## User Protections in Online Dispute Resolution

## Suzanne Van Arsdale\*

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Thanks to Executive Editor Benjamin Sacks and Senior Editor Sally Cohen for their insightful comments and revisions, and to the editors and staff of the Harvard Negotiation Law Review for their dedication and support.

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<sup>\*</sup> Suzanne Van Arsdale is an associate with Sidley Austin LLP. Suzanne earned a J.D. from Harvard Law School in 2015 and three degrees from Clarkson University in 2010: a B.S. in Biomolecular Science, a B.S. in Biology, and a B.S. in Psychology.

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#### I. Introduction

Courts were originally wary of agreements that waived the right to litigate, because alternative dispute resolution (ADR) does not guarantee legal and procedural protections equivalent to those afforded to litigants with legal representation. Nonetheless, courts to-day consistently support arbitration agreements, citing a strong national policy in favor of arbitration following the Federal Arbitration Act.

Perhaps as a result, there has been a steady decline in the percent of civil cases tried<sup>3</sup> and a substantial, unprecedented rise in the popularity of alternative dispute resolution.<sup>4</sup> Today, the majority of

<sup>1.</sup> See Wilko v. Swan, 346 U.S. 427 (1953) (refusing to uphold a pre-dispute arbitration clause and holding that the Federal Arbitration Act does not supersede provisions of the Securities Act of 1933 forbidding waiver of right to litigate fraud claims), overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–86 (1989).

<sup>2.</sup> See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (citing 9 U.S.C. § 2); Southland Corp. v. Keating, 465 U.S. 1, 2 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration . . ."). Congress has increased its support of ADR, as evidenced by statutes encouraging use of ADR, such as the Civil Justice Reform Act and the Alternative Dispute Resolution Act. Kirk W. Schuler, ADR's Biggest Compromise, 54 Drake L. Rev. 751, 767–69 (2006).

<sup>3.</sup> See generally Marc Galanter & Angela Frozena, Pound Civil Justice Inst., 2011 Forum for State Appellate Court Judges, The Continuing Decline of Civil Trials in American Courts, Pound Civil Justice Inst. (2011), http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf; Marc Galanter, A World Without Trials?, 2006 J. DISP. RESOL. 7 (2006).

<sup>4.</sup> For a summary of the rise of ADR and the reasons behind it, see Schuler, *supra* note 2, at 769–73.

cases in the United States never reach trial because they are resolved through settlement negotiation and other forms of ADR.<sup>5</sup>

There are comparatively few protections in ADR, yet those protections are especially important where the user, without meaningful or informed consent, has submitted to ADR as an alternative to litigation. The fairness and due process dangers present in litigation exist in ADR as well; for example, in both, sophisticated, wellrepresented and funded repeat players have a substantial advantage over one-time users. 6 Mandatory pre-dispute arbitration clauses have pervaded consumer transactions, many with arbitration services or procedures that may be biased toward one party, or are private and thus shielded from public scrutiny. Courts and commentators have criticized the adhesive nature of many arbitration clauses, and some provisions have been challenged, with limited success, as being unconscionable because the consumer had no meaningful choice or because dispute resolution procedures were particularly onerous.<sup>7</sup> As these clauses are largely embraced in courts, ADR user safeguards could act as additional protections against unfair terms and procedures.

Online dispute resolution (ODR) is one emerging form of ADR. It adapts traditional ADR methods to use technology, such as digital communication technologies, to help people resolve disputes outside of litigation. While ODR shares many features with ADR generally, its technological component gives rise to a unique set of benefits and pitfalls.

This Note examines what safeguards currently exist or could be developed to protect those who use ODR to resolve commercial and private disputes. It begins in Part I with an overview of ODR and how it can vary by (1) method of dispute resolution; (2) the way the platform makes use of communication technologies, automation and decision-making algorithms, and artificial intelligence; and (3) the public or private nature of the ODR provider. Part II looks at the challenges of ODR, with a discussion of values and principles that

<sup>5.</sup> Honorable William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 73 (2006). For more recent data, see Judicial Business of the United States Courts, Admin. Office of the U.S. Courts, http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts (last visited Sept. 17, 2015), which contains annual judicial business tables for federal courts which include action taken for each case.

<sup>6.</sup> Richard M. Alderman, Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers, 12 J. Consumer & Com. L. 151, 154–55 (2009).

<sup>7.</sup> See infra note 103 and accompanying text.

are important to dispute resolution, interests which may be compromised, and ethical issues that may arise. Part III explores the tools and mechanisms that could be used by consumer, industry, and government actors to implement safeguards that would protect values inherent in ODR. These tools are compared to existing protection mechanisms in other areas, such as consumer protection regulations in the financial sector and judicial assistance and leniency for pro se litigants in the courts. Part IV concludes.

#### II. Overview of ODR

The advent of the Internet and technological development ushered in a new era of human interaction, with changing means of communication and connection. ODR developed alongside e-commerce; it seemed natural that, for transactions originating in cyberspace, related disputes would be resolved online.<sup>8</sup> However, the changing nature and technologies of ODR have made a clear definition of the term elusive.<sup>9</sup> Broadly, ODR uses technology to support or fully facilitate one or more traditional ADR methods.

E-commerce was the driving force behind ODR, as commercial websites created in-house platforms to resolve issues arising out of online sales and other activities. <sup>10</sup> Now ODR is used in a variety of disputes, including e-commerce <sup>11</sup> as well as domain name registration, <sup>12</sup> family disputes, <sup>13</sup> and even child abduction, <sup>14</sup> and it has been proposed for use in even more areas.

<sup>8.</sup> See generally E. Casey Lide, Note, ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation, 12 Ohio St. J. on Disp. Resol. 193, 218–20 (1996); Henry H. Perritt, Jr., Dispute Resolution in Electronic Network Communities, 38 VILL. L. Rev. 349 (1993).

<sup>9.</sup> See Dusty Bates Farned, A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication, 2 FAULKNER L. Rev. 335, 337–41 (2011) (describing ODR with a classification scheme).

<sup>10.</sup> One of the earliest was eBay, which commissioned a pilot project to test the viability of an online mechanism to handle sales disputes. Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 Harv. Negot. L. Rev. 253–55 (2006).

<sup>11.</sup> See infra notes 57-59.

<sup>12.</sup> See infra notes 147-152 and accompanying text.

<sup>13.</sup> See, e.g., Rebecca Brennan, Mismatch.com: Online Dispute Resolution and Divorce, 13 Cardozo J. Conflict Resol. 197 (2011) (online divorce mediation); Martin Gramatikov & Laura Klaming, Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation, 14 J. L. & Fam. Stud. 97 (2012) (discussing a study of online divorce mediation in the Netherlands); Maria Eugenia Sole, Utilizing Online Dispute Resolution (ODR) for Co-parenting Issues in Families with a History of Domestic Violence, Mediate.com (Dec. 2014), http://www.mediate.com/articles/SoleFu ture.cfm (co-parenting). But see Elizabeth Kruse, ADR, Technology, and New Court

It follows that the nature of the parties to these disputes can vary. In e-commerce, many disputes involve business-to-consumer transactions, which are carried out daily on a global basis as individuals use the Internet to purchase goods or services online for personal use. Business-to-business disputes are dominated by large enterprises using e-commerce for physical goods, services, or even electronic data exchange. Is Issues may also arise between individual consumers through Internet auctions or other online services that enable individuals to transact with a larger marketplace, or between people outside the commerce context entirely, such as in domestic disputes.

#### A. ODR Methods

ODR platforms are modeled after traditional ADR mechanisms, such as arbitration, evaluation, and mediation. The processes and interactions thus look similar but use different technologies. As in traditional ADR, participation in a non-binding ODR process does not prevent disputants from pursuing their case in court—these methods of dispute resolution may be used before, during, or after a lawsuit has been filed, although issues settled through binding decisions may not be re-litigated. They also tend to be less formal than litigation. For example, parties may have wider latitude in introduction of evidence. An attorney is generally not required but, if retained, the role of an attorney can vary depending on the nature of dispute and method of ODR.

#### 1. Arbitration

In arbitration, a neutral third party (arbitrator) renders a decision after hearing arguments and looking at evidence. The arbitral

Rules—Family Law Trends for the Twenty-First Century, 21 J. Am. Acad. Matrim. Law. 207, 215 (2008).

<sup>14.</sup> See generally Elizabeth Cunha, The Potential Importance of Incorporating Online Dispute Resolution into a Universal Mediation Model for International Child Abduction Cases, 24 Conn. J. Int'l L. 155, 173–79 (2008) (proposing use of online mediation early in international child abduction); Nuria González Martín, International Parental Child Abduction and Mediation: An Overview, 48 Fam. L.Q. 319 (2014).

<sup>15.</sup> See Benjamin Wright, EDI and American Law: A Practical Guide, TDCC: The Electronic Data Interchange Assoc.

<sup>16.</sup> See Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, The Dispute Tree and the Legal Forest, 10 Ann. Rev. L. & Soc. Sci. 105, 117 (2014).

<sup>17.</sup> See Thomas R. Schuck, Process Is Important: Alternative Dispute Resolution of Employment Disputes, in Strategies for Employment Litigation (2014), 2014 WL 4160091.

award may be binding and replace a judicial decision; nonbinding awards must be confirmed by a court to have the force of a court judgment. In documents-only arbitration, the arbitrator renders a decision based solely on documents submitted by parties. Reliance on submissions alone, rather than live testimony or discussion, makes documents-only arbitration well-suited for ODR, where users can easily initiate proceedings, submit documents, communicate with the arbitrator, and receive a decision entirely online.

