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## 'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR

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**“DRIVE-THRU” ARBITRATION IN THE DIGITAL AGE: EMPOWERING  
CONSUMERS THROUGH BINDING ODR**

Amy J. Schmitz\*

ABSTRACT

Online Dispute Resolution (ODR) has been promoted for quickly and conveniently resolving claims using online “drive-thru” processes instead of more costly and time-consuming face-to-face meetings and hearings. Most commentators have nonetheless focused mainly on non-binding or automated bidding processes, perhaps due in part to fairness concerns associated with off-line arbitration. This Article, however, explores the potential for online binding arbitration (OArb), and sheds new light on arbitration as means for empowering consumers to obtain remedies on their e-merchant claims. By moving arbitration online, OArb helps address concerns regarding companies’ use of arbitration clauses to curb consumers’ access to remedies on their typically small claims. This Article offers suggestions for regulations that aim to capitalize on OArb’s potential for providing consumers with convenient and cost-effective access to remedies while augmenting companies’ cost-savings from avoiding court and class actions, which they may pass on to consumers through lower prices and better quality products.

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## I. INTRODUCTION

We have become a "Drive-Thru" society, continually creating more means for banking, buying, transacting, and communicating quickly,

conveniently, and without leaving our cars, couches or computers.<sup>1</sup> Although “drive-through” or “drive-thru” first referenced restaurants that allow customers to get their meals without stopping or leaving their cars, these convenience windows are now provided for things such as marriage and political constituency services.<sup>2</sup> Accordingly, it seems natural that in this digital age, we would be inclined to embrace “drive-thru” means for resolving disputes without having to leave the comfort of our computers or other digital devices.

Digital dogma boasts the promise of the Internet, communication satellites, submarine fiber optic cable, wireless telephones, and other emerging technologies to connect us with others and society in a myriad of ways.<sup>3</sup> However, dogmas of the Internet and various technological communication devices also raise concerns regarding relational isolation, diminished creativity, increased deception, and other behavioral effects of computer-mediated-communication (CMC).<sup>4</sup> Instead of attending neighborhood meetings or chatting with locals at a coffee shop, people sit alone in front of computers sharing their thoughts through Internet chat rooms, blogs, and social networking sites like Facebook and Twitter.<sup>5</sup> While these portals open up new ways of connecting, they also diminish the intimacy, nonverbal messages, and other social cues created through face-to-face (F2F) interactions.<sup>6</sup>

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<sup>1</sup> We cannot even tolerate the extra effort to spell out “through,” thus allowing for the “drive-thru” alternative spelling for obtaining services quickly and routinely. Thefreedictionary.com, Definition of Drive-through or Drive-thru, <http://www.thefreedictionary.com/p/drive-thru> (last visited Dec. 29, 2009) (defining the term with both spellings as “[r]elating to or conducting exchanges with clients who drive up to a window and remain in their automobiles” and “[p]erformed or provided quickly and routinely”).

<sup>2</sup> See Wikipedia, Drive-through, <http://en.wikipedia.org/wiki/Drive-through> (last visited Dec. 29, 2009) (also noting how “drive-ins” have been replaced by “drive-throughs” – reflecting our intolerance for having to stop and perhaps connect with an individual who brings food to one’s automobile).

<sup>3</sup> See generally Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125, 125–27 (2009).

<sup>4</sup> *Id.* at 125–35 (2009) (discussing “dogmas” of communication via the Internet in resolving disputes). Like Kravec, I am using “dogma” in this context to refer to “generally held set of formulated beliefs that a group holds to be true . . . .” *Id.* at 126.

<sup>5</sup> Indeed, “the great paradox of online mediation is that it imposes an electronic distance on the parties . . . .” *Id.* at 127.

<sup>6</sup> *Id.* at 128–30 (discussing and questioning assumptions of Social Presence Theory and Reduced Social Context Cues with respect to online mediation).

