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Dispute Resolution in Cyberspace: Demand for New Forms of ADR

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I. INTRODUCTION

The Internet has heightened interest in alternative dispute resolution (ADR). Three characteristics of the Internet make traditional dispute resolution through administrative agency and judicial procedures unsatisfactory for many controversies that arise in Internet-based commerce and political interaction. The Internet's low economic barriers to entry invite participation in commerce and politics by small entities and individuals who cannot afford direct participation in many traditional markets and political arenas. These low barriers to entry, and greater participation by individuals and small entities, also mean a greater incidence of small transactions. When dispute resolution costs are high, as they are for traditional administrative and judicial procedures, the transaction costs of dispute resolution threaten to swamp the value of the underlying transaction,¹ meaning on the one hand that victims are less likely to seek vindication of their rights and, on the other hand, that actors and alleged wrongdoers may face litigation costs that outweigh the advantages of their offering goods and services in the new electronic markets. To realize the potential of participation by small entities and individuals and of small transactions, it is necessary to reduce the costs of dispute resolution.

Second, the geographic openness of electronic commerce makes stranger-to-stranger transactions more likely. The absence of informal means of developing trust, as when one shops regularly at the local bookstore, means that both merchants and consumers will be inhibited in engaging in commerce unless they have some recourse if the deal goes sour.

Third, the Internet is inherently global. Offering to sell goods on a web page published on a server physically located in Kansas is as visible to consumers in Kosovo as in Kansas. In other words, it is difficult to localize injury-producing conduct or the injury itself in Internet-based markets or

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¹ A rational person will not engage in a \$5,000 or \$10,000 lawsuit over a \$200 transaction.

political arenas. Traditional dispute resolution machinery depends upon localization to determine jurisdiction.² Impediments to localization create uncertainty and controversy over assertions of jurisdiction. That uncertainty has two results. It may frustrate communities that resent being unable to reach through their legal machinery to protect local victims against conduct occurring in a far-off country. It also subjects anyone using the Internet to jurisdiction by any of nearly 200 countries in the world and, in many cases, to their subordinate political units.

Alternative dispute resolution, including not only arbitration and mediation but also a wider range of alternatives such as credit card chargebacks, escrow arrangements, complaint bulletin boards, and complaint aggregation services culminating in official enforcement activity, helps respond to these challenges in two ways. First, ADR can be designed to be much cheaper than traditional procedures. It also is inherently transnational when those agreeing to participate in the ADR process are in different countries.

Appropriately designed ADR mechanisms offer lower costs, reassure participants, and solve the jurisdictional problem because use of them manifests consent. As important, many forms of ADR involve a readily available fund (usually the payment for the disputed transaction) as a way of satisfying a decision for either disputant. The availability of a fund often is underestimated as a consideration. This consideration may explain why intermediary-provided dispute resolution, such as credit card chargebacks and escrow arrangements, prove more attractive in practice than independent third-party mechanisms such as arbitration or mediation. The successful party to an arbitration still must be concerned about the enforceability of an arbitration award against a reluctant loser.

This Article offers criteria for further development of Internet-based ADR, relating the criteria to elements of procedural due process. It provides an overview of developments in cyberspace that crystallize ideas for effective ADR in this new commercial and political space, including the Virtual Magistrate (VMAG), judicial and administrative agency public access techniques, the Better Business Bureau online (BBBOnline), World Intellectual Property Organization (WIPO) dispute resolution for trademarks/domain name disputes, and consumer techniques such as credit card chargebacks and eBay's escrow arrangements.

The Article explains why disputes between merchants and consumers present greater challenges than business-to-business disputes, necessitating

² See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 401 (1987) (describing bases for jurisdiction).

public law frameworks for private dispute resolution systems. It then concludes by explaining how systems can be constructed that meet these criteria while being linked to other new techniques for hybrid international regulation of Internet activities.

II. CRITERIA

The criteria for Internet-based dispute resolution depend on the type of dispute resolution contemplated. Criteria appropriate for arbitration are not necessarily appropriate in every respect for mediation or credit card chargeback systems. Because arbitration is the most formal and comprehensive form of dispute resolution resulting in a binding decision, however, it is useful to begin with criteria for arbitration and then to consider how those criteria should be relaxed or otherwise modified for "softer" forms of dispute resolution.

A. Arbitration

Arbitration is a form of adjudication. Basic concepts of adjudicative due process³ provide an appropriate starting point for developing online arbitration criteria. Shortly after the U.S. Supreme Court's decision in *Goldberg v. Kelly*,⁴ holding that the due process clause of the U.S. Constitution prohibits termination of social benefits without a hearing meeting the criteria of procedural fairness, Judge Henry J. Friendly wrote an article in the *University of Pennsylvania Law Review* entitled *Some Kind of Hearing*.⁵ In this article, Friendly defined eleven requirements of procedural due process that can be applied to adjudicative procedures.⁶ He did not suggest that all eleven must be present in order for due process to be satisfied; rather, his list of procedural elements represents a kind of menu.⁷

³ See U.S. CONST. amends. V, XIV. The Fifth and Fourteenth Amendments to the U.S. Constitution require procedural due process only when the state deprives a person of "life, liberty, or property." *Id.* Most of the disputes considered in this Article do not involve governmental deprivation. Nevertheless, procedural due process provides a conceptual framework for evaluating the fairness and adequacy of private dispute resolution.

⁴ 397 U.S. 254 (1970).

⁵ See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

⁶ See *id.* at 1279-91.

As one moves down the list, more formality and more fairness are present, albeit at increased cost.

Judge Friendly's first criterion, an unbiased decisionmaker, is the most rudimentary element of due process.⁸ In the online arbitration context, this means that the decisionmaker for dispute resolution must be someone other than the person who made the decision leading to the dispute. Widely accepted arbitration systems, such as those defined by the American Arbitration Association (AAA)⁹ and by the International Chamber of Commerce (ICC),¹⁰ maintain rosters of qualified arbitrators who have been screened to ensure the absence of bias. Online dispute resolution systems similarly should begin with rosters of qualified and unbiased decisionmakers, with appropriate background information available online, to facilitate review and selection of arbitrators by disputants.

Judge Friendly's second element, notice and a statement of reasons for the initial action giving rise to the dispute,¹¹ is linked conceptually with his third element, the opportunity to present reasons why the disputed action should not be taken.¹² Both these elements represent pleading requirements.¹³ They contemplate that both claimant and respondent set forth their positions, thus defining the controversy to be resolved. In some controversies, such as ones involving claims of fraud, the burden of proof, and therefore the burden of pleading, is placed on the claimant. As Federal

⁷ Selections from the "menu" depend on a pragmatic balancing of the magnitude of the deprivation resulting from erroneous decisions, the efficacy of a particular "ingredient" from the menu in improving accuracy, and the cost to the dispute resolution system of affording additional procedural elements. *See Matthews v. Eldridge*, 424 U.S. 319, 347-48 (1975).

⁸ *See Friendly*, *supra* note 5, at 1279-80.

⁹ *See American Arbitration Association* (visited Apr. 14, 2000) <<http://www.adr.org>>.

¹⁰ *See International Chamber of Commerce* (visited Apr. 14, 2000) <<http://www.iccwbo.org>>.

¹¹ *See Friendly*, *supra* note 5, at 1280-81. Judge Friendly wrote in the context of *Goldberg v. Kelly*, 397 U.S. 254 (1977), in which the dispute was triggered by cutting off welfare benefits. In the ordinary civil litigation context, it is the plaintiff who seeks a change in the status quo. In that context, the second element can be understood as a requirement that the plaintiff give reasons why the law justifies a judgment in the plaintiff's favor.