#### 2. Mediation

Mediation is voluntary dispute resolution facilitated by a neutral third party (mediator) and is a common form of ODR for small consumer disputes.<sup>19</sup> Unlike an arbitrator, the mediator does not render a decision, instead helping the disputants reach an agreement by encouraging constructive discussion and resolution. The mediator may improve dialogue, encourage parties to share information, cultivate empathy and understanding of the other party's interests, and perhaps even offer suggestions or proposals.<sup>20</sup> While the role of the mediator broadly is to assist in resolving a dispute, there are different approaches which can sometimes blend together. Facilitative mediators guide the process, providing a structure and agenda for discussion without advising parties as to substance.<sup>21</sup> A transformative mediator approaches conflict as a breakdown in communication and focuses efforts on transforming parties' relationship and the conflict itself through empowerment and understanding, again without evaluating arguments or directing parties toward a specific agreement.<sup>22</sup> In evaluative mediation, the mediator serves an advisory role, perhaps evaluating strengths and weaknesses in disputants' arguments in light of substantive law, predicting an outcome should

<sup>18.</sup> See Ryan S. Bewersdorf, A Primer on Alternative Dispute Resolution in Today's Legal System, in Trends in Alternative Dispute Resolution 87 (2012), 2012 WL 5898580.

<sup>19.</sup> Ethan Katsh & Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace 56~(2001).

<sup>20.</sup> See Deborah Greenspan, Helping Clients Determine Whether the Alternative Dispute Resolution Process Is Appropriate and How to Reach a Fair Remedy, in Trends in Alternative Dispute Resolution 87 (2012), 2012 WL 5898585.

<sup>21.</sup> See Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7, 23–24, 45–46 (1996).

<sup>22.</sup> See Joseph Folger, Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice, 84 N.D. L. Rev. 823, 843–48 (2008) (describing four types of transformation mediation techniques).

the dispute go to court, or expressing a view on what is a fair or reasonable settlement.<sup>23</sup> Mediators may choose to employ other models of mediation.<sup>24</sup>

## 3. Negotiation

In negotiation, disputants interact without the assistance of a neutral third party and instead communicate directly or through lawyers. They may thus determine the structure or process of dispute resolution and resolve some or all issues. Negotiation may occur at various stages during a case.<sup>25</sup>

Automated negotiation systems for dispute resolution diverge more from the other traditional ADR processes. Where an issue does not require the flexibility of a human neutral, algorithms may be designed and implemented in software and ODR tools to resolve disputes with fully automated ADR processes. Double blind bidding is the most popular automated negotiation system.<sup>26</sup> In double blind bidding, parties have already agreed that monetary compensation is due, but have not determined what amount. Parties submit settlement offers and demands to an automated system in several rounds. The amounts are usually not disclosed to the opposing side; rather, the software compares the offered and acceptable settlement amounts in each round.<sup>27</sup> If an offer is greater than the demand, the dispute settles. If the two values are sufficiently close, according to settlement parameters chosen by the parties (e.g., within \$1000 of each other or where the offer is no more than 5% less than demand), the case settles for the arithmetic mean. Otherwise, bidding proceeds to the next round.<sup>28</sup> This type of automated negotiation is limited to

<sup>23.</sup> See Riskin, supra note 21, at 23-24, 44-45.

<sup>24.</sup> For discussions other models, see Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harv. Negot. L. Rev. 71, 109–10 & nn.135–42 (2013) (enumerating different models and collecting citations).

<sup>25.</sup> See Greenspan, supra note 20.

 $<sup>26.\,</sup>$  Corporate Counsel's Guide to Alternative Dispute Resolution Techniques, § 17.5~(2014).

<sup>27.</sup> See id.

<sup>28.</sup> *Id.* Smartsettle's so called "visual blind bidding" is an exception; it displays proposals and suggestions, while keeping preferences confidential and allowing parties to see the potential agreement before final settlement. *Smartsettle's Visual Blind Bidding*, Smartsettle, http://www.smartsettle.com/home/products/smartsettle-one/smartsettles-visual-blind-bidding/ (last visited Dec. 6, 2015).

handling purely numerical interests, such as money distribution in insurance disputes.<sup>29</sup>

Smartsettle is a program that provides a multivariate blind bidding system which can resolve disputes among any number of negotiators and involving any number of numerical or binary interests. <sup>30</sup> While a multivariate system requires the parties to undertake a more complex analysis of which combinations of factors would be acceptable or desirable, they may benefit from doing so. With these inputs, the platform may determine whether a set exists that would satisfy all parties. Where a set of interests cannot be separated from the remainder of the dispute, a more neutral-managed process, such as arbitration or mediation, must be used.

Both forms of automated negotiation are highly efficient and can overcome parties' fear of revealing bottom lines. However, they are also subject to attempts to game the system.

There are also assisted negotiation platforms, which are not fully automated and instead facilitate the negotiations with more sophisticated dispute resolution tools than mere communications technologies. These services provide the tools for communication, and they may frame the communications with forms, time limits, reminders, or standard settlement terms as a starting point.<sup>31</sup>

#### 4. Evaluation and Mini-Trials

Both evaluation and mini trials combine elements of other dispute resolution processes to advise parties on the likely outcome(s) of a trial, should the parties resort to litigation.<sup>32</sup> In evaluation, a neutral third party (evaluator) renders a non-binding recommendation based on each party's arguments and evidence submitted. This can sometimes be interchangeable with non-binding arbitration, where parties submit the dispute and receive a decision that can then be accepted, modified, or rejected;<sup>33</sup> however, arbitration may focus on

<sup>29.</sup> See Corporate Counsel's Guide to Alternative Dispute Resolution Techniques, supra note 26, at § 17.5.

<sup>30.</sup> Smartsettle's Visual Blind Bidding, supra note 28.

<sup>31.</sup> These tools may include "threaded message board systems, secure sites, storage means, online meeting management devices, software for setting up the communication, engaging in productive discussions, identifying and assessing potential solution[s], and writing agreements . . . ." Gabrielle Kaufmann-Kohler & Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice 12–14, 62 (2004).

<sup>32.</sup> See Corporate Counsel's Guide to Alternative Dispute Resolution Techniques, supra note 26, at § 17.5.

<sup>33.</sup> Kaufmann-Kohler & Schultz, supra note 31, at 43.

reaching a decision acceptable to both parties, while evaluation may seek the most likely outcome. The evaluator may be an expert in the subject matter of the dispute, particularly if technical issues are raised.<sup>34</sup> In mini trials, also called summary jury trials, a jury of peers renders a non-binding determination of issues based on documents and other allowed submissions. Volunteers acting as if they were a jury take the place of the neutral third party evaluator.

## 5. Collaborative and Cooperative Law

In collaborative and cooperative law, lawyers and other professionals work together with all parties to encourage them to develop and resolve their positions on an issue. These are non-adversarial processes commonly used in family law disputes.<sup>35</sup> Unlike evaluators, the team members do not make specific recommendations and instead work with parties to make informed decisions and find a resolution. In a custody dispute, for example, a child specialist may assess the situation and work with parents to create a parenting plan.<sup>36</sup>

In collaborative law, the parties sign a disqualification agreement which stipulates that if either party opts to litigate, the collaborative process must end and lawyers who work on the matter are disqualified from representing either party in the related action. A cooperative session uses the same approach, but without a disqualification agreement.<sup>37</sup>

#### 6. Credit Card Charge Back

Credit card charge back mechanisms are similar to dispute resolution mechanisms in the consumer context. The consumer disputes a payment, and the credit card issuer evaluates whether the complaint is justified.<sup>38</sup> This places the issuer in the position of a third party neutral arbitrating a dispute between the consumer and business. There may be additional tension underlying the different relationships that the issuer has with the consumers and the businesses, and

<sup>34.</sup> See Susan Blake, Julie Browne & Stuart Sime, A Practical Approach to Alternative Dispute Resolution 333 (2nd ed. 2012).

<sup>35.</sup> Leonard L. Riskin et al., Dispute Resolution and Lawyers 14 (5th ed. 2014).

<sup>36.</sup> Id. at 211-14.

<sup>37.</sup> Id.

<sup>38.</sup> Disputing Credit Card Charges, Federal Trade Commission (Aug. 2012), https://www.consumer.ftc.gov/articles/0219-disputing-credit-card-charges (noting that the creditor must provide an explanation for any decision).

the issuer also may play an investigative role;<sup>39</sup> however, it primarily acts as an adjudicator in evaluating a claim and rendering a decision.<sup>40</sup>

## B. Technologies Used in ODR

## 1. Communication Technologies

ODR providers create platforms for disputants and neutral third parties to communicate. These platforms can employ different communication technologies as discussed below, which mirror the traditional process or protocols adapted to the platform. Choice of technology can change how parties approach a dispute, and a dispute systems design approach to ODR systems considers how the technologies change the way parties communicate and otherwise approach the dispute resolution process.<sup>41</sup> Compared to face-to-face dispute resolution, users may perceive ODR platforms as being impersonal,<sup>42</sup>

The interviewee explained that pure ODR is not always the most appropriate solution and offered an example: "Of course, the advantage of online dispute resolution is the efficiency, but there is the risk that it gets too impersonal . . . . For example, we had many claims regarding a railway company that had problems with its air conditioning in Germany in the summer and people got the compensation of 500 Euro if they seriously physically suffered. But to know how . . . it was for them from a health perspective, we decided it was better to talk to people in person rather than to just read what they wrote online. We all know that the capacities of expressing yourself via email are quite different from those in person, depending on education and so on, and we didn't want to exclude people from our procedure."

<sup>39.</sup> See FAQ: Chargebacks, Chase Paymentech, https://www.chasepaymentech.com/faq\_chargebacks.html (last visited Dec. 6, 2015) (noting that the Chase Paymentech may look at its own records to try to resolve the chargeback automatically, but may also request additional information for an analyst to review).

<sup>40.</sup> For an overview of chargeback procedures, see Louis Del Duca, Colin Rule & Zbynek Loebl, Facilitating Expansion of Cross-Border E-Commerce—Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems—Work of the United Nations Commission on International Trade Law), 1 Penn St. J.L. & Int'l Aff. 59, 71–72 (2012).