Nonetheless, CMC has its attributes and continues to flourish. This has given rise to Online Dispute Resolution (ODR),<sup>7</sup> which generally includes various dispute resolution processes that minimize or dispel need for F2F communications by utilizing the Internet, e-mail, and other information technologies.<sup>8</sup> ODR took root in 1996 and has germinated in various directions, fueled by rising e-commerce and alternative dispute resolution's (ADR) reputation for fostering efficiency and cost-savings for courts and disputing parties.<sup>9</sup> Furthermore, ODR opens new avenues for resolution of small claims.<sup>10</sup> This prompted the Federal Trade Commission's (FTC) 2000 public workshop and 2001 roundtable discussions exploring expanded use of ODR for resolution of consumer disputes regarding online transactions.<sup>11</sup>

Since that time, ODR has slowly expanded with hopes of providing cheaper, faster, and less intrusive avenues for dispute resolution than found through in-person dispute resolution processes.<sup>12</sup> Although ODR has its uncertainties and lacks the human element of F2F contact, it increases the range of connection and communication possibilities.<sup>13</sup> The Internet allows for flexible scheduling and asynchronous communication, as well as real-

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<sup>7</sup> See Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 327–29 (2008) (discussing how use of Online ADR can foster efficient dispute resolution and maximize the growth of e-commerce in England and abroad).

<sup>8</sup> A.B.A. Task Force on Elec. Commerce & Alternative Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002) [hereinafter ABA 2002 Report] (broadly defining ODR).

<sup>9</sup> See Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 19–31 (2006) (discussing birth and evolution of ODR since the first articles were published on ODR in 1996).

<sup>10</sup> See Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 302 (2008) (noting use for consumer small claims).

<sup>11</sup> FED. TRADE COMM'N, *Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace*, 65 Fed. Reg. 7831 (Feb. 16, 2000); FED. TRADE COMM'N, *Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts* (2001), available at <http://www.ftc.gov/os/2001/01/cbadrfrn.htm> (last visited Dec. 29, 2009). It appears from the FTC site and other research that little has happened since these events. See generally Federal Trade Commission, <http://www.ftc.gov/>.

<sup>12</sup> See Katsh & Wing, *supra* note 9, at 21–31 (explaining ODR's evolution).

<sup>13</sup> See Gilliéron, *supra* note 10, at 326–33 (explaining how use of ODR provides beneficial and efficient avenues for communication that may transcend benefits of the face-to-face environment in traditional ADR).

time dialogue.<sup>14</sup> Furthermore, many predict that ODR will grow in the coming years due to its ability to transcend borders and escape the constraints of other legal processes less-suited for resolution of e-commerce and international disputes.<sup>15</sup>

At the same time, the rise in Internet transactions has escalated consumers' disputes with companies located in unknown or far-away locations.<sup>16</sup> This has left consumers stymied in seeking redress for their claims against online merchants.<sup>17</sup> Consumers have had difficulty bearing the travel, time, and legal costs of traditional F2F dispute resolution processes, and the limited ODR processes currently offered are usually non-binding or only applicable if the consumer agrees to use the merchant's ODR provider and process.<sup>18</sup> Post-dispute agreements to use ODR also are rare due to parties' defensive posturing and concerns regarding online information security, technological reliability, award enforcement, and process regulation.<sup>19</sup>

ODR scholarship is also fairly limited. Most commentators mainly have discussed use of the Internet for filing, scheduling, and managing ADR processes, or for numbers-focused processes such as Cybersettle's "double-blind-bidding" that gathers parties' confidential settlement offers and demands and determines if and what settlement the parties should mutually

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<sup>14</sup> *Id.* at 312–13.

<sup>15</sup> Int'l Inst. for Conflict Prevention & Resolution, *More More More: CPR Meeting Highlights*, 27 ALTERNATIVES TO HIGH COST LITIG. 125, 128 (2009) (highlighting technology and ODR as key elements in the future of dispute resolution).

<sup>16</sup> *See id.* at 127 (noting that geography will be much less of a factor in contracts and dispute resolution through ODR).

<sup>17</sup> *See* Steve Woda, *Can Bonded Shopping Boost E-Commerce? It's Surety, Security and Peace of Mind. Counsel Should Be Sure Clients Are Aware of This Option*, NO. 2 E-COMMERCE L. & STRATEGY, June 2005, at 1, 1 (highlighting that in many instances, victims of online fraud have little opportunity for recourse).