¹² *See Friendly*, *supra* note 5, at 1281. In the civil litigation context, the third element represents the defendant's opportunity to answer the complaint, presenting legal or factual defenses.

¹³ To characterize these elements of due process as pleading requirements does not suggest that writings are necessary; pleading in this sense may be entirely oral.

Rule of Civil Procedure 9 requires, “fraud must be pleaded with particularity.”¹⁴

After the claimant sets forth the particulars of the alleged fraud, the respondent should be able to deny the allegations or offer “new matter”—additional factual allegations that would exonerate the respondent from legal liability. In other types of controversies, such as a complaint over removal of material from a web server, the burden of proof and therefore of pleading most appropriately rests with the respondent. Pleading obligations should be organized so that someone whose web page is taken down can protest the action through an online arbitration mechanism, thereby triggering an obligation on the part of the respondent to explain why the page was taken down. Then the complainant can challenge the reasons offered by the respondent.

The first three Friendly elements are essential for any online arbitration system. They also may be sufficient for simple claims. Indeed, in many instances, an exchange of formal positions in the virtual presence of an unbiased decisionmaker will be enough to permit a settlement because these first three elements permit the parties to understand each others’ positions more concretely than they may have before exchanging their position statements or pleadings.

In other cases, however, the first three Friendly elements will not be enough, and the online arbitration process must include other elements from Judge Friendly’s list. The fourth element, an opportunity to present evidence, including witnesses, in support of one’s position, is only appropriate to help resolve factual disputes.¹⁵ In order to make this element meaningful, some procedural device should be available to define the factual issues in dispute, lest the fourth element deteriorates into an unfocused group debate. One possibility is for the arbitrator, after reviewing the pleadings, to issue a statement defining disputed facts and the law to be applied to the facts once determined. This procedural device is akin to a partial summary judgment¹⁶ or a final pretrial order,¹⁷ although in the online arbitration context it can be much simpler and briefer than a typical partial summary judgment or pretrial order in federal court practice.

As with the judicial process for developing pretrial orders, parties wishing to call witnesses should be required to relate the expected witness

¹⁴ FED. R. CIV. P. 9(b).

¹⁵ See Friendly, *supra* note 5, at 1282–87.

¹⁶ See FED. R. CIV. P. 56.

¹⁷ See FED. R. CIV. P. 16.

testimony with particular facts in dispute. The arbitrator should have the power to limit the number of witnesses in the interest of efficiency. How witnesses should be heard presents a technological challenge. The simplest technologies, e-mail exchanges and web-based discussion spaces, can be used when written statements by witnesses are sufficient. They also are sufficient for textual documentary evidence such as subscriber agreements. The process is equivalent to that in common law and civil law judicial procedure for deciding cases based on affidavits and exhibits thereto.

In some but not all cases, witness credibility will be important. When that is so, some mechanism must be available to allow the arbitrator to observe witness demeanor and thereby to judge credibility. The simplest but most expensive possibility is to take these cases "offline" and schedule a live face-to-face hearing at which witnesses can testify. But this is not the only possibility. Increasingly, judicial and formal administrative agency proceedings allow witnesses to testify via video conference or video recording.¹⁸ As the bandwidth of Internet connectivity improves, it is feasible to use inexpensive video and audio technology to allow witnesses to testify over the Internet with their voices and images available to the disputants and to the decisionmaker. Video cameras, microphones, speakers, and capture (digitization) cards for desktop and portable computers are available now for about \$150. Online arbitration systems should be designed to accommodate this kind of evidence when the parties have the necessary hardware and bandwidth.

Judge Friendly's fifth element, the right to know opposing evidence,¹⁹ and sixth element, right to cross-examine opposing witnesses,²⁰ elaborate on the notice and witness presentation elements. Both discovery and cross-examination may be conducted by electronic means, such as e-mail exchanges with attachments and Internet-based telephone or video conferencing.

Judge Friendly's seventh element, limiting the decision to that which can be justified by the record,²¹ helps to ensure that the hearing process is not a sham, but it also increases the burden on the parties' counsel to get everything in the record necessary to support their positions. The existence of a record is also necessary to permit complete appellate review, in those cases for which some form of appeal is provided. Imposing a record

¹⁸ See FED. R. CIV. P. 30(b)(7) (allowing telephonic depositions by agreement of parties).

¹⁹ See Friendly, *supra* note 5, at 1282-87.

²⁰ See *id.*

²¹ See *id.* at 1287-91.

requirement for online arbitration may be less onerous than imposing the same requirement for live dispute resolution. When parties argue their positions and present witnesses orally in the physical presence of a dispute resolver, it is cheaper if no verbatim record must be made. In contrast, online dispute resolution automatically generates a record because textual submissions and oral submissions transmitted electronically are fixed (recorded) by the technology. Accordingly, it is appropriate to have a basic record requirement in online arbitration.

The eighth element, the right to be represented by counsel,²² has few implications for the technical design of online arbitration systems; instead, the availability of this right depends on a policy judgment. Allowing counsel increases the cost of dispute resolution procedures. A party wishing to minimize costs nevertheless may be unwilling to suffer the disadvantage associated with being unrepresented while the opponent is represented. Moreover, use of counsel interposes delay. Parties must be allowed time to find and retain counsel, and counsel must be allowed time to become familiar with the case. When disputants act without counsel, they may proceed directly to define their dispute before the decisionmaker.

But in all but the simplest cases, counsel is invaluable in helping a naive disputant understand the procedure, the relevant rules for decision, and the most effective way to present a case. Online arbitration systems should allow for counsel, perhaps subject to control by the arbitrator, who may determine in simple cases that no counsel is permitted.

Judge Friendly's ninth and tenth requirements, that the decisionmaker prepare a record of evidence presented²³ and give reasons supporting the decision,²⁴ are appropriate for online arbitration. In very simple administrative conference-type proceedings, and in some labor arbitrations, the reasoned decision requirement imposes additional burdens and costs on the decisionmaker and is unnecessary to the perceived fairness and legitimacy of the process. A decisionmaker can meet with the parties, hear their stories, and say, "I have listened carefully and it is my overall judgment that Party A should win."

But the benefits of reasoned decisionmaking outweigh the costs for online arbitration. Online arbitration is a new process and therefore likely to be mistrusted to some extent by early users. Reasoned decisionmaking will alleviate some of the mistrust. Moreover, if the public has access to online

²² See *id.* at 1291–92.

²³ See *id.*

²⁴ See *id.* at 1293–94.

arbitral decisions, decisions without accompanying reasons are only of modest utility; those wishing to understand the developing decisional law must infer the reasons for decisions from the parties' pleadings and from the testimony. Moreover, appellate review with any degree of deference to the original decisionmaker is almost impossible without reasoned decisionmaking.

Another element not explicitly enumerated by Judge Friendly, public access to the proceedings,²⁵ implicates conflicting interests. Many disputants prefer commercial arbitration over judicial conflict resolution precisely because arbitration proceedings need not be open to the public. Closed proceedings allow presentation of proprietary material and avoid the risk that public knowledge of one dispute may trigger the presentation of other disputes. On the other hand, the democratic tradition mistrusts secret proceedings, and the legitimacy and acceptability of online arbitration may be diminished if its proceedings are not opened to public scrutiny at some point. Moreover, most advocates of online dispute resolution for Internet governance contemplate the development of a body of decisional law to help people understand the ground rules for conduct. Only if decisions are available to the public can this aspiration be realized.