<sup>41.</sup> For a discussion of how dispute systems design relates to ODR and technology, see Orna Rabinovich-Einy & Ethan Katsh, Lessons from Online Dispute Resolution for Dispute Systems Design, in Online Dispute Resolution: Theory and Practice, 39 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

<sup>42.</sup> DIRECTORATE GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT, CROSS-BORDER ALTERNATIVE DISPUTE RESOLUTION IN THE EUROPEAN UNION 33 & n.49 (June 2011) http://www.europarl.europa.eu/meetdocs/2009\_2014/documents /imco/dv/adr\_study\_adr\_study\_en.pdf. The Conciliation Board for Public Transport of Germany allows users to file complaints online and communicate via e-mail, but they usually try to call the business and complainant separately to talk at least once.

and disputants may even be more deceptive than normal.<sup>43</sup> An ODR platform may use electronic communications to reproduce existing offline procedures as closely as possible; for example, mediation by phone, videoconferencing, telepresence, and even holography more closely approximate in person interactions.<sup>44</sup> However, a platform may also pursue benefits such as greater efficiency, overcoming human biases, and convenience<sup>45</sup> by implementing technologies in new and creative ways.

How a technology is used can also influence the nature of the proceedings. For example, some forms of online mediation can more closely resemble traditional adversarial processes. 46 When mediating online, the parties are separated by distance and asynchronous communications are separated by time. Unlike traditional mediation, where the parties are together in person and the mediator must hold a caucus to communicate with parties separately, an online mediator may use communication technologies to maintain threads of private conversations simultaneously and without creating perceived barriers or pressure to conclude. While these factors may make online mediation a more convenient or comfortable process, they can also silo the disputants. ODR can overcome this isolation with more interpersonal communication technologies and open mediation protocols. Similarly, a platform can reduce isolation by allowing parties to view the entire communication and by prohibiting cross-talk, where disputants communicate one-on-one with the mediator.47

<sup>43.</sup> Brian Farkas, Old Problem, New Medium: Deception in Computer-Facilitated Negotiation and Dispute Resolution, 14 Cardozo J. Conflict Resol. 161, 182–92 (2012).

<sup>44.</sup> See Susan Nauss Exon, The Next Generation of Online Dispute Resoflution: The Significance of Holography to Enhance and Transform Dispute Resolution, 12 Cardozo J. Conflict Resol. 19 (2010); see also Kaufmann-Kohler & Schultz, supra note 31, at 61 (discussing communication nuance and richness in information transfer).

<sup>45.</sup> Cf. Joseph W. Goodman, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites, 2 Duke L. & Tech. Rev. 1, 7–9 (2003), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr (reviewing advantages of cyber-mediation).

<sup>46.</sup> Susan L. Brooks, Online Dispute Resolution and Divorce: A Commentary, 21 Disp. Resol. Mag. 18 (2015).

<sup>47.</sup> See Goodman, supra note 45, at 9–13 (reviewing disadvantages of cyber-mediation).

# 2. Automation Technology, Algorithms, and Artificial Intelligence

An ODR platform may use algorithms and party input to automate the decision-making and settlement process. Early automation technologies in law focused on "expert systems" designed to apply clear and domain-specific rules, such as by determining eligibility under statutes.<sup>48</sup> Blind bidding emerged in ODR, automatically resolving disputes reduced to a single variable, like money.<sup>49</sup> Multivariable resolution programs resolve more complicated disputes by collecting relative preference and value information from each party and then using an algorithm to calculate one or more optimal solutions, in addition to allowing disputants to generate settlement proposals.<sup>50</sup>

By 2006, numerous ADR systems "render[ed] expert advice or decision-making on cases where to date human intelligence ha[d] been required to process the factual information." There have been a few proposals to apply modern conceptions of artificial intelligence to dispute resolution, with techniques that more closely resemble human reasoning.  $^{52}$ 

Arno Lodder and John Zeleznikow have written about artificial intelligence and ODR at length, discussing decision-making technologies ranging from traditional simple algorithm automation to artificial intelligence, including: (1) rule-based reasoning, where knowledge is represented as a collection of rules; (2) case-based reasoning, which applies training examples to solve a specific problem; (3) machine learning, which uses training examples to build a general model, rather than one tailored to a specific problem, and which can

<sup>48.</sup> Arno R. Lodder & John Zeleznikow, Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in A Three-Step Model, 10 Harv. Negot. L. Rev. 287, 293–94 (2005).

<sup>49.</sup> See supra Part I.A.3.

<sup>50.</sup> One example is Smartsettle, discussed *supra* note 30 and accompanying text.

<sup>51.</sup> Martín, *supra* note 14, at 346 (noting that ODR is "only effective if the mediator has been properly trained to employ this medium" with clear communication and empathy, as well as the ability to create rapport, build trust, and notice incongruous communication in the medium).

<sup>52.</sup> Lodder & Zeleznikow, supra note 48, at 293-94.

Such techniques include argumentation theories, systems of non-monotonic logic, case-based reasoning, legal ontologies, and knowledge discovery from legal databases. The logical tools developed over the past fifteen years for use in modelling legal arguments can assist with undercutting and rebutting arguments, weighting principles, reasoning about rules, and creating lines of argumentation, commitment, and burden of proof.

Id. at 294-95.

then be used to make data-driven predictions or solve various problems; and (4) artificial neural networks, where algorithms inspired by biological neural networks use statistical learning algorithms presented as systems of interconnected "neurons" to compute values from inputs and conduct machine learning and adaptive pattern recognition with different learning paradigms and algorithms.<sup>53</sup>

Currently, artificial intelligence technologies are used more for intelligent negotiation and decision support than as a substitute for the advice and guidance of attorneys or the evaluation or judgment of a neutral. The results are ultimately supervised by human users or experts due in part to the complexity of dispute resolution arising from, among other things, choice of law, applicable law, and human variables like fairness judgments, heuristics, and biases. This oversight is similar to practice in other industries, such as banking and insurance.<sup>54</sup>

One program built with artificial intelligence, Split Up, provided decision-making advice on property distribution after divorce under Australian law by using a neural network to mimic how judges combine relevant variables. <sup>55</sup> Another, the INSPIRE system, studied cultural differences in negotiation with decision theory. In many high-context cultures, an agreement is viewed as the beginning of a negotiation, and renegotiation and revision are integral to the negotiation process. INSPIRE allowed a user to construct a utility function that would evaluate offers based not only on the current and past offers, but also on the potential for Pareto improvements that could be considered post-settlement. <sup>56</sup> In both cases, the artificial intelligence provided advice rather than a binding agreement. However, the role of artificial intelligence in ODR may grow as artificial intelligence technologies and computational power improve and consumer confidence in them increases.

<sup>53.</sup> Arno R. Lodder & John Zeleznikw, Artificial Intelligence and Online Dispute Resolution, in Enhanced Dispute Resolution Through the Use of Information Technology, 73, 75 (2010), http://www.mediate.com/pdf/lodder\_zeleznikow.pdf.

<sup>54.</sup> Davide Carneiro et al., Online Dispute Resolution: An Artificial Intelligence Perspective, 41 Artificial Intelligence Rev. 211, 219 (2014).

<sup>55.</sup> See generally Andrew Stranieri, John Zeleznikow, Mark Gawler & Bryn Lewis, A Hybrid Rule—Neural Approach for the Automation of Legal Reasoning in the Discretionary Domain of Family Law in Australia, Artificial Intelligence & L., Sept. 1999, at 153–83.

<sup>56.</sup> See generally Gregory Kersten & Sunil Noronha, Negotiation via the World Wide Web: A Cross-Cultural Study of Decision Making, Group Decision & Negot., May 1999, at 251–79; Gregory E. Kersten & Sunil J. Noronha, WWW-Based Negotiation Support: Design, Implementation, and Use, 25 Decision Support Systems 135 (1999).

## C. Private and Public Platforms

One basic distinction between public and private ODR platforms is that private schemes are usually financed by industry and operated on a for-profit basis, while public platforms are often non-profit, publicly funded, and/or judicially supported.

#### 1. Private ODR Platforms

There are two types of private ODR platforms: self-contained and full service.<sup>57</sup> A self-contained ODR platform is designed to resolve disputes within a community, such as in an online marketplace like eBay,<sup>58</sup> Amazon,<sup>59</sup> or Etsy.<sup>60</sup> Members of that community agree to be governed by the terms of service and associated agreements that regulate the community and dictate how and when that ODR platform is used. By virtue of being self-contained, these community systems can create unique incentives or impose unique sanctions, such as delay of payment, charge reversal, account restrictions, feedback publication, and encouragement like internal trustmarks to designate top sellers or other performers based on user feedback.<sup>61</sup>

By comparison, a full service platform is open to any disputant for whom the ODR method is appropriate—according to dispute type, cost, or other factors. Modria is one popular and new example. <sup>62</sup> The cloud-based platform, created by Collin Rule, the first Director of Online Dispute Resolution for eBay and PayPal, is designed for "disputes of any type and volume," with both business and government users. <sup>63</sup>

<sup>57.</sup> Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 Mich. J. Int'l L. 485, 501 (2014).

<sup>58.</sup> Resolution Center, EBAY, http://resolutioncenter.ebay.com/ (last visited Dec. 6, 2015).

<sup>59.</sup> Buyer Dispute Program, Amazon Payments, https://payments.amazon.com/sdui/sdui/about?nodeId=6025 (last visited Dec. 6, 2015); Handling Customer Disputes, Amazon Payments, https://payments.amazon.com/help/201212320 (last visited Dec. 6, 2015).

<sup>60.</sup> Report a Problem with an Order, ETSY, https://www.etsy.com/help/article/35 (last visited Dec. 6, 2015).

<sup>61.</sup> Raymond & Shackelford, supra note 57, at 502-03.

<sup>62.</sup> About Us, Modria, http://modria.com/about-us/ (last visited Dec. 6, 2015).

<sup>63.</sup> Modria Resolution Center, Modria, http://modria.com/product/ (last visited Dec. 6, 2015).