<sup>18</sup> Haloush & Malkawi, *supra* note 7, at 335.

<sup>19</sup> *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1247–1342 (2009) (highlighting the arbitration debate and critiquing arguments advancing the fairness of pre-dispute arbitration agreements); *see also* Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627–32, 661–86 (2008) [hereinafter *Warranty Woes*] (discussing need for procedural protections in consumer arbitration proceedings); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEG. L. REV. (forthcoming 2010) [hereinafter *Legislating in the Light*] (discussing arbitration debate and research, and need for disclosure regulations in light of empirical data).

accept.<sup>20</sup> Furthermore, articles and reports have provided more facial discussion of ODR’s inevitability with the rise of e-communities and the Internet-savvy generation, or have focused on jurisdiction or technical aspects of encryption and Internet security.<sup>21</sup>

This has left binding online arbitration (I will refer to it as “OArb” for ease of reference and to distinguish it from non-binding ODR methods) largely overlooked. However, OArb deserves attention as a means for effectively and efficiently resolving consumers’ disputes with online merchants.<sup>22</sup> As with other ODR, it allows for fast, flexible, convenient, and often more comfortable scheduling and communications.<sup>23</sup> OArb also has more potential than other ODR processes to satisfy consumers with substantive answers on their claims’ merits and quick access to remedies because it culminates in a final third-party determination.<sup>24</sup> In addition, OArb does not suffer from lack of F2F interactions to the same extent as

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<sup>20</sup> See, e.g., *Legislating in the Light*, *supra* note 19 (discussing ODR software and its use in mediation, and findings from an experiment revealing how CMC impacts formality, party empowerment, efficiency, emotion, mediator control, and other salient aspects of the dispute resolution process); Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1308–11, 1321 (1998) (raising concerns regarding online mediation due to lack of in-person contact); Debi Miller-Moore & Maryann Jennings, *At the Forefront of ODR: Recent Developments at the AAA*, 62 DISP. RESOL. J. 35, 36–38 (2007) (discussing various uses of the Internet by the American Arbitration Association (AAA), including its partnership with Cybersettle); Glenn Kauth, *ODR in Canada Getting a Boost: Two Computer Programs Launching in 2009*, L. TIMES, Dec. 8, 2008, available at [http://www.lawtimesnews.com/index2.php?option=com\\_content&task=view&id=4400&p](http://www.lawtimesnews.com/index2.php?option=com_content&task=view&id=4400&p) (introducing 2009 release of Chambersettle and Smartsettle in Canada using double-blind processes like that of Cybersettle).

<sup>21</sup> See, e.g., David A. Hoffman, *The Future of ADR: Professionalization, Spirituality, and the Internet*, 14 DISP. RESOL. MAG. 6, 6–8 (2008) (highlighting how ADR will grow and especially take flight among the “[m]illennials” that essentially live and socialize on the Internet through sites such as Facebook); IBLS Internet Law News Portal, *Amendments to the .eu Alternative Dispute Resolution Rules*, [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?s=latestnews&id=2002](http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2002) (last visited Feb. 11, 2010) (noting needed changes to ODR rules applicable in European domain name disputes, especially with respect to definition and implementation for “secure authentication” of e-communications).

<sup>22</sup> See Haloush & Malkawi, *supra* note 7, at 343 (the elimination of physical meeting can increase the arbitrator’s case management abilities and can free them from time and space constraints).

<sup>23</sup> See *id.* (flexibility offers huge advantages to online third party neutrals, including freeing them from certain time constraints).

<sup>24</sup> See *id.* at 340 (the arbitrator has the power to impose a final and legally binding decision).

more facilitative processes due to its reliance on evidentiary submissions.<sup>25</sup>

OArb also deserves special attention due to its likely enforcement under the Federal Arbitration Act (FAA) in conjunction with the Electronic Signature Act (ESign) making electronic contracts enforceable to the same extent as paper contracts.<sup>26</sup> The FAA and its state counterpart, the Uniform Arbitration Act (UAA), require courts to enforce pre and post-dispute arbitration agreements.<sup>27</sup> These laws also boost arbitration enforcement with liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators in the absence of agreement, limited review of arbitration awards, and treatment of awards as final judgments.<sup>28</sup> Furthermore, the Supreme Court has read the FAA to preempt states from hindering the enforcement of arbitration in contracts affecting interstate commerce, thereby limiting state regulation of arbitration to general common law contract defenses.<sup>29</sup>