But transparency need not occur at the outset of an online arbitration. As was the case with the Virtual Magistrate system, parties may present their positions and evidence to the arbitrator in closed electronic spaces with the decision in the record being opened up to the public only after a decision is made in the case.²⁶

Judge Friendly's eleventh element, the availability of appellate review,²⁷ contemplates a range of possibilities. One polar position is to allow no appellate review at all when the parties have so stipulated. A slightly more intrusive possibility is represented by the extremely narrow grounds for judicial review of arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in which an arbitration decision may not be reviewed on the merits, but can be overturned only for fraud, gross irregularity in procedure, or the absence of jurisdiction based on the arbitrator's having exceeded the scope of the

²⁵ See *id.* at 1279–91.

²⁶ See Chicago-Kent College of Law, Illinois Inst. of Tech., *VMAG: Online Dispute Resolution* (visited Apr. 15, 2000) <<http://www.vmag.org>>.

²⁷ See Friendly, *supra* note 5, at 1294–95.

agreement to arbitrate.²⁸ The most intrusive possibility, but also the least controversial in terms of getting online arbitration started, is represented by the WIPO guidelines, in which an online arbitration decision is without prejudice to a subsequent decision by a traditional judicial or administrative agency tribunal.²⁹

Opening up online arbitration to a subsequent de novo decision by another tribunal does not necessarily vitiate entirely the effect of online arbitration. The experience of court-annexed arbitration when state constitutions mandate an opportunity for subsequent de novo jury trial demonstrates that many disputes stop at the arbitration stage. The parties perceive the initial decision as representing a reasonably accurate prediction of what a jury will do, and the substantial additional transaction costs of proceeding to a jury trial outweigh the expected value of the result. It may be that the most prudent course for proponents of online arbitration is to allow de novo trials in other tribunals—at least for a period of time, until online arbitration has proven its acceptability.

B. Mediation

The transcript of the first online ombuds case³⁰ provides a good example of online mediation. Analysis of the interaction disclosed by that transcript offers a concrete context for evaluating mediation under Judge Friendly's elements of due process. The first element—an unbiased decisionmaker³¹—is appropriate and essential for effective mediation, although mediation does not vest the neutral party with actual decisionmaking power. Neutrality is essential for the kind of trust that allows mediation to work.

The second and third elements³² also are appropriate for mediation; indeed, the mediation process is focused on facilitating party communication about the reasons favoring and opposing proposed action. The difference between mediation and arbitration is that arbitration structures the second

²⁸ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 40–41 [hereinafter New York Convention].

²⁹ See WIPO, *Guidelines for Online Arbitration Decisions* (visited Mar. 27, 2000) <<http://arbiter.wipo.int/domains/access/index.html>>.

³⁰ See *Transcript of a Dispute: The Web Site Developer and the Newspaper* (visited Apr. 15, 2000) <<http://aaron.sbs.umass.edu/center/ombuds/narrative1.html>>.

³¹ See Friendly, *supra* note 5, at 1279–80.

³² See *id.* at 1280–81.

and third elements while mediation allows a more fluid process. Mediation seeks a kind of conversation.

For the remaining elements in Judge Friendly's system,³³ arbitration and mediation diverge completely. Rarely would mediation involve the presentation of evidence through documents or third-party testimony. Counsel is less appropriate for mediation because mediation seeks to engage the parties directly in assessing how their interests can be reconciled. Privacy rather than public scrutiny helps the parties communicate candidly with the mediator and with each other. Usually there is no record, and there is no third-party decision to be bound by a record or to be subjected to appellate review.

III. EXPERIENCE

The Virtual Magistrate³⁴ is an online arbitration system initially implemented in the fall of 1996. VMAG resulted from discussions organized in October 1996 by David R. Johnson, a partner at Wilmer, Cutler & Pickering, former president of Counsel Connect, and former president of the Electronic Frontier Foundation.³⁵ Mr. Johnson, Robert M. Gellman, former chief counsel of the Government Operations Committee in the House of Representatives, representatives of the American Arbitration Association (AAA), counsel for America Online and CompuServe, as well as this author, were concerned about the dilemma confronting online service providers such as America Online when they were accused of allowing access to illegal material, such as postings or e-mail messages that infringed copyright, invaded privacy, represented consumer fraud, or were defamatory. In such circumstances, the service provider could choose to remove the accused material, potentially exposing the service provider to liability in favor of the author or sponsor,³⁶ or the provider could allow it to remain, resulting in potential liability to the accuser. Now, the Online Copyright Infringement Liability Limitation Act³⁷ provides a safe harbor for service providers that implement detailed procedures for removing material.³⁸ In 1996, however,

³³ See *id.* at 1281-91.

³⁴ See Chicago-Kent College of Law, Illinois Inst. of Tech., *VMAG: Online Dispute Resolution* (visited Apr. 15, 2000) <<http://www.vmag.org>>.

³⁵ See *id.*

³⁶ See generally, e.g., *Jessup-Morgan v. America Online, Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998).

³⁷ 17 U.S.C. § 512 (Supp. IV 1998).

³⁸ See *id.*

no such statutory safe harbor existed. The designers of VMAG sought to provide a mechanism for a quick and inexpensive interlocutory³⁹ dispute resolution mechanism to decide whether accused material should be removed immediately or should be allowed to remain.

While the design of VMAG may not have met all the requirements of the New York Convention⁴⁰ or the Federal Arbitration Act,⁴¹ and thus VMAG decisions may not have the same preclusive effect as arbitration awards, VMAG designers nevertheless thought that the existence of an interlocutory decision by a third party would show that the service provider acted in good faith in dealing with accused material and that the decision would be given some weight by a court ultimately deciding the dispute on the merits, or that, at the least, it would avoid damages linked to bad faith or indifference.⁴²

From the beginning, VMAG was implemented entirely through the World Wide Web, with e-mail communication as a backup. No aspect of the procedure involved paper submissions or reports or face-to-face contact. Disputes were handled pursuant to procedural rules posted on the VMAG website.⁴³ A complainant could initiate a VMAG case by clicking on an e-mail button on the website to post a complaint.⁴⁴ Complaints thus posted initially were screened by an AAA staff member who determined whether the complaint facially was within the jurisdiction of VMAG.⁴⁵ An affirmative determination resulted in the AAA staff member selecting a virtual magistrate from a roster maintained by the AAA.⁴⁶ One could be

³⁹ Interlocutory signifies a preliminary or provisional decision, in the expectation that more comprehensive litigation on the merits will follow.

⁴⁰ See generally New York Convention, *supra* note 28, 21 U.S.T. at 2517, 330 U.N.T.S. at 38.

⁴¹ 9 U.S.C. §§ 1–16 (1994).

⁴² See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993) (finding a \$10 million punitive damage award not “grossly excessive” given the bad faith of petitioner); *Roy Export Co. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1153 (S.D.N.Y. 1980) (finding punitive damages were appropriate if defendant acted with reckless indifference to plaintiffs’ rights).

⁴³ See Chicago-Kent College of Law, Illinois Inst. of Tech., *The Virtual Magistrate Project: Basic Rules* (visited Apr. 15, 2000) <<http://www.vmag.org/docs/rules.html>>.

⁴⁴ See Chicago-Kent College of Law, Illinois Inst. of Tech., *VMAG: Online Dispute Resolution* (visited Apr. 15, 2000) <<http://www.vmag.org>>.

⁴⁵ See Chicago-Kent College of Law, Illinois Inst. of Tech., *The Virtual Magistrate Project: Concept Paper* (visited Apr. 15, 2000) <<http://www.vmag.org/docs/concept.html>>.