## 2. Public ODR Platforms

Several government agencies and public organizations have developed and implemented their own ODR systems as a voluntary alternative or supplement to court proceedings in traditional disputes. National and international ODR programs have been instituted in countries including Mexico, Canada, and the United States. In Mexico, the Consumers' Protection Agency created Concilianet, an ODR platform for consumers to resolve disputes with businesses. The online platform is regulated by the Office of the Federal Prosecutor for the Consumer (PROFECO) and annexed to and supported by the judiciary, with outcomes that are enforceable in the domestic court system.<sup>64</sup> In Canada, a British Columbia non-profit offers Resolution Center, an ODR platform that engages a business when a consumer files a complaint against it. The platform initiates different dispute resolution processes depending on the type of business,65 and its success has led to the creation of the British Columbia Civil Resolution Tribunal, a voluntary small claim and condominium dispute system.66

Several U.S. federal agencies have also adopted or considered adopting ODR. The National Mediation Board has experimented with and advocated for ODR in the federal government. The Federal Mediation and Conciliation Services are capable of offering an ODR platform through its Technology Assisted Group Solutions, with electronic conference centers, collaborative tools, and virtual conferencing.<sup>67</sup> After requests made under the Freedom of Information Act generated numerous disputes and concerns about open government, Congress created the Office of Government Information Services to prevent and resolve FOIA-connected disputes and explored the feasibility of using an ODR system.<sup>68</sup> However, the feasibility study found

<sup>64.</sup> FAQs, PROFECO, http://concilianet.profeco.gob.mx/Concilianet/faq.jsp (last visited Dec. 6, 2015).

<sup>65.</sup> Resolve Your Dispute, Consumer Prot. B.C., http://www.consumerprotectionbc.ca/odr (last visited Dec. 6, 2015) ("A pilot project to help consumers and businesses resolve disputes online."); Frequently Asked Questions, Consumer Prot. B.C., http://www.consumerprotectionbc.ca/faqs-2017 (last visited Dec. 6, 2015).

 $<sup>66.\</sup> How\ Will\ the\ CRT\ Work?$  Civil Resol. Tribunal, http://www.civilresolution bc.ca/what-is-the-crt/how-will-the-crt-work/ (last visited Dec. 6, 2015).

<sup>67.</sup> eServices-TAGS, Fed. Mediation & Conciliation Serv., http://lapps.fmcs.gov/internet/categoryList.asp?categoryID=23 (last visited Dec. 6, 2015).

<sup>68.</sup> Advancing Freedom of Information in the New Era of Responsibility: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) (statement of Miriam Nisbet, Dir., Office of Gov't Info. Servs., Nat'l Archives and Records Admin., College Park, Maryland), ("We will create an online dispute resolution system, called ODR,

that the caseload was not large enough to make ODR more beneficial than the existing processes.<sup>69</sup>

These public platforms can encompass more than one jurisdiction and thus function as cross-border ODR platforms. For example, there are over 750 ADR schemes in the European Union. In 2013, to establish a common framework, the European Parliament and Council of the European Union adopted the Directive on Consumer ADR and Regulation on Consumer ODR. Under the new system, operational as of January 9, 2016, the national ADR schemes continue to operate with "common minimum quality principles," supplemented by a free EU-wide ODR platform for online transaction disputes.

#### III. Dangers and Ethical Issues In ODR

Numerous academics, industry organizations, and governments have researched and discussed what values and principles are important to dispute resolution. This Part considers how those values and principles intersect with ODR in practice, identifying which areas of ODR can be particularly problematic or in tension with traditionally held values and ethics.

Alternative dispute resolution often does not require representation by an attorney, and ODR services, available simply by navigating to a provider's website, make it even easier to initiate and resolve disputes without ever consulting a professional. Whereas disputants

which is a relatively new approach to conflict resolution and which holds great potential to efficiently process and prioritize a high volume of cases."); Ben Bain, *FOIA Dispute Mediator Opens Doors*, FCW (Jan. 14, 2010), http://fcw.com/articles/2010/01/14/nara-ogis.aspx.

- 69. Outreach and Training, Office of Gov't Info. Servs., https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/outreach-and-training.htm (last visited Dec. 6, 2015).
- 70. Alternative and Online Dispute Resolution (ADR/ODR), EUROPEAN COMM'N, http://ec.europa.eu/consumers/solving\_consumer\_disputes/non-judicial\_redress/adr-odr/index\_en.htm (last updated Sept. 11, 2015).
- 71. Council Directive 2013/11, 2013 O.J. (L 165) 63 (EU), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF.
- 72. Council Regulation 524/2013, 2013 O.J. (L 165) 1 (EU), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF.
- 73. Press Release, European Commission, Daily News (Jan. 8, 2016), http://ec.europa.eu/consumers/solving\_consumer\_disputes/docs/daily\_news\_odr\_09-01-2016.pdf.
- 74. Press Release, Council of the European Union, New Alternative Dispute Resolution System for Consumers (Apr. 22, 2013), https://www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/intm/136891.pdf.

who seek professional ADR services might be advised to at least consult with an attorney, those who initiate a case on an ODR platform might never receive comparable advice. Participants who opt not to retain counsel miss out on the protections of an expert advocate guided by an ethical code. Neutrals may be trained, and even certified, to be impartial and use different techniques to elicit relevant information;<sup>75</sup> lawyers serve a different role as advocates. Courts have repeatedly underscored the importance of access and right to counsel in ensuring due process in litigation. While ADR can arguably be less adversarial, its role as an alternative to litigation suggests that similar protections should be considered.

This Part takes key principles of dispute resolution and connects them to ODR, discussing potential dangers and ethical issues if they are compromised. It covers: (1) awareness, accessibility, and usability of ODR platforms; (2) disclosure and transparency of the ODR method and terms of use; (3) due process and fairness; (4) enforceability of outcomes; and (5) privilege, confidentiality, and privacy of user data.

## A. Awareness, Accessibility, and Usability: The Digital Divide

The first hurdle to accessibility is disputant awareness of the ODR service and its applicability to the conflict at issue. Even in the infancy of ODR, Robert Bordone recognized the importance of informing people in an easy-to-understand way and, relatedly, the importance of encouraging disputants to actually try ODR. <sup>76</sup> Disputants are more likely to be harmed by lack of knowledge than affirmative misinformation about which options exist.

Once a disputant has chosen an ODR service, she must be able to access and use the chosen platform. When ODR was in its infancy, web access and some level of technological literacy were fairly assumed for e-commerce disputants, whose conflicts could not arise in their absence.<sup>77</sup> As ODR expanded to other types of disputes, universal access to the related technologies became a greater concern. However, for many parties, even in developing countries, access to

<sup>75.</sup> For examples of different techniques, see supra Part I.A.

<sup>76.</sup> Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal*, 3 Harv. Negot. L. Rev. 175, 196–97 (1998).

<sup>77.</sup> See George H. Friedman, Comment, Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities, 19 Hastings Comm. & Ent. L.J. 695, 708, 713 (1997).

minimum technologies and the Internet is reasonably available, if inconvenient.<sup>78</sup> In the United States, Internet access is an important public policy and political issue, and numerous funds exist to deliver computer and broadband Internet access to the public and underserved areas.<sup>79</sup>

Locating a particular ODR platform or resource for exploring options should be of comparable difficulty, if not easier, than locating resources for litigation. Pro se litigants can find legal forms and other resources, which are commonly made available on the Internet through public court websites or state-wide legal aid websites.<sup>80</sup>

Affordability also influences access. How much the ODR provider charges depends on (1) the costs of operating the ODR service, (2) external funding—revenues or other income from non-disputants, and (3) how remaining costs are allocated across disputes and disputants. Different models exist to allocate costs: one party might pay all costs, multiple parties might share the cost, and some or all of the cost may be covered by outside funding. Under a bilateral user fees model, each disputant pays a proportion of the charges.<sup>81</sup> The initiating party may be required to pay an additional fee in order to register a dispute. Other ODR platforms may be available for free as part of a corresponding marketplace<sup>82</sup> or through advertising or public funding. Compared to traditional ADR methods and litigation, ODR offers lower costs of producing witnesses, copying, postage, and travel,<sup>83</sup> thereby reducing operating costs or costs borne by the user. ODR can make dispute resolution available where travel costs would otherwise

<sup>78.</sup> Cf. Communications Technology in Emerging and Developing Nations, PEW RESEARCH CTR. (Mar. 19, 2015), http://www.pewglobal.org/2015/03/19/1-communications-technology-in-emerging-and-developing-nations/#internet-usage-in-emerging-and-developing-nations (showing Internet usage and access in emerging and developing nations).

<sup>79.</sup> See, e.g., National Broadband Plan, Fed. Commc'ns comm'n, https://www.fcc.gov/national-broadband-plan (last visited Dec. 6, 2015) (describing and providing the full text of the National Broadband Plan).

<sup>80.</sup> Every state now maintains a state-specific legal aid website, providing a portal for self-help resources. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 243, 243–44 (2012).

<sup>81.</sup> See generally Karim Benyekhlef & Fabien Gélinas, Online Dispute Resolution, 82–84 http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1336379 (discussing funding generally).

<sup>82.</sup> See supra notes 58–60 (listing examples of marketplaces that have their own ODR service).

<sup>83.</sup> See David Allen Larson, "Brother, Can You Spare a Dime?" Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes, 11 Nev. L.J. 523, 541–42 (2011).

be prohibitive or in excess of the claim value, which is especially beneficial for cross-border disputes.<sup>84</sup>

Usability concerns follow access. Once located, the ODR platform technologies and interfaces may have a learning curve, and a user may need to complete a tutorial or otherwise explore the platform in order to use it effectively.<sup>85</sup> An ODR provider may preempt this with user interface and navigation testing.

Technology can also improve ODR usability by providing additional features. For example, communication technologies may benefit from low cost or free language translation services, although accuracy and other issues with those services should naturally be disclosed and consented to. This is particularly beneficial due to how well-suited ODR is for cross-border and multi-jurisdictional disputes, where parties may be distant and conversant in different languages, but still able to transact and interact in ways that give rise to a dispute online.

