputes generated offline and online.<sup>27</sup> Businesses are able to fund the cost of ODR bilaterally, thereby eliminating the funding constraints discussed above.

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23. American Bar Association Task Force, *supra* note 1, at 443.

Internet merchants are on the front line of dealing with consumer e-commerce complaints. Realistically, consumers often turn to a merchant and its in-house customer service department or complaint handling process first if a problem arises from an e-commerce transaction. The Internet merchant will have familiarity, data, and expertise that will allow it to provide effective complaints resolution processes for the consumer. As for cost, a strong and professionally conducted in-house complaint resolution program is inherently less costly than the use of third-party ODR or ADR service as a means of resolving consumer complaints.

*Id.*

24. *Id.* at 431.

25. *Id.* at 457.

26. Gerry Blackwell, *On-Line ADR Helps Close Cases Quickly*, GLOBE & MAIL (Toronto), Dec. 18, 2003 (discussing Cybersettle, Inc., a U.S. ODR firm that uses a patented computer based ODR system to resolve small dollar value insurance claims), *available at* <http://www.globetechnology.com/servlet/story/RTGAM.20031218.gttwdisp18/BNStory/Technology>.

27. *Id.* (discussing role of ODR Providers for larger value commercial disputes).

### III. THE PROMISE OF ODR: PUBLIC SECTOR DISPUTE RESOLUTION

Could technology-assisted dispute resolution be useful in other contexts, outside of the e-commerce arena? The answer is yes—with respect to resolving government-to-citizen (G2C) disputes. To date, there has been little focus on the promise of ODR in the public sector.

Many reasons for the lack of ODR deployment in the private sector may be eliminated when ODR is deployed in the public sector.<sup>28</sup> When ODR is employed as a public good rather than as a private commodity, the economics of running a successful business become less of a concern.<sup>29</sup> The government could assess the cost of deploying technology in order to offer dispute resolution mechanisms for its citizens and decide whether to offer such a service in light of competing priorities within the justice system.<sup>30</sup>

What would make ODR attractive to government entities? At present, it may be premature to advocate full-blown court-based adjudication that is conducted solely in cyberspace. Although there have been some moves to create online courts (at least in the civil context),<sup>31</sup> there are much greater considerations at stake with respect to transferring litigation proceedings, which involve complex issues relating to documentary evidence, witnesses, and the role of counsel, for example, into the online context.

Where might ODR play a role in government-based adjudication? At present, a starting point might be situations in which the government is

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28. See Schultz, *supra* note 18, at 7 (arguing that ODR in the public sector creates greater accountability since judges are public servants).

29. *Id.* at 9.

30. See UNCTAD, *supra* note 10, at 191.

A major function of government agencies is the resolution of disputes between citizens and government, or between citizens and other citizens. In addition, many government functions such as rule making, may involve trying to achieve consensus among interested parties, a very familiar dispute resolution goal. While ODR has in the past few years been concerned mostly with the private sector, increasing efforts in the areas of e-government and e-democracy are focusing attention on the value of ODR.

*Id.*

31. In the United States, the State of Michigan is endeavoring to create a new “cybercourt” for disputes involving businesses. See, e.g., *Michigan’s Cyber Court*, at <http://www.michigancybercourt.net/Documents/court-docs.htm> (last visited Jan. 12, 2004); see also Michigan Cybercourt.net, at <http://www.michigancybercourt.net> (last visited Jan. 12, 2004) (resource page on the Michigan cybercourt initiative); Anita Ramasastry, *Michigan’s Cybercourt: Worthy Experiment or Virtual Daydream?* (Feb. 6, 2002), at [http://writ.news.findlaw.com/commentary/20020206\\_ramasastry.html](http://writ.news.findlaw.com/commentary/20020206_ramasastry.html).

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already engaged in high-volume administrative proceedings that are currently adjudicated remotely. If the state has already provided a mechanism for citizens to appeal or contest government actions remotely, by mail for example, it may streamline the process by offering similar functionality with the assistance of technology.

Citizens routinely have administrative appeals and other types of disputes with government entities at the local, municipal, state, and federal levels. Disputes arise in multiple contexts. For example, citizens appeal parking tickets or participate in mitigation hearings for such citations, as well as for tax assessments, zoning permits, etc.