⁴⁶ See *id.*

listed on the roster by qualifying under general AAA rules to be an arbitrator and also demonstrating familiarity with Internet technology.⁴⁷

Once a virtual magistrate was selected, the magistrate would forward the complaint to the respondent and any affected third parties, such as an online service provider or the originator of the accused material.⁴⁸ Respondents were given several hours to respond through the website. The virtual magistrate then was obligated to make a decision within seventy-two hours.⁴⁹ Until a decision was made, the record of the proceedings was not open to the public, but a decision triggered an automatic routine that moved the complaint, the response, the decision, and other pertinent materials to a part of the website open to the public.⁵⁰ In the first two years of VMAG's existence, only one case was decided.⁵¹ Several dozen other complaints were submitted, however, and a few of these resulted in settlements. Most of the others were determined to be outside the scope of VMAG jurisdiction.

In late 1996 and early 1997, Peter E. Sand, now with the Pennsylvania Attorney General's Office, sought to induce participants in Internet electronic commerce in eastern Pennsylvania to participate in VMAG. Though interest was expressed, no actual use resulted. VMAG received extensive print publicity, but no service providers provided actual links on their own sites to VMAG. In 1999, responsibility for VMAG was transferred from Villanova University School of Law to Chicago-Kent College of Law at the Illinois Institute of Technology.⁵² AAA interest in the project had waned in connection with personnel changes at AAA, and Professor Pam Kentra at Chicago-Kent took over responsibility for the project, revising the rules to make VMAG available for a wider range of disputes.

The features of VMAG represent a logical use of the Internet and the Web for alternative dispute resolution involving relatively simple disputes. The initial rules confine the dispute resolution system to a very narrow set of cases, resulting in the rejection of a number of complaints in the early years of the system's operation. Even after the rules were modified to expand the

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See Chicago-Kent College of Law, Illinois Inst. of Tech., *The Virtual Magistrate: Sample Opinion* (visited Apr. 15, 2000) <<http://www.vmag.org/sample.html>> (forthcoming).

⁵² See Chicago-Kent College of Law, Illinois Inst. of Tech., *The Virtual Magistrate Project: Frequently Asked Questions* (visited Apr. 15, 2000) <<http://www.vmag.org/docs/FAQ.html>>.

scope of VMAG jurisdiction, however, few complaints were filed and no additional disputes were decided.

IV. WHY DID VMAG NOT PROVE MORE POPULAR?

Over three years of existence, VMAG has not attracted many disputes. Understanding why can help designers of ADR for electronic commerce design more effective systems.

One reason for VMAG's limited popularity is that initial predictions that online service providers would refer large numbers of cases to VMAG proved to be wrong. America Online in particular, which was a strong original proponent of developing the VMAG system, found that its own internal terms-of-service complaint mechanisms resolved most controversies successfully and that the feared exposure to conflicting liability before outside fora did not materialize. Keeping complaints within the internal system gave AOL and other service providers complete control over the outcome of the complaint process. Referring the complaints to VMAG would result in loss of control. Also, the failure of significant numbers of complainants to submit disputes to VMAG is likely due to the fact they did not know about VMAG—at least they had no easy way to file a complaint with VMAG, as contrasted with filing complaints with service providers directly or in other fora.

Two conclusions can be drawn from the VMAG experience, both applicable to online dispute resolution systems in general. First, proponents of online ADR must recognize that whoever has superior economic power in a dispute is unlikely to be eager to surrender that power to a third party decisionmaker. Nonunion employers have not embraced arbitration of employment disputes even though arbitration might protect them from lawsuits in regular judicial fora.⁵³ The fact is, most complaints about online services are resolved through complaint mechanisms such as AOL's term-of-service procedure or credit card chargeback mechanisms. One may be skeptical of the fairness of such mechanisms, either because decisionmakers have an economic interest in particular outcomes or because the process does not result in a binding resolution of the dispute. Nevertheless, complainants stop with these procedures in the vast majority of cases rather than going on

⁵³ See Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156-57 (1999).

to file lawsuits or complaints with administrative agencies. Thus, the purported benefit of online arbitration is modest.

Second, online dispute resolution procedures must be easy to find and easy to access, preferably by a link directly on the site where the controversy arises. For example, one wishing to submit a complaint about noncompliance with voluntarily adopted privacy policies is far less likely to submit that complaint to an unfamiliar online dispute resolution process that is not linked directly to the offending site. The complainant must look for and find the dispute resolution procedure and then cannot have any confidence that the dispute resolution forum will have jurisdiction over the complaint, in the sense that any meaningful relief can be obtained. On the other hand, if the site at which the controversy arises has a link to the dispute resolution site, and if the site in controversy represents that it will accept and be bound by a decision of the dispute resolution forum, complainants are more likely to make use of that dispute resolution machinery.

A. *Virtual Mediation*

Shortly after VMAG was launched, Ethan Katsh, Professor of Legal Studies at the University of Massachusetts, launched a virtual mediation system.⁵⁴ In conjunction with the University, as a mechanism for resolving student complaints under University rules, the University of Massachusetts Center for Information Technology and Dispute Resolution initiated an "Online Ombuds Office."⁵⁵ The Online Ombuds Office was established in June of 1996 with a grant from the National Center for Automated Information Research (the "Center") and also was supported in part by a grant from the Hewlett Foundation.⁵⁶ The Center works with eBay and Up4Sale to mediate disputes arising out of auctions on the Internet.⁵⁷

The best way to get a feel for the process is to view the transcript of the first dispute, which is available from the website.⁵⁸ That dispute involved a claim by a local newspaper that an Internet user was committing copyright infringement by posting excerpts from his stories on the Internet—

⁵⁴ See Center for Info. Tech. & Dispute Resolution, University of Mass., *Online Ombuds Office* (visited Apr. 15, 2000) <<http://aaron.sbs.umass.edu/center/ombuds/default.htm>>.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *Transcript of a Dispute: The Web Site Developer and the Newspaper* (visited Apr. 15, 2000) <<http://aaron.sbs.umass.edu/center/ombuds/narrative1.html>>.

apparently in e-mail messages rather than on a web page.⁵⁹ The Internet user sought the assistance of the Online Ombuds Office, and Director Ethan Katsh mediated the dispute himself. Although both of the parties were located in Kansas, Katsh was in Massachusetts and all of the communication occurred either by e-mail, fax, or phone.⁶⁰ The dispute was resolved successfully with little difficulty or acrimony.⁶¹

The University of Massachusetts's virtual mediation project was much more active than VMAG. Some of this is attributable to its association with an institution that referred large numbers of complaints. Some of it is attributable to more effective marketing. Some of it may be attributable to the superiority of mediation to arbitration as an online dispute resolution process, although this conclusion is hard to justify given the absence of any real experience with disputants who made it as far as arbitration and somehow found that procedure unsatisfactory.

B. Credit Card Chargebacks

The most common form of alternative dispute resolution for consumer disputes is a credit card chargeback.⁶² Under the Fair Credit Billing Act,⁶³ credit card issuers must investigate⁶⁴ cardholder claims of billing errors.⁶⁵ "Billing errors" are defined to include "[a] reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction."⁶⁶ When cardholders allege such nonacceptance or nondelivery, the card issuer may not insist on the charge without determining "that such goods were actually delivered, mailed, or otherwise sent to the

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² Debit card chargebacks are covered by Federal Reserve Regulation E, 12 C.F.R. pt. 205 (1999), rather than Regulation Z, 12 C.F.R. § 226.13(i) (1999). The definition of "error" in Regulation E omits claims of nondelivery or nonconforming goods or services. 12 C.F.R. § 205.11(a) (1999).