## B. Lack of Disclosure and Transparency

When an ODR provider discloses the details of the platform and terms of use, it empowers potential users to make a meaningful and informed choice and engage effectively in dispute resolution proceedings. Disclosing potentially problematic aspects of an ODR service can arguably be deemed to cure them, or at least ameliorate their impact, for parties who voluntarily consent to the process. Ideally, disputants are adequately informed to choose among judicial (in court) and extrajudicial (out of court) options and appreciate the nuances: What are the advantages and disadvantages of the different methods of dispute resolution? Which are relevant to the parties and

<sup>84.</sup> *Id.* at 544–45 ("International developments, travel costs combined with personal security and safety concerns, additional costs associated with face-to-face meetings such as time investment, and the desires and demands of a generation raised on technology are requiring us to think critically about whether dispute resolution and problem solving truly requires face-to-face interaction.").

<sup>85.</sup> *Id.* at 542. Larson explains that there is a learning curve to using some ODR platforms:

Smartsettle does require users to educate themselves as to how to use that unique system. This may be particularly problematic for certain parties who are less comfortable with contemporary technologies or accustomed to using dispute resolution processes that rely on the leadership of a third-party neutral. Smartsettle is not intuitive for everyone and does not mirror the ways in which individuals use technology in their daily lives. Perhaps for that reason, Smartsettle has not been able to capture as much of the dispute resolution market as might be anticipated, even though it is using artificial intelligence more robustly than other TMDR providers.

the dispute at hand? However, answering these questions is often infeasible for non-experts, especially those who are not repeat players.

If a disputant is inadequately informed to decide, an expert human or software could assist her. Under the European Union's ODR Regulation, there is an EU-wide ODR platform for online transaction disputes, and each member state designates an ODR contact point to assist consumers with disputes submitted through that platform. <sup>86</sup> Information could also simply be made available to potential users, without additional evaluation or active comparison of a disputant's preferences to existing options.

Disclosure does not by itself create an informed user; the information must also be accessible, understandable, and presented such that the user attends to key information.<sup>87</sup> Anjanette Raymond has written about the need to create an informed consumer who is aware of and understands a dispute resolution clause in terms of sale, so that meaningful consent is possible.<sup>88</sup> This might be accomplished through active user engagement with the information presented, rather than through pop-ups or language emphasized by larger font size or other typeface changes.<sup>89</sup> Some information may be important enough to warrant clearer, affirmative disclosure that forces the user to engage, while some information may simply be made available upon request or by browsing resources.

#### C. Due Process and Fairness

In litigation, due process ensures accuracy and fairness in court proceedings for all parties. Procedural safeguards and judicial assistance help to ensure impartial decisions on the merits and equal access to justice for pro se and represented litigants by upholding minimum standards of due process and minimizing differences between parties; pro se lenience further permits relaxed procedures that hold pro se pleadings to a "less stringent standard" than "formal pleadings drafted by lawyers." These help pro se litigants, who are unfamiliar with the substance and process of law, while preserving

<sup>86.</sup> A Step Forward for EU Consumers: Questions & Answers on Alternative Dispute Resolution and Online Dispute Resolution, Eur. Comm'n (Mar. 12, 2013), http://europa.eu/rapid/press-release\_MEMO-13-193\_en.pdf.

<sup>87.</sup> See generally Anjanette H. Raymond, Yeah, but Did You See the Gorilla? Creating and Protecting an Informed Consumer in Cross-Border Online Dispute Resolution, 19 Harv. Negot. L. Rev. 129 (2014) (reviewing ODR platform design and legislative initiatives to protect consumers in light of consumer behavior).

<sup>88.</sup> Id.

<sup>89.</sup> Id. at 145-46.

<sup>90.</sup> Haines v. Kerner, 404 U.S. 519 (1972).

the rights of the opposing party, impartiality of the court, and judicial resources.

In ODR, due process and fairness concerns arise where disputants are uninformed, without counsel, and are subject to procedures that are unfair due to substantive problems (e.g., failure to apply correct law), procedural problems (e.g., a biased algorithm), or power imbalances<sup>91</sup> resulting from, among other things, unequal status in a hierarchy, socio-economic status, and tendency of one party to be deferential. While procedural due process is recognized as a fundamental right in European Union law, and new ODR mechanisms must adapt to comply with them at least in the consumer context,<sup>92</sup> constitutionally protected procedural due process in the United States is limited to government proceedings, such as civil and criminal lawsuits.

Opportunity to be represented by legal counsel, an advocate well-informed about the law and procedures for dispute resolution, is a key element of due process; failure to obtain counsel, even when voluntary, can be particularly problematic in ODR involving large or complex claims. An ODR platform or a neutral using the platform is likely to provide inadequate instructions to users. While users may be advised to consult an attorney, most will not, particularly in lower-stake contests. ODR providers and neutrals are not bound by the same ethical code as attorneys, and automated providers are not held even to the minimum codes of conduct required for many neutrals, nor do they advocate for a party. The goal may be to resolve the dispute, but with greater tolerance for user dissatisfaction and ignorance in accepting a resolution. As a result, ADR professionals may be rightly concerned about fully-automated ODR platforms resolving certain types of disputes.

<sup>91.</sup> See Larson, supra note 83, at 545–48. Note, however, that ODR may also weaken the traditional advantages of the more "powerful" player and even the playing field; some suggest that online or computer-facilitated dispute resolution may be superior to face-to-face mediation for parties of unequal negotiating power. Andrea M. Braeutigam, Fusses that Fit Online: Online Mediation in Non-Commercial Contexts, 5 Appalachian J.L. 275, 276 (2006).

<sup>92.</sup> Anastasia Konina, Application of Due Process to Consumer Online Dispute Resolution, Jurist (Feb. 12, 2015, 1:00 PM ET), http://jurist.org/dateline/2015/02/ana stasia-konina-due-process-resolution.php.

<sup>93.</sup> See generally Bruce L. Mann, Smoothing Some Wrinkles in Online Dispute Resolution, 17 Int'l J. L & Info. Tech. 83 (2009), http://ijlit.oxfordjournals.org/content/17/1/83.full.pdf+html.

<sup>94.</sup> Farned, supra note 9, at 341-42.

There may be biases inherent in ODR platforms that favor one party or another. Without counsel, a trusting consumer may not recognize bias in procedures or outcomes and thus accept them out of ignorance. This is especially likely if ODR methods adopt artificial intelligence technologies, where the decision-making process is even more of a black box to users, yet choice and interpretation of law is complex or ambiguous. S As Rafal Morek has noted, "in ODR, inefficiency, errors, or bias can be hidden under nicely crafted computer interfaces based on the way the program was constructed."

Unrepresented parties with serious rights at issue should be afforded particular care. The Supreme Court recognized this in *Turner v. Rogers*, <sup>97</sup> in which it explicitly sanctioned judicial measures to ensure due process for pro se litigants with serious rights at stake. As in litigation, disputes resolved through ODR may vary, and different parties or dispute types may use different minimum levels or types of protections. <sup>98</sup> While ODR is often used for low-value commerce disputes, it can also be used when more serious rights are at issue, for example, parental rights, custody, collections, or housing. The protections that *Turner* enumerates can be applied to a broad range of cases, and analogous protections may be appropriate to safeguard serious rights when ODR is used.

However, for at least some disputes, ODR may appropriately dispense with the requirement for professionals, even without substantial protections of disclosure or initial outside consultation.<sup>99</sup> Such instances could include: (1) when the cost of counsel exceeds or is

<sup>95.</sup> Davide Carneiro et al., *Online Dispute Resolution: An Artificial Intelligence Perspective*, 41 Artificial Intelligence Rev. 211, 230 (2014) (discussing the future of and ethical issues with ODR and artificial intelligence).

<sup>96.</sup> Rafal Morek, The Regulatory Framework for Online Dispute Resolution: A Critical View, 38 U. Tol. L. Rev. 163, 188–89 (2006).

<sup>97. 131</sup> S. Ct. 2507 (2011). The protections included (1) notice to defendants of issues to be litigated, (2) use forms to elicit pertinent information from pro se litigants, (3) question pro se litigants as needed, (4) appoint counsel when necessary, (5) enlist court staff to provide neutral support in understanding the nature of the proceedings, to provide clear instructions, and to help fill out forms, and (6) make court findings clear and in writing. *Id.* 

<sup>98.</sup> Thomas Stipanowich, for example, has proposed development of an arbitration fairness index to evaluate arbitration of employment and consumer disputes. See Thomas J. Stipanowich, The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logian and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes, 60 U. Kan. L. Rev. 985 (2012).

<sup>99.</sup>  $\it Cf.$  Farned,  $\it supra$  note 9, at 343 (noting that many ODR consumers are without counsel).

likely to exceed the value or stakes of the dispute, (2) when the disputants come into the system already well-informed—or at least adequately informed for the complexity or topic of the dispute, or (3) when the ODR platform meets some minimum standards for neutrality and fairness.

#### D. Enforceability

It is unclear how international conventions on recognition and enforcement of arbitral awards apply to awards made in ODR. <sup>100</sup> For example, there is debate over whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to awards made through online arbitration, with more likely applicability in online commercial business-to-consumer arbitration. <sup>101</sup> Electronic recordings and digital signatures may not comply with the writing requirements of many national laws and international conventions, and authentication and certification is even more difficult to carry out in ODR following historical interpretations. <sup>102</sup>

Even absent the complications of cross-border enforcement, the method of imposing ODR may bring enforceability into question. For example, terms and conditions for a service, license to install software, or product purchase could require a user to submit to specific ODR procedures as an exclusive means of resolving dispute—a waiver to the right to litigate, but often with little notice, and thus little meaningful or informed consent. Such contracts of adhesion could be challenged as unconscionable, but thus far, such challenges have been met with limited success, even where the consumer had no meaningful choice or dispute resolution procedures were particularly onerous. 103

<sup>100.</sup> For relevant instruments, see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/NYConvention.html; Inter-American Convention on International Commercial Arbitration (Panama, 1975); European Convention on International Commercial Arbitration (Geneva, 1961).