In many instances, governments have an administrative system in place to deal with citizen appeals and to adjudicate them either by mail or in a person-to-person context.<sup>32</sup> Citizens can, for example, often appeal the issuance of a parking ticket or a moving violation in a court or administrative hearing. Alternatively, they can often choose to have a hearing by mail.<sup>33</sup>

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32. As an Australian government report notes:

For non-consumer disputes, the role played by government in online ADR should be driven by access to justice and quality of service concerns. Where governments already provide face-to-face or telephone ADR services, there is a strong argument for extending these services online: both to meet public expectations and to improve access to services for a number of groups, including rural and regional, hearing impaired and other disadvantaged citizens.

Melissa Conley Tyler & Di Bretherton, *Country Experiences of ODR: Australia, A Report of Research Conducted for the Department of Justice, Victoria, Australia, Proceedings of the UNECE Forum on ODR 2003*, at <http://www.odr.info/unece2003/pdf/tyler1.pdf> at 19.

33. *See, e.g.*, Municipal Court of Seattle, *Adjudication by Mail*, at <http://www.cityofseattle.net/courts/comjust/admail.htm> (last visited Jan. 12, 2004) (explaining procedure for resolving parking disputes by mail); *see also* City of Lynwood Municipal Court, *Mitigation Hearing by Mail, Prosecutors for Traffic Infractions*, <http://www.ci.lynnwood.wa.us/Docs/CourtMitigateByMail.pdf>; *see also* <http://www.ci.lynnwood.wa.us/Content/CityHall.aspx?id=156>.

Pierce County, Washington has also lauded the use of hearings by mail:

Rather than require a defendant to personally appear in a courtroom to present testimony for a traffic violation which typically takes five minutes, the Pierce County District Court No. One has provided a process for the defendant to submit a written statement for consideration.

Washington State court rules require an infraction hearing to be scheduled within 120 days of the violation date. Early in 2000, it became apparent to the court that the time frame was unlikely to be met. Available hearing dates were consistently set at 15 weeks, leaving little flexibility for the court or the defendant. Requests for hearings had also increased. Between 1995 and 2000, the percentage of cases that required a hearing increased 6 percent overall (25 percent in 1995 to 31 percent in 2000).

Without a remedy, the court faced the possibility of dismissing cases for failure to schedule the hearing within the mandated time frame.

Simply adding more court room time to accommodate the increased need for hearings was not feasible. The court had experienced a reduction in judicial positions in 1999, and an increase in 2000 was not an option.

By expanding the methods by which citizens can have claims involving the government adjudicated through the use of ODR, one may ultimately expand access to justice by creating greater opportunities for citizens to interact with the state and to have their grievances resolved in a timely fashion. Similarly, this may allow for the state to deal with a larger number of cases because technology can be deployed to speed up a traditionally paper-based process.

Another instance where ODR may be useful is for citizens who have problems arising from online transactions that they conduct with government entities. Many government services, such as renewing car licenses, requesting vital records, and paying taxes, are available online. Errors are bound to arise with such transactions. An online or “electronic” ombudsman could serve as an intermediary for resolving problems that arise with G2C electronic transactions.<sup>34</sup>

Have governments deployed ODR for public sector dispute resolution? To date, the general answer appears to be no. In the United States, the Internal Revenue Service recently announced that it would launch a new service to resolve tax disputes online. If this occurs, it would be the first such federal government initiative in the United States.<sup>35</sup> At the municipal level, New York City offers “Parking

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To address the expanding quagmire, the Pierce County court turned to a Washington State court rule that allows individual courts to conduct certain hearings-by-mail.

A local rule was adopted authorizing infraction hearings based on written statements given under penalty of perjury. The information sheet for infractions was revised to include the hearings-by-mail process. Additional forms were developed to standardize the process, provide detailed information to the defendants, and lessen the confusion for defendants and staff.

Defendants typically requested hearings for the infractions through the mail or at the public counters. Since providing consistent information was important to minimize staff workload and maximize the new procedure’s impact, counter clerks were trained to explain this option to defendants requesting a hearing and provide forms as appropriate.