⁶³ 15 U.S.C. §§ 1666 *et seq.* (1994).

⁶⁴ *See id.* § 1666(a)(3)(B)(ii).

⁶⁵ The claim must be in writing. *See id.* § 1666(a); *see also* *Himelfarb v. American Express Co.*, 484 A.2d 1013, 1018–19 (Md. 1984) (noting that oral notice is insufficient).

⁶⁶ 15 U.S.C. § 1666(b)(3) (1994); *see also* 12 C.F.R. § 226.13(a)(3) (1999). The term also includes transactions as to which the cardholder requests documentation as to the validity of the charge. *See id.* § 226.13(a)(6).

obligor and provid[ing] the obligor with a statement of such determination."⁶⁷

Under Regulation Z and the Fair Credit Billing Act, chargebacks extend only to consumers and not to business transactions.⁶⁸

Card issuers typically retain only limited authority—defined by the merchant and cardholder agreements—actually to adjudicate the dispute, although repeated claims involving the same merchant may jeopardize the merchant's membership in the credit card network.⁶⁹ In most cases, the cardholder protests the charge, a chargeback results, the merchant substantiates the charge, informal negotiation directly between merchant and cardholder may ensue, and the charge is reinstated.

Major credit card networks extend chargeback protection internationally⁷⁰ and have adopted special consumer protection chargeback rules for electronic commerce.⁷¹

⁶⁷ 15 U.S.C. § 1666(a)(3)(B)(ii). Regulation Z defines the required investigation to include such a determination:

If a consumer submits a billing error notice alleging either the nondelivery of property or services under paragraph (a)(3) of this section or that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card has made an incorrect report to the card issuer, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed or that the information was correct.

12 C.F.R. § 226.13(f) n.13.

⁶⁸ See 12 C.F.R. § 226.3; see also 15 U.S.C. § 1666(a)(3)(B).

⁶⁹ See *Banking Policy Report Credit Cards: FTC Expects Processors to Insulate Operations Against Consumer Fraud*, BANKING POL'Y REP., Dec. 7, 1992, at 6, 6-7 (describing settlement between the Federal Trade Commission (FTC) and Citicorp Credit Services, Inc. requiring credit card processor to monitor chargeback rates and to stop processing charges from merchants with unusually high rates, as a protection against consumer fraud); Patrick E. Michela, "You May Have Already Won . . .": *Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 PEPP. L. REV. 553, 571 & n.116 (1994) (reporting that consumer fraud operations often are denied access to credit card systems because of high chargeback rates).

⁷⁰ As stated by Visa officials:

Visa's chargeback rules do not attempt to track all of the possible consumer protection laws around the world, although some chargeback rights do correspond with statutory rights granted to consumers in particular countries, such as the rights granted under Federal Reserve Board Regulation Z to dispute certain credit card transactions. The chargeback reasons permitted under Visa's rules for international transactions have been adopted to enable issuers of Visa cards to address the fundamental consumer concerns of their cardholders, and incidentally to reinforce the reputation of Visa Cards as the best way to pay.

Although good empirical data is lacking, it appears that the system satisfies both consumers and merchants. Almost no reported cases in the regular courts exist, suggesting that consumers rarely are motivated to go beyond the chargeback process to more formal forms of dispute resolution.

It is important for designers of online dispute resolution systems to understand the apparent attractiveness of the chargeback mechanism. On its face, it would seem to be an incomplete dispute resolution mechanism quite different from the arbitration model. Several hypotheses can be offered as to why it works so well. Chargebacks give customers leverage with merchants against whom they have claims, thus equalizing to some extent otherwise disparate bargaining power. Psychological satisfaction results from triggering a chargeback even if the customer eventually has to pay the full price. In at least some cases, triggering a chargeback gets the merchant's attention, allowing the merchant and the consumer to work out a compromise. And, in extreme cases, there is the possibility that the consumer will not have to pay or that the merchant will be excluded from the credit card network, ending a pattern of consumer abuse. Moreover, the system is

Letter from Broox W. Peterson, Senior Vice President and Associate General Counsel, Visa International Service Association, to the Secretary of the Federal Trade Commission (March 25, 1999) (on file with the Federal Trade Commission), *available in* Federal Trade Comm'n, *U.S. Perspectives on Consumer Protection in the Global Electronic Commerce Marketplace* (visited Apr. 15, 2000) <<http://www.ftc.gov/bcp/icpw/comments/visa.htm>>.

Likewise, American Express has stated, "[w]hile U.S. law requires us to institute these practices, as a card issuer, we have adopted a policy of applying them consistently outside the U.S. as well. If a cardmember outside the U.S. is afforded more protection under local law, we of course comply with that law." Letter from Sally Cowan, Group Counsel, American Express Travel Related Services Company, Inc., to the Secretary of the Federal Trade Commission (June 30, 1999) (on file with the Federal Trade Commission), *available in* Federal Trade Comm'n, *U.S. Perspectives on Consumer Protection in the Global Economic Marketplace* (visited Apr. 15, 2000) <<http://www.ftc.gov/bcp/icpw/comments/american-express.htm>>.

⁷¹ American Express also stated:

We will immediately chargeback a merchant selling goods or services *delivered electronically* (e.g., software, images) if a cardmember disputes the charge (for example, claiming it was unauthorized). There are several sound business and policy reasons underlying this rule: processing an inquiry is costly and not justified by the usually small dollar amount of these transactions. In addition, an immediate chargeback for these types of purchases provides an incentive for the merchant to exercise greater care in authorizing such transactions.

Letter from Sally Cowan, Group Counsel, American Express Travel Related Service Company, Inc., to the Secretary of the Federal Trade Commission, *supra* note 70.

cheap, easily accessible, and quick. A consumer need not search for and find a lawyer or a third-party dispute resolution forum. All that is necessary upon receiving a monthly credit card statement is to call or write the card issuer and protest the charge. The card issuer and the merchant handle the rest. No dispute resolution fees are involved.

Merchants like the system compared to other possibilities such as accepting personal checks for a larger percentage of transactions because the merchant is in a better position with credit card chargebacks than with stop payment orders on checks. If a consumer buys merchandise or services with a personal check and then stops payment on the check to protest failure of the merchant to perform, the merchant has no attractive remedy. It only can sue the consumer or cut the consumer off from further check-payment privileges. Cutting the consumer off may be an effective remedy for the merchant when there is a continuing relationship between the merchant and consumer, but not in stranger transactions, which are increasingly important to electronic commerce. Lawsuits over small consumer transactions are no more attractive to merchants than to consumers. They are expensive, require lawyer involvement, and engender long delays.

Credit card chargebacks are a more common form of dispute resolution in the United States than in other prosperous nations.⁷² One of the reasons is the existence of Regulation E in the United States, which requires card issuers to make chargebacks available.⁷³ Canadian banks strongly oppose the institution of chargebacks in Canada because of concern about processing costs for card issuers.⁷⁴ This reluctance is reinforced by the perception of

⁷² Chargebacks are required by law in the United Kingdom and not provided for in France, although the Visa and Mastercard systems provide them throughout Europe to some extent. See Organization for Econ. Co-operation & Dev., *Consumer Redress in the Global Marketplace: Chargebacks* (visited Apr. 15, 2000) <http://www.oecd.org/dsti/sti/it/consumer/prod/e_96-142.htm>. In the United Kingdom, merchants have interpreted section 75 of the Consumer Credit Act of 1974, 22 & 23 Eliz. 2, ch. 39, § 75 (1974) (Eng.), which establishes a chargeback regime, as inapplicable to international transactions. U.K. credit card issuers have agreed to apply section 75's protections in certain limited categories of international transactions. See *id.* § 69. The Organization for Economic Co-operation and Development's (OECD's) Committee on Consumer Policy has addressed the possibility of establishing an international chargeback regime that would overcome the domestic limitation of national legal regimes. See Organization for Econ. Co-operation & Dev., *Consumer Redress in the Global Marketplace: Chargebacks* (visited Apr. 15, 2000) <http://www.oecd.org/dsti/sti/it/consumer/prod/e_96-142.htm>.