<sup>101.</sup> See Mohamed S. Abdel Wahab, ODR and E-Arbitration, in Online Dispute Resolution: Theory and Practice, supra note 41, at 399.

<sup>102.</sup> However, more recent resolutions and acts that have been adopted give weight to electronic means of satisfying writing requirements, at least in the e-commerce space. See United Nations Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, art. 9, https://treaties.un.org/doc/Treaties/2005/11/20051128%2004-23%20PM/Ch\_X\_18p.pdf (making electronic and handwritten signatures functionally equivalent internationally).

<sup>103.</sup> For a discussion of how clickwrap dispute resolution clauses may be unconscionable and a review of such challenges and commentary, see generally Lucille M. Ponte, Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution

## E. Privilege, Confidentiality, and Privacy

Confidentiality and privilege are well-established principles in a client-lawyer relationship, where informed consent is necessary before sharing information related to representation of a client.<sup>104</sup> Although ODR providers do not share a similarly privileged relationship with disputants, privacy concerns should still be of paramount importance. ODR providers may store sensitive communications and records, such as personally identifying information; opinions and communications made to other disputants or neutrals with the expectation that they would not be shared; and records relating to health, education, and employment. This privacy interest is two-pronged: (1) disputants may want protection against unauthorized access of data, in the form of technical and physical security, <sup>105</sup> and (2) disputants may want protection against unauthorized and unexpected (or otherwise unconsented to) use of data.

At minimum, ODR providers must comply with privacy statutes. For example, the European Union Data Protection Directive regulates the data collection, storage, and maintenance practices of those who operate publicly accessible electronic communication networks. <sup>106</sup> Communication data must be stored securely in order to protect user-related data and efficiently respond to requests for information. However, data privacy is less regulated under US law, which takes a sectoral approach to privacy regulation; due to the patchwork nature of legislation, regulation, and industry standards, some industries are heavily regulated, while others are not covered at all. <sup>107</sup>

Clauses and a Proposal for Improving the Quality of These Online Consumer "Products," 26 Ohio St. J. on Disp. Resol. 119, 126 (2011). For a collection of cases challenging these provisions as being unconscionable, see id. at 157 & n.54.

<sup>104.</sup> Model Rules of Prof'l Conduct R. 1.6.

<sup>105.</sup> See generally, Benyekhlef & Gélinas, supra note 81, at 84–85 (discussing ODR privacy policies and system security). Security-related privacy issue have been highlighted recently in other contexts, notably Edward Snowden's leak of National Security Agency cell phone metadata collection. See Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily, Guardian (June 6, 2013, 6:05 AM), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

<sup>106.</sup> Directive 95/45/EC of the European Parliament and of the Council, 1995 O.J. (L 281) 31 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:319 95L0046&from=EN.

<sup>107.</sup> Daniel J. Solove & Chris J. Hoofnagle, A Model Regime of Privacy Protection, 2006 U. Ill. L. Rev. 357, 357 (2006) ("[P]rivacy protections in the United States are riddled with gaps and weak spots. Although most industrialized nations have comprehensive data protection laws, the United States has maintained a sectoral approach [to privacy] where certain industries are covered and others are not."). US federal statutes that protect privacy include FERPA, the Health Insurance Portability and

ODR providers do not fall neatly within the ambit of any federal statutes governing privacy, although some privacy regulations may apply in limited ways.

Under either scheme, disputant expectations for privacy might not line up with the providers' actual use of information provided, and those expectations might not be protected by federal regulations or ethical or certifying codes. Disputants might not even inquire about or understand technical data protection measures, nor who is authorized to use information provided and for what purpose, suggesting that privilege, confidentiality, and privacy interests are especially susceptible to affront.

#### IV. Protection Mechanisms for Users

Businesses often have the resources to protect their interests when implementing or selecting an ODR platform, but consumers and individual users may lack the sophistication, resources, or opportunity to make an informed choice among alternatives. <sup>108</sup> Individuals may also lack the resources and incentives to pursue claims against businesses or platforms that engage in unfair or deceptive practices. <sup>109</sup>

Other industries have addressed inequities by enacting consumer protection regulations, which exist for financial services, 110 trade, 111 product safety, 112 food and drug safety, 113 and privacy. 114 These regulations provide oversight and investigation for specialized services, mandate disclosure, offer recourse for consumers, and more. In litigation, various protection mechanisms exist to safeguard

Accountability Act (HIPAA), the Fair Credit Reporting Act (FCRA), and the Privacy Act of 1974. See Existing Federal Privacy Laws, Ctr. For Democracy & Tech. (Nov. 30, 2008), https://cdt.org/insight/existing-federal-privacy-laws.

<sup>108.</sup> See Henry N. Butler & Jason S. Johnston, Reforming State Consumer Protection Liability: An Economic Approach, 2010 Colum. Bus. L. Rev. 1, 51 n.129 (2010) ("Consumers are forced to either make a less-informed choice . . . or engage in a protracted and costly inquiry in order to acquire information regarding product or service attributes such as price, quality, service, and warranties.").

<sup>109.</sup> See id. at 5.

<sup>110.</sup> See, e.g., Fair Credit Reporting Act, 15 U.S.C. § 1681; Fair Debt Collection Practices Act, 15 U.S.C. § 1692–1692p; Truth in Lending Act 15 U.S.C. § 1601; see also Mark E. Budnitz, The Development of Consumer Protection Law, The Institutionalization of Consumerism, and Future Prospects and Perils, 26 Ga. St. U.L. Rev. 1147, 1151–68 (2010) (reviewing the origin of consumer financial services regulation).

<sup>111.</sup> Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

<sup>112.</sup> Consumer Product Safety Act, 15 U.S.C. §§ 2051-84.

<sup>113.</sup> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. ch. 9 § 301 et seq.

<sup>114.</sup> See Telephone Consumer Protection Act, 47 U.S.C.  $\S$  227 et seq.; National Do Not Call Registry.

against misconduct $^{115}$  and due process concerns implicated by self-representation. $^{116}$ 

This Part explores different mechanisms that may be implemented to protect the values and principles in the previous Part: (A) user education and training; (B) consumer feedback and provider reputation; (C) codes of practice, through industry adoption and government regulation; (D) accreditation; and (E) judicial review. In doing so, this Part focuses on how to protect those ODR users who are less able to bargain for meaningful legal protections and may be unfamiliar with judicial and extrajudicial options and procedures.

## A. User Education and Training

User education and training are basic protection mechanisms that can enable users to make a more meaningful and informed choice about whether to use ODR and, if so, which provider or platform to use. Training can also make users and neutrals more effective at using an ODR platform.

These protection mechanisms might be implemented in various ways. For example, they might be a prerequisite for accreditation of providers and platforms. They might be offered in the form of ongoing classes and programs or platform-specific tutorials. The flexibility of offerings also lends itself to various funding sources and executing bodies—a government agency or grant may provide money to applicants hoping to start an educating non-profit; an existing ODR provider may sponsor a lesson on its platform; a negotiation program at a law school may organize workshops, seminars, or discussion groups open to the public.

## B. Consumer Feedback and Provider Reputation

Shortfalls in existing legal protections may prompt ODR users to increasingly rely on performance reputation to assess the fairness, effectiveness, and other attributes of ODR providers. The ability to attract new users and charge for more expensive services would depend on reliable feedback and ratings, consumer surveys, and reports by industry, government, and consumer watchdog groups.<sup>117</sup> ODR

<sup>115.</sup> See Maureen A. Weston, Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality, 76 Ind. L.J. 591, 606–18 (2001).

<sup>116.</sup> See supra, Part II.C.

<sup>117.</sup> See Omri Ben-Shahar, One-Way Contracts: Consumer Protection Without Law, 6 Eur. Rev. Cont. Law 221, 242–44 (2010), http://home.uchicago.edu/omri/pdf/articles/One\_Way\_Contracts.pdf. Omri Ben-Shahar proposes consumer review and

users necessarily have some familiarity with technology and Internet access, making online feedback an appropriate avenue to publicize and collect information about providers. With minimal user time and effort in providing reviews, user feedback can leverage information to protect both potential users (when choosing a provider) and legitimate ODR providers (in developing and maintaining their reputation).<sup>118</sup>

Users may contribute reviews of their experience with ODR providers on websites designed to aggregate reviews, and potential users may use that information to choose among providers or to decide whether to use one at all. Yelp is one example of a review aggregator, <sup>119</sup> but it could take different forms in the ODR context. Reviewers could remain anonymous or optionally associate a username, name, or even a complete profile linking dispute reviews and potentially relevant information about the user. A review aggregator could also use review guidelines <sup>120</sup> to improve reliability and legitimacy, and to avoid the fake review problem that might otherwise bolster the reputation of unscrupulous ODR providers. <sup>121</sup> It could allow users to rate reviews, such as on helpfulness, to encourage higher

ratings as effective non-legal protections in a regime of "one-way contracts"—contracts to which the consumer is bound, but the business is not. *Id.* While this regime is just a thought experiment, where there is one sophisticated party with power and one unsophisticated party without, interactions between the two seem in practice to approach the same lack of legal protections—consumers rarely have the resources to challenge terms of use and similar contracts which may contain an ODR clause. If users become aware of the impracticability or unavailability of legal remedies, the reputation of ODR providers can become similarly influential.