The program has been extremely successful. The timeframe for scheduling hearings dropped from 15 weeks to 12 weeks; of the 10,917 infraction hearings conducted by the court during the first 11 months of 2001, 2,705 were hearings-by-mail, representing 25 percent of the hearings; mitigation hearings conducted by mail represented 35 percent of all mitigation hearings and 19 percent of all infraction hearings; 77 percent of the defendants receiving information with their hearing notice responded with a written statement; payments are received sooner with the hearings-by-mail cases due to a quicker response by the court; and possible case appeals are reduced, as they are not allowed (under state law) from a decision reached through the hearings-by-mail process.

NAT’L ASS’N OF COUNTIES, *Hats Off To . . . 2001 Achievement Award Winners . . . County Administration, Traffic Hearings by Mail Pierce County, Wash.*, COUNTY NEWS ONLINE 34(20) (Oct. 28, 2002), available at <http://www/nco.org/cnews/2002/02-10-28/Section-HatsOff.html>.

34. Richard Hill, *E-Government and ODR*, Proceedings of the UNECE Forum on ODR at 2 (2003), at <http://www.odr.info/unece2003/pdf/Hill.pdf>.

35. David Cay Johnston, *IRS Set To Resolve Disputes Online*, N.Y. TIMES, Dec. 1, 2003, at C7 (abstract available at 2003 WL 67281935). Although the headline characterizes the IRS service as a

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Violatings Hearings by Web” as a counterpart to its hearings by mail program for parking infractions.<sup>36</sup>

In developing or transition economies, governments are exploring the use of ODR for public dispute resolution. In Hungary, for example, the federal telecommunications ministry may engage in an ODR pilot program to resolve consumer complaints with respect to telecommunications service providers.

The European Union is also exploring ways to facilitate public sector dispute resolution. The Information Society Directorate within the European Commission is exploring the potential use of ODR in the e-government sector for disputes that arise relating to data protection, copyright infringements, and domain name.<sup>37</sup> It has established a European Extra-Judicial Network (EEJ-NET) that links together many dispute resolution services offered by member states within the European Union. European countries have a tradition of publicly-funded and privately-operated ombudsman and other ADR providers who resolve consumer disputes with businesses in the private sector.<sup>38</sup> Many of these existing offline dispute resolution services are beginning to consider offering ODR components. EEJ-NET, as a government clearinghouse, could help to facilitate consumers’ ability to access ODR services.

The European Union has also funded a pilot program for private sector dispute resolution known as ECODIR (Electronic Consumer Dispute Resolution). ECODIR, which is currently offered free of charge, allows businesses and consumers to use this ODR service to resolve e-

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new form of online dispute resolution, it appears that IRS may only provide tax practitioners access to their records online. This will assist in clearing up errors or disputes, but is not full scale ODR.

36. The New York City Hearings by Web web site indicates that not all claims may be resolved via the Internet and e-mail:

*Using this system is only a request to the Department of Finance for a Hearing. You will not receive an immediate determination. Your case will be reviewed by an ALJ. If we are able to adjudicate your claim based solely on your e-mail, you will receive an e-mail confirmation and an ALJ's written decision by conventional mail. If we are unable to adjudicate your claim, you may be asked to either provide additional information / evidence to support your defense or have a by mail or in-person PVO hearing as described above.*

New York City Department of Finance Parking Violations Hearing Request Form, Parking Violations Hearings by Web, at <http://home.nyc.gov/html/dof/html/hearbywebmain1.html> (last modified Aug. 14, 2003).

37. See Timothy Fenoulhet, Directorate-General Information Society, European Commission, *An Introduction to Activities Related to Online Dispute Resolution in the Information Society at EU Level* (Nov. 10, 2001), at [http://droit-internet-2001.univ-paris1.fr/ve/page4\\_17.html](http://droit-internet-2001.univ-paris1.fr/ve/page4_17.html).

38. European Extra-Judicial Network, at <http://www.eej-net.org> (last modified Oct. 9, 2002).

commerce disputes.<sup>39</sup> While this is not G2C ODR, it provides a model for government-subsidized and implemented ODR.