⁷³ See 12 C.F.R. pt. 205 (1999).

⁷⁴ See Organization for Econ. Co-operation & Dev., *Consumer Redress in the Global Marketplace: Chargebacks* (visited Apr. 15, 2000) <http://www.oecd.org/dsti/sti/it/consumer/prod/e_96-142.htm>.

Canadian card issuers that the incidence of disputes is much higher in electronic commerce than in conventional face-to-face commerce.⁷⁵

In Europe, chargebacks are not required, but they are nevertheless fairly common in credit card and debit card agreements.⁷⁶ The availability of chargebacks in debit card agreements is much more important in Europe than in credit card agreements because the proportion of consumer transactions accomplished through debit cards relative to credit cards in Europe is much higher than in the United States, although the total of credit and debit card transactions is a much smaller proportion of the total universe in Europe than in the United States.⁷⁷ The relatively wide availability of chargebacks in Europe despite the absence of any government compulsion to offer them is strong testimony to their attractiveness as an alternative dispute resolution mechanism.

As with newer and relatively untested mechanisms such as eBay's escrow, insurance, and complaint-posting procedures, credit card chargebacks put a private sector intermediary in the position of being the dispute resolver. Intermediaries are willing to do this because the availability of mutually acceptable dispute resolution facilitates consumer and merchant use of the intermediaries' services. Intermediary-provided dispute resolution greatly reduces search costs and other costs because the intermediary already has a relationship with both disputants.⁷⁸

As the preliminary report on the subject by the Organization for Economic Co-operation and Development (OECD) said:

Financial intermediaries appear best suited to resolve individual transaction problems in the global marketplace through chargeback mechanisms. This involves reversing a transaction (charging it back to the seller) to settle various types of problems (for example, nondelivery of goods, nonconformance of goods, billing errors, etc.). Chargeback mechanisms encourage merchants to provide high levels of customer satisfaction, as card associations withdraw card privileges from merchants with excessive chargeback rates. Such mechanisms have long been available in the United States and are credited with helping to create consumer confidence in, and widespread use of, catalog shopping in that country.

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See* John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 977 (1999) (proposing that credit card systems expand chargeback rights to facilitate electronic commerce).

During the several years of discussions on this project with card associates, the spread of such mechanisms internationally and to debit cards has been seen as an encouraging sign.⁷⁹

C. eBay's Escrow and Insurance Arrangements

eBay⁸⁰ is a Web-based auction service popular with individuals and small businesses wishing to buy and sell merchandise and services. Apparently because eBay fears that people will stop using its service because of threats of fraud and nonperformance of agreements, it offers several mechanisms for avoiding or resolving disputes. One mechanism is iEscrow, which allows purchasers to escrow their payments until they accept delivered merchandise.⁸¹ The function of iEscrow is very much like a documentary letter of credit.⁸² Both the letter of credit and iEscrow are intended to protect the interests of both buyer and seller in international transactions in which there is a risk of nonperformance on one side or the other. eBay also offers a complaint mechanism and feedback and evaluation of buyers and sellers. The combination of these services permits an unsophisticated user to assess, in advance, whether it wishes to deal with another unsophisticated user based on that user's reputation in the eBay community. Then, if a complaint arises, the victim can enlist eBay in attempting to resolve the dispute. Ultimately, eBay commits only to refer serious complaints to public authorities. This is an obvious example of traditional law backing up a private dispute resolution mechanism.

The National Consumer's League (NCL) provides a somewhat similar service,⁸³ although it, unlike eBay, is not involved in facilitating electronic

⁷⁹ See Organization for Econ. Co-operation & Dev., *Consumer Redress in the Global Marketplace: Chargebacks* (visited Apr. 15, 2000) <http://www.oecd.org/dsti/sti/it/consumer/prod/e_96-142.htm>.

⁸⁰ See eBay (visited Apr. 15, 2000) <<http://www.ebay.com>>.

⁸¹ See eBay, Inc., *Services: Escrow Overview* (visited Apr. 15, 2000) <<http://pages.ebay.com/help/community/escrow.htm/>>.

⁸² A letter of credit is a written commitment by a bank to make payment of a defined amount of money (usually from an account set up by a buyer) to a beneficiary (usually the seller) according to the terms and conditions specified in the contract between the buyer and seller; typically these include the presentation of certain documents, such as a bill of lading or an inspection certificate. Examples of documentary letter of credit forms can be found at AVG Trade Group, *Interactive Sales and Letter of Credit Transaction Forms* (visited Apr. 15, 2000) <<http://www.avgtsg.com/gbmforms.htm>>.

⁸³ See Susan Grant, *Fraudulent Schemes on the Internet: Remarks to the Senate Permanent Committee on Investigation* (Feb. 10, 1998), in National Consumers League,

commerce directly. NCL accepts complaints of e-commerce fraud and forwards them to the Federal Trade Commission and to state attorneys general.⁸⁴ This is another example of a new type of intermediary that helps mice mobilize the resources of public authorities.

Some of this is not very international yet. The NCL service only provides for reference to U.S. authority, and there is no suggestion that eBay will refer complaints to consumer protection authorities in other countries. On the other hand, there is nothing about iEscrow, the feedback and evaluation system, or the internal eBay complaint resolution mechanisms that limits them to national boundaries; they function just the same in transnational transactions as in local ones. Moreover, it is entirely conceivable that including arbitration within the scope of the New York Convention could strengthen the eBay complaint resolution machinery. Agreements to arbitrate either could be a condition of doing business on eBay or an option, much as iEscrow is an option.

Fraudulent Schemes on the Internet: Remarks to the Senate Permanent Committee on Investigation (visited Apr. 15, 2000) <<http://www.natlconsumersleague.org/nettest.htm>>.

The National Fraud Information Center (NFIC) originally was established in 1992 by the National Consumers League. Consumers can report Internet fraud through the NFIC website, see *National Fraud Information Center* (visited Apr. 15, 2000) <<http://www.fraud.org/welcome.htm>>, or by calling the hotline at 1-800-876-7060. Though the website was launched only two years ago, it has had more than 5 million visitors to date. Every week, the National Fraud Information Center and Internet fraud watch programs receive an average of 1,500 calls and an equal number of e-mails, plus dozens of letters. The NFIC also takes reports from consumers about possible telemarketing or Internet fraud and relays them to a variety of federal, state, and local law enforcement agencies in the United States and Canada. *See id.*

The NFIC data system uploads new reports daily to an electronic database maintained by the Federal Trade Commission and the National Association of Attorneys General. *See id.*

Charts showing types of fraud and their geographic locations for 1997 are available at National Consumers League, *Charts from Senate Testimony by Susan Grant to the Senate Permanent Committee on Investigations* (visited Apr. 15, 2000) <<http://www.natlconsumersleague.org/charts.htm#comploc>>. Comparison charts for 1998, showing types of fraud, age of victim, and payment methods are available at National Consumers League, *Top Ten Internet Fraud Report Charts* (visited Apr. 15, 2000) <<http://www.natlconsumersleague.org/Internetscamfactsheet.html>>.

⁸⁴ *See Grant, supra* note 83.