- 118. Less well-known ODR providers may benefit more from published user feedback. One study of restaurant reviews on Yelp and the Washington State Department of Revenue found that, as Yelp penetration increased, the market share of chain restaurants decreased. See Michael Luca, Reviews, Reputation, and Revenue: The Case of Yelp.com 18–19 (Harvard Business School, Working Paper No. 12-016), http://www.hbs.edu/research/pdf/12-016.pdf.
- 119. See 10 Things You Should Know About Yelp, Yelp, http://www.yelp.com/about (last visited Dec. 6, 2015).
- 120. For examples of user review guidelines, see *General Review Creation Guidelines*, Amazon, http://www.amazon.com/gp/community-help/customer-reviews-guidelines (last visited Apr. 20, 2015); *OpenTable.com Community Standards for Diner-Generated Reviews*, OpenTable, https://community.opentable.com/t5/FAQs-Knowledge-Base/OpenTable-com-Community-Standards-for-Diner-Generated-Reviews/ta-p/502 (last revised Apr. 7, 2015).
- 121. Cf. Kashmir Hill, I Created a Fake Business and Bought It an Amazing Online Reputation, Fusion (Sept. 15, 2015, 7:00 AM), http://fusion.net/story/191773/icreated-a-fake-business-and-fooled-thousands-of-people-into-thinking-it-was-real/.

quality reviews with more information. <sup>122</sup> A website could restrict reviews to verified users of the ODR provider, for example by requiring a single-use confirmation code given to the user by participating providers. If a website allows users to initiate the ODR process or make an inquiry with different providers directly through the website, with some confirmation process, it could also solicit reviews about the interaction shortly after, as OpenTable does with diners who have completed reservations at participating restaurants. <sup>123</sup> Verification systems could do more than simply confirm use of a particular ODR provider; they could prevent users from providing information that is confidential pursuant to an agreement, either by screening reviews or by limiting information that may be provided.

Social media has also been proposed as a supplement or alternative to litigation, as a means of pushing user-friendly policies. Facebook, Twitter, YouTube, blogs, and other social media channels provide groups and influential individuals with a tool to vindicate interests and pressure companies to change individual decisions or existing practices. However, social media campaigns may be less utilized in the ODR context because they rely on interconnected personal information, and disputants may be reluctant to publicly offer detailed information about the dispute or even admit to its existence.

User feedback may also take the form of complaint websites. Consumers have created websites designed exclusively to criticize a specific company, dubbed "complaint" or "gripe sites." These websites reflect sustained or extreme customer dissatisfaction and thus may be useful, not only for choosing providers, but also for triggering consumer watchdog, industry, or government investigation into the ODR provider's practices. A complaint website can generate substantial publicity; however, it also takes more user savvy to create and

<sup>122.</sup> See, e.g., Amazon's Top Customer Reviewers, Amazon, http://www.amazon.com/review/guidelines/top-reviewers.html/ (last visited Dec. 6, 2015) (helpful); How Do I Vote a Review as Useful, Funny, or Cool?, Yelp, http://www.yelp-support.com/article/How-do-I-vote-a-review-as-useful-funny-or-cool?l=en\_US (last visited Dec. 6, 2015) (useful, funny, cool); Nathan Grayson, Two New Steam Features You Might Not Have Noticed, Kotaku (Jan. 15, 2015), http://kotaku.com/two-new-steam-features-you-might-not-have-noticed-1679825757 (helpful, funny).

<sup>123.</sup> What Are OpenTable Ratings & Reviews, OpenTable, https://community.opentable.com/t5/FAQs-Knowledge-Base/What-are-OpenTable-Ratings-amp-Reviews/ta-p/127 (last revised Mar. 5, 2015).

<sup>124.</sup> See generally Tristan Morales, Social Media Campaigns as an Emerging Alternative to Litigation, 38 Rutgers Computer & Tech. L.J. 35 (2012).

<sup>125.</sup> See Jonathan L. Schwartz, Making the Consumer Watchdog's Bark as Strong as Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense, 16 Alb. L.J. Sci. & Tech. 59, 66–70 (2006) (discussing examples of general complaint websites and their development).

raises the risk of retaliation from the other party, particularly if the dispute was not resolved or the resolution was nonbinding. This form of review also creates a particular risk of sharing personal or dispute-related information in the course of crafting a story of indignity and injustice.

Valid concerns exist regarding reliability of information and the prospect of disinformation campaigns by users or competitors; <sup>126</sup> however, as in other arenas, consumers can guard against these dangers by being skeptical about feedback provided in forums or review websites where anyone may contribute.

## C. Consumer Protection Regulation and Provider Codes of Practice

Codes of practice and standards for ODR can serve as one component of a protection scheme. These safeguards already exist for ADR generally and may be adopted in response to consumer protection regulation or voluntarily. In many states, uniform acts standardize important features of dispute resolution processes, including arbitration, <sup>127</sup> collaborative law, <sup>128</sup> and mediation. <sup>129</sup> The American Bar Association (ABA) Section of Dispute Resolution provides model standards of conduct, codes of ethics, best practices, and more. <sup>130</sup> Several providers and certifiers have promulgated due process protocols and codes of practice to establish a baseline of fairness in arbitration and other ADR clauses. <sup>131</sup> If an alternative dispute resolution clause does not comply with the institution's protocols, that institution may request a waiver to excuse compliance with those provisions <sup>132</sup> or refuse to administer the case. <sup>133</sup>

<sup>126.</sup> See id. at 78.

<sup>127.</sup> See Arbitration Act (2000), Uniform Law Comm'n., http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000) (last visited Dec. 6, 2015).

<sup>128.</sup> See Collaborative Law Act, Uniform Law Comm'n., http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act (last visited Dec. 6, 2015).

<sup>129.</sup> See Mediation Act, Uniform Law Comm'n., http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited Dec. 6, 2015).

<sup>130.</sup> Policy & Standards, Am. Bar Assoc. Section of Disp. Resol., https://www.americanbar.org/groups/dispute\_resolution/policy\_standards.html (last visited Dec. 6, 2015) (compiling policy documents and model rules and standards).

<sup>131.</sup> See, e.g., Online Dispute Resolution Standards of Practice, ICANN Advisory Comm. of the Nat'l Ctr. for Tech. & Dispute (July 2009), https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf (proposing principles for ODR systems); Certification Values & Principles, Mediate.com, http://www.mediate.com/certification/pg1129.cfm (last visited Dec. 6, 2015).

<sup>132.</sup> See, e.g., American Arbitration Association, Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee (Apr. 17, 1998), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\_005014.

A common criticism of these protocols is that they lack a monitoring and enforcement mechanism, even within adopting providers. <sup>134</sup> Consumer protection regulations, which provide for enforcement and penalties if violated, may be under-enforced. <sup>135</sup> However, a recent study found that the practice is effective at identifying and responding to offending clauses, and has also led to waiver or revision of arbitration clauses. <sup>136</sup> Additionally, these codes create and reinforce norms within the industry, even if they are only binding on the providers that adopt them voluntarily.

If protocols apply to ADR generally, ODR falls within their scope. The limitations and special considerations of ODR warrant codes of practice and standards tailored to developing technologies used and corresponding risks to users. This is particularly true for potential dangers related to automated decision-making systems and artificial intelligence, where users may be less able to understand how the platform resolves the dispute.

#### D. Accreditation

Accreditation can broadly be understood as an information and trust service. Where users have a choice, they can apply market control. Easily identifiable and relevant information, and trust in that information, enables them to more confidently make choices without spending as much time sifting through the excess of information for what is relevant and accurate. As a result, they can avoid a potentially inferior default. For dispute resolution, the default could be costly litigation or no resolution at all.

In 2002, the ABA Task Force on Electronic Commerce and ADR recommended "creation of a structure or entity that acts to inform and educate lawyers, businesspersons and consumers on relevant issues," noting that one of the largest failures in business-to-consumer

<sup>133.</sup> See, e.g., id.; Judicial Arbitration and Mediation Services, Inc., JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness, (July 15, 2009), www.jamsadr.com/consumer-arbitration/ (requiring mandatory pre-dispute arbitration clauses between companies and consumers to comply with outlined standards of fairness).

<sup>134.</sup> See supra note 131.

<sup>135.</sup> See generally Kathleen S. Morris, Expanding Local Enforcement of State and Federal Consumer Protection Laws, 40 Fordham Urb. L.J. 1903 (2013).

<sup>136.</sup> Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289 (2012).

<sup>137.</sup> See Henry N. Butler & Jason S. Johnston, Reforming State Consumer Protection Liability: An Economic Approach, 2010 Colum. Bus. L. Rev. 1, 51 n.129 (2010), citing Jeff Sovern, Toward a New Model of Consumer Protection Statutes: The Problem of Increased Transaction Costs, 47 Wm. & Mary L. Rev. 1635, 1705–09 (2006).

disputes is the absence of structures where "consumers and businesspersons can obtain the information necessary to make informed choices about e-commerce and ODR."<sup>138</sup>

An accrediting body, such as the one proposed by the ABA, provides information about accredited bodies to a group of users and may offer other services or information: general guidance about ODR, evaluations of providers listed, certification for qualifying providers, or a portal to directly access an ODR platform. This can go beyond text to also include interactive forms or natural human assistance in choosing a provider.

Accreditation might be conducted or funded by the government (e.g., through legislation, agency regulation and enforcement). Accreditation may also be done in part by consumer organizations, advocacy groups that protect and serve the interests of consumers. These organizations might work directly with consumers by providing information or assistance with consumer activities, such as choosing among services or filing complaints. Consumer organizations might also help indirectly by establishing and enforcing consumer rights through protests, litigation, campaigning, lobbying, or general watchdog activities. More generally, a non-profit organization could serve those same interests. While the accrediting body might also be a private organization, this raises neutrality concerns, as revenue may come from advertising or fees related to accreditation (e.g., listing, evaluation, certification), and the accrediting body might itself be an ODR provider or have other biases.

The ultimate success of an accreditation scheme depends on consumer adoption and, in turn, trust and confidence in the platform. <sup>139</sup> Ease of use and completeness may suffice for an accrediting body that simply provides information and competes with others on how comprehensive that information is. However, an accrediting body with any evaluative role must distinguish its evaluation as meaningful and trustworthy.

This Section discusses the varied roles that an accrediting body may take, closely following the accreditation categories set forth by

<sup>138.</sup> ABA Task Force on Electronic Commerce and ADR, Addressing Disputes in Electronic Commerce, 25, 27 (2002), https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf.

<sup>139.</sup> See, e.g., Thomas Schultz, Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust, 6 N.C. J.L. & Tech. 71 (2004).

Gabrielle Kaufmann-Kohler and Thomas Schultz.<sup>140</sup> While these distinguish among roles primarily according to the amount of control accorded to users in making an informed decision (e.g., amount of information provided, degree of evaluation, enforcement of standards), accreditation may take many forms and characteristics across these categories.