The Singapore court system offers an ODR service referred to as e@dr. This service provides online mediation and arbitration for parties to an e-commerce transaction. As with ECODIR, the e@dr service is not available for G2C disputes.<sup>40</sup>

Governments have made some very preliminary forays into offering ODR processes for citizens. At present, however, the examples are few.

#### IV. G2C ODR AND ACCESS TO JUSTICE CONSIDERATIONS

One of the main focuses when looking at access to justice and technology is to examine the types of commitments that a government should make when it deploys technology as part of the legal system. If deployed with proper safeguards, ODR does facilitate access to justice.<sup>41</sup>

How would one ensure due process within the context of G2C ODR? First, such ODR would be regulated—not unregulated. Thus, just as current hearings by mail are regulated through statutes and rules, ODR would be likewise regulated. Additionally, to the extent that administrative procedures are similar to state or federal administrative procedure laws, there would be additional safeguards in place with respect to a citizen's right to be heard.

In addition, in devising new public sector ODR, one could adapt principles that have been developed in the private sector ODR context and apply them to the public sector process. There are a series of guidelines and principles for B2C ODR that government bodies, nongovernmental organizations, and industry have developed as a way of articulating best practices for private ODR. In many senses, these principles are meant to embody principles of access to justice, fairness, and due process that replicate principles derived from the traditional legal system. Thus, they embody principles that are highly relevant for public sector ODR.

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39. See <http://www.ecodir.org> (last visited Jan. 14, 2004).

40. See e@dr, eAlternative Dispute Resolution, at <http://www.e-adr.org.sg> (last visited Jan. 12, 2004).

41. See Schultz, *supra* note 18, at 10 (“An important reason why we need ODR is that it constitutes an access to justice, sometimes the only access to justice that is reasonably available to the parties. . . . ODR may be more than just a tool that solves disputes. It may also be a way to provide justice.”).

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Some of the principles that appear in statements of ODR best practices include:

- *Transparency*—ODR programs should provide readily-accessible information about all aspects of their services;
- *Independence*—ODR programs should operate independently of business interests;
- *Impartiality*—ODR programs should operate without bias favoring business interests;
- *Effectiveness*—there should be mechanisms to ensure business compliance with ODR outcomes;
- *Fairness and Integrity*—ODR programs should observe due process standards ensuring, that each party to a dispute has equal opportunity to express its point of view;
- *Accessibility*—ODR programs should facilitate easy use by consumers;
- *Flexibility*—ODR programs should permit adaptation of their procedures to suit the circumstances of the particular dispute at hand; recourse to courts by consumers should not be precluded unless by prior and equitable agreement; and
- *Affordability*—ODR programs should be affordable for citizens or consumers, particularly in light of the amount of compensation being sought.

For the principles listed above, one could substitute “government” for “business” to achieve a similar list of principles for G2C ODR. Given the “legal” and possibly binding nature of G2C ODR, self-regulatory principles or best practices would not be enough. One would still need formal rules and procedures.

In a broader sense, G2C ODR would involve public magistrates or officials, it has the potential to instill greater confidence and trust in the proceedings than ODR in the private sector, where the problem of unilateral fees being paid by the industry creates perceptions of bias or partiality in the process. To the extent that citizens feel confident in remote adjudicatory processes to date, ODR may enhance trust and confidence by allowing citizens to interact more directly with the adjudicator and the state—using e-mail or online real time communication.

Of course, the concept of ODR raises other concerns that must be considered. First, not everyone will have the means to access technology

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to engage in ODR processes in the administrative context. Creative use of public sector kiosks and terminals, perhaps even in government buildings or courthouses, might ensure greater access to ODR than would be feasible if individuals were required to deploy their own technology as a precursor to benefiting from ODR. Second, as with private sector ODR, issues of computer literacy, culture, language, and other factors will certainly come into play with respect to ODR in the public sector. This suggests at least initially that ODR cannot supplant in-person hearings or remote hearings by mail; ODR becomes an alternative or supplement rather than an end in itself.

In closing, one hopes that governments will explore the potential for ODR as a public good rather than cordoning its possible use in the private sector. When one sees dispute resolution as serving an access to justice purpose rather than merely as a private complaint resolution mechanism, the potential for ODR becomes much greater.