D. WIPO Procedures

The World Intellectual Property Organization (WIPO)⁸⁵ developed recommended uniform processes for resolving disputes over Internet domain names that conflict with trademarks.⁸⁶ The procedures now are in use to resolve disputes involving domain name registrars, who agree on the need for uniform dispute resolution procedures covering this set of disputes.⁸⁷

Article V of the WIPO report on Internet domain name conflicts with trademarks, providing for “administrative” resolution of complaints, allows for complaints and responses to be filed electronically and provides, with respect to hearings, under Article 27:

a. Normally, the determinations on Complaints under these Rules are to be made with reference to the file alone. However, as an exceptional matter a Panel may, at the request of a Party or on its own motion, determine in relation to a particular complaint that a hearing shall be held with the participation of the Parties.

b. For the purposes of this Article, “hearing” shall include a physical meeting, a telephone or video conference and the simultaneous exchange of electronic communications in a manner that allows the Panel and the Parties to receive any communication sent by one of them and to send communications to the others.⁸⁸

E. BBB Online

The Better Business Bureau (BBB) has developed a privacy program for businesses, which receive a BBBOnline “seal” if they agree to conform to the policies. The BBBOnline procedures contain dispute resolution

⁸⁵ See *World Intellectual Property Organization* (visited Apr. 15, 2000) <<http://www.wipo.org>>.

⁸⁶ See World Intellectual Property Org., *Final Report of the WIPO Internet Domain Name Process*, (visited Apr. 15, 2000) <http://ecommerce.wipo.int/domains/process/eng/final_report.html>.

⁸⁷ See World Intellectual Property Org., *WIPO Internet Domain Name Process* (visited Apr. 15, 2000) <<http://ecommerce.wipo.int/domains/process/eng/wipo1.html>> (reporting on the July 27, 1999 WIPO meeting in Washington, D.C.).

⁸⁸ World Intellectual Property Org., *Final Report of the WIPO Internet Domain Name Process* (visited Apr. 15, 2000) <http://ecommerce.wipo.int/domains/process/eng/final/_report.html>.

policies,⁸⁹ but, remarkably, the procedures do not authorize electronic submissions or electronic hearings, referring at one point to teleconferencing to permit “oral” interaction.⁹⁰ BBBOnline does not make it possible to file a complaint through the Web. As of September 26, 1999, the BBBOnline site had no link for any dispute resolution services, but only about obtaining a seal to participate as a merchant in the BBBOnline program.

From March 17, 1999 to June 30, 1999, BBBOnline received 225 inquiries and 4 complaints—apparently by telephone, fax, and regular mail. None of the complaints resulted in decisions. One was settled and the other three were determined to be ineligible.⁹¹

F. Other Online Dispute Resolution Projects and Proposals

As another example, Technology Mediation Services extols the virtues of mediating high technology intellectual property and Y2K disputes, but nowhere on its Web page does it offer an opportunity to submit a dispute or to find out how to submit a dispute.⁹²

V. WHY CONSUMER TRANSACTIONS PRESENT SPECIAL CHALLENGES FOR ADR

The rapid growth of electronic commerce on the Internet is beginning to focus attention on consumer protection. According to statistics maintained by the National Consumers League, reports of consumer fraud on the Internet grew from fewer than 1,000 in 1996 to nearly 8,000 in 1998.⁹³ Consumer protection is a broad category, encompassing securities fraud, deceptive advertising, failure to deliver promised products or services, and personal data privacy protection. It is useful to deal with privacy separately, because it already has received so much attention. While ultimately it may

⁸⁹ See Better Bus. Bureau, *BBBOnLine Privacy Program Dispute Resolution Process: Privacy Policy Review Service and Privacy Review Appeals Board* (visited Apr. 15, 2000) <<http://www.bbbonline.com/business/privacy/DR/index.html>>.

⁹⁰ *Id.*

⁹¹ See Better Bus. Bureau, *BBBOnline Privacy Program Dispute Resolution Statistics* (visited Apr. 15, 2000) <<http://www.bbbonline.com/businesses/privacy/statistics.html>>.

⁹² See *Technology Mediation Services* (visited Apr. 15, 2000) <<http://www.technologiesmediation.com>>.

⁹³ See National Consumers League, *Top Ten Internet Fraud Reports Charts* (visited Apr. 15, 2000) <<http://www.natlconsumersleague.org/Internetcamfactsheet.html>>.

be desirable to focus separately on distinct aspects of consumer protection, initially it is useful to seek to identify characteristics that may distinguish the broad category of consumer protection issues from other Internet legal issues such as taxation, hate speech, pornography, payment systems, and intellectual property.

One distinguishing characteristic of consumer protection issues is the disparity of bargaining power between seller and purchaser. The bargained-for exchange model of contract is conspicuously absent from the vast majority of consumer transactions. Instead, sellers unilaterally specify the terms of the sale, offering them to consumers on a "take it or leave it" basis. This disparity of bargaining power leads legislatures and administrative agencies to prescribe special terms for consumer contracts. The terms supply default legal rules and in some cases are nonwaivable by contract—so-called "mandatory rules."⁹⁴ The power disparities also lead law reform initiatives such as the United Nations Committee on International Trade Law (UNCITRAL) to limit their drafting activities to business-to-business

⁹⁴ Article V of the European Economic Community Convention on the Law Applicable to Contractual Obligations provides in material part as follows:

Notwithstanding the provisions of Article 3 [providing that "a contract shall be governed by the law chosen by the parties"], a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

European Communities: Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 19 I.L.M. 1492, 1494. Article V.2 of the New York Convention allows signatories to refuse enforcement of arbitration awards when "(a) the subject matter of the difference is not capable of settlement by arbitration in the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention, *supra* note 28, 21 U.S.T. at 2520, 330 U.N.T.S. at 42. This language leaves it open to enforcing states to provide by domestic law that consumer contracts are not arbitrable.

contracts⁹⁵ and to special treatment of consumer transactions under the Uniform Commercial Code (UCC).⁹⁶

On the other hand, it is not correct that consumers have no choices in electronic marketplaces. Presently, the Internet intensifies competition, offering consumers a wider array of products and services from different sellers than they would have in geographically defined markets. While consumers may not be able to bargain with their voices across the negotiating table, they can bargain with their computers, rejecting offers from sellers specifying less attractive terms.

But bargaining with a computer is a reality only while consumers are shopping, not necessarily after they have agreed to purchase, and only when the information costs of knowing differing terms offered by different sellers are low. Once a consumer has purchased a continuing service, switching costs may be high enough to reduce significantly the range of real consumer choices after the purchase decision is made.

Disparity of bargaining power often has invited governmental intervention and less reliance on private ordering in consumer transactions, if only by requiring certain levels of disclosure of the terms of the bargain offered, much as the UCC requires that disclaimers of certain warranties be prominently disclosed.

A second characteristic of consumer transactions is relatively low transaction value. Indeed, the possibility of small transactions is what makes the Internet such an interesting medium for electronic commerce. Its inherently lower transaction costs make it economical for buyers and sellers to purchase and sell units of smaller value than they could do economically in physical markets with their higher inventory, rental, utility, labor, and transportation costs.

But low transaction value means that less is at stake when something goes wrong. Accordingly, consumers victimized by unscrupulous or incompetent sellers are less likely to devote necessary resources to investigating and prosecuting violations of legal rights. This creates an economic environment in which the costs of consumer abuse are diffuse while all the benefits are concentrated. Such asymmetry of costs and benefits is a traditional justification for governmental intervention in the form of

⁹⁵ "[T]his law does not override any rule of law intended for the protection of consumers." *UNCITRAL Model Law on Electronic Commerce Art. 1* (visited Apr. 15, 2000) <<http://www.uncitral.org/english/texts/electcom/ml-ec.htm>>.