## 1. Directory or Guide

A directory is a compilation of ODR providers or platforms and their contact information. A guide provides additional information, such as the nature of disputes handled, type of ODR, and technical requirements. These are weak forms of accreditation because they provide information—most likely directly from the ODR provider—with little context. There is no evaluation or recommendation by those more familiar with dispute resolution as to which platforms are better overall or for specific circumstances, only a determination that the provider effectively provides the services that it claims to provide.

A directory or guide may restrict the listing to providers that share certain characteristics, depending on the nature of the directory. For example, a guide to online mediation would list only platforms offering online mediation or similar processes. As a result of the limited evaluative role, it may provide a starting point for researching ODR providers or platforms but, without verification or evaluation, is unlikely on its own to inspire user confidence in the options listed.

Government agencies have provided this type of information in the ADR and ODR context. For example, in 2005, the U.S. Federal Trade Commission and consumer protection agencies in twenty countries created an International ADR directory to help consumers locate a neutral provider to resolve cross-border e-commerce disputes.<sup>141</sup>

<sup>140.</sup> Kaufmann-Kohler & Schultz, supra note 31, at 121–30 (discussing mechanisms of exerting control over ODR providers). Their categories are based on the work of Mirèze Philippe, who proposed five types of services that information centers could provide to make information about ODR providers available to users. See Mirèze Philippe, Where Is Everyone Going with Online Dispute Resolution (ODR)?, Int'l Bus. L.J. 167, 183–84 (2002), http://www.ombuds.org/cyberweek2002/ARTICLE%20ODR1 .pdf. The ABA Task Force on Electronic Commerce and ADR also elaborated on informational roles that the iADR center could fill. See ABA Task Force on Electronic Commerce and ADR, supra note 138.

<sup>141.</sup> Press Release, Federal Trade Commission, FTC, International Partners Unveil New Tool To Help Consumers Resolve Cross-border Problems (Feb. 14, 2005), https://www.ftc.gov/news-events/press-releases/2005/02/ftc-international-partners-unveil-new-tool-help-consumers-resolve.

#### 2. Evaluator

Evaluating accreditors are similar to directories and guides, with one difference: They evaluate the ODR provider or platform to ensure that minimum requirements are met before including them in the listing. This offers a slightly stronger form of accreditation, as there are standards beyond existence or mere provision of information. If the accreditor is trusted, users may rely on the mere listing as a form of quality control.

The evaluation may be the product of investigation by the accrediting body. For example, the European Commission and its member states maintain a database of ADR and ODR bodies, but require that they conform to the Commission's "quality criteria" on dispute resolution. The evaluation may also be based on user feedback submitted to review aggregators or directly to the accrediting body.

## 3. Certifier

Certifiers also evaluate ODR providers or platforms, but take the additional step of allowing each certified provider or platform to publicize the certification as a trustmark (e.g., on their website or promotional materials). Trustmarks signal that minimum standards of fairness and other traditionally held ODR values have been met, but without requiring the user to invest time in researching and verifying information about the ODR providers. This is particularly important for one-shot or unsophisticated disputants, who are unlikely to have sought counsel and thus may be unaware of potential biases or values to consider. Trustmarks also overcome the lack of publicity suffered by directories, guides, and evaluators, which rely on the ability of potential users to locate their materials.

The nature of advertising and certification may bring certification accreditation within the ambit of government regulation. Agreement on standards for certification nationally across states and internationally across countries—at least for cross-border disputes—would encourage uniformity and predictability by requiring different providers to harmonize their procedures and policies in order to receive certification. More trusted accrediting bodies could even have enough leverage to impose strict requirements and provide more

<sup>142.</sup> ADR in Your Country, Eur. Comm'n, http://myadr.eu/adr-in-your-country/(last visited Dec. 6, 2015).

<sup>143.</sup> For more discussion of the dangers of lack of knowledge, specifically due to nondisclosure and failure to obtain counsel, see discussion *infra* Part II.B.2.

meaningful certification. Together, these steps make certification a strong form of accreditation.

Private and public trustmarks might proliferate in e-commerce and ODR marketplaces, creating a confusing multiplicity of trustmarks that fail to inspire consumer confidence or recognition. Trustmarks and certifications with minimal requirements may appropriately be viewed as meaningless. Where trustmarks are issued without substantial verification or trustworthiness and thus may be easily faked, the presence of a trustmark may even signal a fraudulent website rather than a "genuine" trusted one. 144

## 4. Implementer

While not strictly a form of accreditation, implementation of an ODR platform by a trusted entity can satisfy the same user confidence interest. Public ODR platforms implemented by governments, discussed above, are perfect examples of implementation accreditation.<sup>145</sup>

An implementer directly controls the dispute resolution process (e.g., filing, forms, appeals) and enforces awards through its implementation of an ODR system. If it also offers evaluation or certification, it can preserve user choice and control and continue to meet informational needs. While concurrent implementation and evaluation or certification may appropriately give rise to bias concerns, users may perceive government and non-profit implementers as more neutral sources of information.

Implementation has been successful for entities that settle international disputes. For example, the International Chamber of Commerce, which resolves various international business disputes, developed the NetCase platform for managing International Court of Arbitration proceedings in a secure online environment. 146

Certification and implementation of accredited dispute resolution service providers have also been successful in the realm of trademark-based domain name disputes. All domain name registrars must be accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), which administers registries of Internet protocol identifiers in part by distributing top-level domains (e.g., .biz, .com,

<sup>144.</sup> See generally Benjamin Edelman, Adverse Selection in Online "Trust" Certifications and Search Results, 10 Electronic Commerce Research & Applications 17 (2010).

<sup>145.</sup> See Part I.B.2 (discussing examples).

<sup>146.</sup> Thomas Schultz, Information Technology and Arbitration: A Practitioner's Guide 93-100 (2006).

.info, .name, .us) and IP addresses. ICANN policy, enforced by accredited registrars, requires all generic top-level domain registrants to agree to be bound by the Uniform Domain Name Dispute Resolution Policy (UDRP),<sup>147</sup> The eUDRP initiative, approved in 2009, requires all pleadings to be filed electronically.<sup>148</sup>

The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center was the first ODR provider to be accredited by ICANN and the first to receive cases under the UDRP policy; a total of five providers are currently approved. <sup>149</sup> The accreditation process requires potential dispute resolution service providers to show "ability to handle proceedings in an expedited, global, online context in an orderly and fair manner." <sup>150</sup>

Originally there was criticism based on perceived delay and expense, potential for abuse, and lack of finality, but the UDRP has provided a framework for numerous and diverse disputes since its creation in 2009. In 2014 alone, over 30,000 cases were filed with WIPO, involving parties from over one hundred countries and conducted in sixteen different languages. Part of its success may be due to the inherent online nature of domain name disputes and the difficulty and cost of handling such disputes in person. Some providers also benefit from specialized knowledge in intellectual property and experience with UDRP dispute resolution administration. 152

<sup>147.</sup> WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), WORLD INTELLECTUAL PROP. OFFICE, http://www.wipo.int/amc/en/domains/guide (last visited Dec. 6, 2015) [hereinafter WIPO Guide to UDRP]. Many country code top level domains have voluntarily adopted the UDRP, while others, including the United States, have adopted variations. See Arbitration and Mediation Center ccTLD Database, WORLD INTELLECTUAL PROP. OFFICE, http://www.wipo.int/amc/en/domains/cctld\_db/output.html (last updated Dec. 3, 2015).

<sup>148.</sup> *eUDRP Rules*, World Intellectual Prop. Office, http://www.wipo.int/amc/en/domains/rules/eudrp/ (last visited Dec. 6, 2015).

<sup>149.</sup> For current and former providers, see *List of Approved Dispute Resolution Service Providers*, ICANN, https://www.icann.org/en/help/dndr/udrp/providers (last visited Dec. 6, 2015).

<sup>150.</sup> Information Concerning Approval Process for Dispute-Resolution Service Providers, ICANN, https://www.icann.org/en/help/dndr/udrp/provider-approval-process (last visited Dec. 6, 2015).

<sup>151.</sup> Press Release, World Intellectual Property Office, Telecoms Firms Lead WIPO International Patent Filings (Mar. 19, 2015), http://www.wipo.int/pressroom/en/articles/2015/article\_0004.html.

<sup>152.</sup> See WIPO Guide to UDRP, supra note 147.

#### E. Judicial Review

Judicial review can serve as another protection mechanism for users who challenge agreements binding them to ODR and accompanying clauses that contain potentially unfair procedures. Disputants can seek judicial review of arbitral awards, which are meant to be final, if the reason for entering arbitration or the agreed-upon process was unconscionable. Courts may protect disputants and their interests on a case-by-case basis, in narrowly tailored circumstances, or in a broader manner. This can be done by finding grounds for review, determining the proper scope of judicial review, and even by relying on the standards established by the Federal Arbitration Act and other statutes, common law, and any provisions negotiated by the parties themselves.

As one of many examples, courts are very deferential to click-wrap dispute resolution clauses, upholding them in the face of numerous challenges based on unconscionability. Courts might also hold ODR providers to higher standards, similar to those imposed by fiduciary duties owed by lawyers, guardians, corporate directors, and financial advisors. While the provider is not an advocate and simply provides a platform, a court could treat it as having some duty of care toward disputants in providing a platform that is neutral and otherwise satisfies important values and principles of ODR.

#### V. Conclusion

Dispute resolution should abide by traditional values of fairness and equal access to justice, be it litigation or ODR. Just as pro se litigants receive procedural safeguards in disputes handled by the judiciary, so should users receive basic protections in disputes handled by ODR providers. This is especially true for those who have neither the resources nor leverage to bargain for meaningful legal protections and who may be unfamiliar with judicial and extrajudicial options and procedures. By providing an overview of methods and technologies, principles, and potential options for user mechanisms in one place, this Note aims to create a framework for government, industry, and even users to implement user safeguards in ODR.