⁹⁶ Section 2-102 of the Uniform Commercial Code provides, "nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." U.C.C. § 2-102 (1999).

publicly funded investigation and prosecution resources, for example by appropriating public funds for a governmental consumer protection agency or by allowing class action lawsuits and attorney's fee provisions to encourage private representation of diffuse consumer interests.

A third distinguishing characteristic of consumer protection is the existence of consumer protection agencies at almost any level of government. Such existing agencies naturally seek to extend their jurisdiction into new areas of commerce to preserve their reason for existence. Most such agencies have considerable autonomy in making rules and in allocating resources for investigation and prosecution. The result is heightened potential for conflicting geographic demands on actors in an inherently global marketplace.

Dispute resolution through arbitration similarly may provide consumers far less due process—real or perceived—than regular courts because of relatively less knowledge on the part of consumers about arbitration procedures and the characteristics of potential arbitrators. This information deficit has been noted widely in connection with arbitration of individual employment disputes.⁹⁷ The low transaction value makes it less likely that consumers will avail themselves of private counsel.

But there is still room for private regulation of consumer transactions. There is every reason to expect that consumer transactions will occur to a significant degree within the framework of existing credit card payment and dispute resolution systems.⁹⁸

Market forces as well may stimulate creation of fairly complete systems of private dispute resolution for consumer disputes because of the need for merchants and intermediaries such as “virtual shopping centers” to reassure consumers that they safely can use electronic commerce.

A. Politics of Consumer Protection

The strongest political forces will focus on consumer transactions because it is those transactions that engender broad sympathy for overreaching and abuse of private power. It is such political forces that

⁹⁷ See, e.g., Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 95 (1996) (explaining necessary procedural protections); Russell Evans, Note, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive “Fairness” Analysis?*, 50 HASTINGS L.J. 635, 644 (1999).

⁹⁸ See generally David G. Oedel, *Private Interbank Discipline*, 16 HARV. J.L. & PUB. POL'Y 327, 363–64 nn.139, 142 (1993) (summarizing credit card clearing processes and dispute resolution procedures).

stimulated so many states to set up consumer protection units in their attorneys general offices in the first place.⁹⁹

Three political realities will shape the evolution of international and national consumer protection mechanisms. First, the usual mechanisms of issue identification and priority setting in domestic politics are likely to prefer government-based to private self-regulatory mechanisms. The aphorism that foxes should not guard chicken coops has not lost its power merely because of the Internet. Second, private enterprises always will prefer unilateral decisionmaking and other attributes of autonomy to any form of third-party dispute resolution. That is why nonunion employment dispute arbitration has been so slow to take root. That is why the Virtual Magistrate project did not, in the end, produce the expected flood of referrals from America Online and other private providers. Third, much of the ethos of Silicon Valley is undergirded by a remarkable ignorance of politics and government, and ignorance breeds contempt. Some (but not all) of the demand for the Internet being its own sovereign simply reflects lack of awareness of what sovereign governments are. These industry attitudes will discourage development of effective private regimes for protecting mice when they deal with elephants.

VI. PUBLIC LAW FRAMEWORKS

Political pressure for effective consumer protection in electronic commerce accompanied by jurisdictional difficulties in relying entirely on governmental dispute resolution encourages the development of hybrid legal systems for dispute resolution. Public law, expressed in the form of national statutes, regulations, or international treaties,¹⁰⁰ provides a framework for

⁹⁹ FTC Commissioner Roscoe B. Starek, III, speaking in 1995, identified some of the problems confronting consumer protection agencies in dealing with Internet fraud and consumer disputes while also illustrating examples of international governmental operations in investigating and remedying such problems. See Roscoe B. Starek, III, Remarks at the Conference on Transborder Consumer Regulation and Enforcement (June 7, 1995), in Arent Fox, *Prepared Remarks of Roscoe B. Starek, III, Commissioner, U.S. Federal Trade Commission, on the Topic of "Consumer Protection in the Age of Borderless Markets in the Information Revolution"* (visited Apr. 15, 2000) <<http://www.arentfox.com/quickguide/businesslines/advert/advertisinglaw/adlawlawsreg/trr/starek.html>>.

¹⁰⁰ See generally New York Convention, *supra* note 28, 21 U.S.T. at 2517, 330 U.N.T.S. at 38.

private dispute resolution. Historically, the Federal Arbitration Act¹⁰¹ and the Uniform Arbitration Act¹⁰² have reinforced arbitration agreements that meet their requirements, and they have provided for enforcement of arbitration awards in the regular courts. Now, negotiations between the U.S. government and the European Commission over a "safe harbor" for private self-regulation are encouraging the provision of private dispute resolution mechanisms as a prerequisite for deference to self-regulation.¹⁰³

In the future, such public law frameworks for private dispute resolution provide the best means for expressing best practice, and they also provide incentives for private participants in e-commerce to provide effective alternative dispute resolution.¹⁰⁴

VII. CONCLUSIONS AND PROSPECTS FOR THE FUTURE

"Build it and they will come" is an aphorism clearly unwarranted for online dispute resolution. There is no empirical support for the proposition that persons or institutions involved in cyberspace disputes or other disputes readily embrace unfamiliar forms of dispute resolution. Rather, the growing use of alternative dispute resolution almost always is associated with explicit linkage of ADR to or by one of the disputing parties, as through arbitration or mediation provisions in terms-of-service or sales contracts, or by the annexation of ADR procedures to well-known court systems, as in the case of court-annexed arbitration or family court mediation and conciliation procedures.¹⁰⁵

There is little basis at this time to conclude that technological limitations impede use of online ADR. Even simple disputes not requiring oral

¹⁰¹ 9 U.S.C. §§ 1-16 (1994).

¹⁰² See generally UNIFORM ARBITRATION ACT (1955).

¹⁰³ See U.S. Dept. of Commerce, *U.S. Department of Commerce Opinion on 2/99 on the Adequacy of the "International Safe Harbor Principles"* (visited Apr. 15, 2000) <<http://europa.eu.int/comm/dg15/en/media/dataprot/wpdocs/wp19en.htm>>.

¹⁰⁴ For a more complete analysis of international hybrid regulatory structures, see Henry H. Perritt, Jr., *The Internet Is Changing Public International Law*, 88 KY. L.J. (forthcoming 2000).

¹⁰⁵ See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2172-74 (1993); Sharon A. Jennings, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice?*, 6 OHIO ST. J. ON DISP. RESOL. 313, 314-16 (1991); Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 796-800 (1983).

testimony, extensive fact investigation, or discovery have not been submitted to online ADR systems. Before investing greater amounts of money in developing more elaborate technological applications for online dispute resolution, the dispute resolution community should work harder on referral and linking approaches to develop a greater body of experience with simple applications. Once this body of experience exists, it will be possible to make more intelligent judgments about needed technological enhancements.

At the same time, greater use of electronic filing and virtual hearing processes by the regular courts can add useful insights as to what works well and what does not work, what is readily acceptable to disputants and their counsel, and what is not.

Online ADR provides an attractive solution to an important part of the jurisdictional challenges presented by the Internet's global and "low-barriers to entry" characteristics.

More empirical research is desirable on credit card chargebacks and other intermediary-provided dispute resolution to test some of the hypotheses offered in this Article.

Entrepreneurs offering new kinds of intermediation in electronic commerce should be alert to the potential attractiveness of escrow, chargebacks, and insurance mechanisms as ways of building their businesses.