This Article therefore takes OArb out of the shadows of other ODR processes, and explores its potential for resolving consumers' disputes with online merchants.<sup>30</sup> Part I places OArb among the ODR options currently

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<sup>25</sup> See *id.* at 340–47 (also explaining how online arbitration provides cost and time savings for parties and neutrals). “[T]he opportunities for using the virtual capabilities of electronic media in law-related processes are enormous. For instance, computer facilitated charts, figures, graphs, scales, tables, and diagrams can be utilized in OADR proceedings.” *Id.* at 343.

<sup>26</sup> Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (covering domestic arbitration); *Id.* §§ 201–08 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)); *Id.* §§ 301–07 (implementing the Inter-American Convention on International Commercial Arbitration (Panama Convention)) (2006); see also Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2006) (making electronic contracts enforceable to the same extent as written contracts; effective October 1, 2000).

<sup>27</sup> FAA, §§ 1–16; UNIF. ARBITRATION ACT (UAA), 7 U.L.A. §§ 1–33 (2000). The UAA is model legislation nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA. *Id.*

<sup>28</sup> See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–30 (2002) (discussing the FAA's pro-efficiency remedial provisions).

<sup>29</sup> See *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (finding the FAA preempted state notice requirements for arbitration clauses); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); *Southland Corp. v. Keating*, 465 U.S. 1, 7, 15–16 (1984) (holding that the FAA applies in federal and state court).

<sup>30</sup> See *Katsh & Wing*, *supra* note 9, at 19–45 (opening article for a symposium celebrating the fifth anniversary of the International Competition for Online Dispute Resolution and tenth



offered, highlighting OArb's finality, binding nature, and evidentiary focus that set it apart from other online processes.<sup>31</sup> Part II then discusses OArb's attributes for resolution of consumers' disputes with online or e-merchants<sup>32</sup>, while Part III addresses the hurdles and pitfalls to OArb's advancement.<sup>33</sup> Part IV accordingly confronts these OArb concerns and offers suggestions for designing and regulating OArb in order to benefit consumers and companies.<sup>34</sup> Properly regulated OArb can empower consumers with cost-effective and fair access to remedies on their e-contract claims while fostering companies' cost savings and efficiency benefits from avoiding court and class actions.

## II. OARB'S PLACE AMONG ODR OPTIONS

Personal computers began as hobbyists' playthings in the 1970s, but have since become essential home appliances.<sup>35</sup> Consumers now regularly purchase products and services on the Internet, resulting in more disputes with online retailers.<sup>36</sup> Meanwhile, the rising use of the Internet has converged with pro-ADR forces to give birth to various ODR processes and providers that may be available for resolution of consumers' claims.<sup>37</sup> Although there is variety among ODR services, they generally have been for non-binding or money-focused blind-bidding processes.<sup>38</sup> Nonetheless,

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anniversary of ODR, and introducing multiple articles discussing various aspects and issues regarding ODR).

<sup>31</sup> See *infra* Part I.

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See *infra* Part III.

<sup>34</sup> See *infra* Part IV.

<sup>35</sup> Jane Winn & Nicholas Jondet, *A "New Approach" to Standards and Consumer Protection*, 31 J. CONSUM. POL. 459, 460–65 (2008) (discussing Internet Communication Technologies (ICT) and highlighting the rise of computer and mobile phone usage). In 2007, there were more cellular phones than people in the European Union. *Id.* at 461.

<sup>36</sup> See Paul Stylianou, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes*, 36 SYRACUSE J. INT'L L. & COM. 117, 117 (2008) (noting that developed nations have become increasingly reliant on the Internet for the sale and purchase of products and services). In 2005, e-commerce transactions accounted for 22% of the total amount of business to business transactions. *Id.*

<sup>37</sup> See, e.g., Mediation Arbitration Resolution Services (MARS), Online Dispute Resolution, <http://www.resolvemydispute.com/online-dispute-resolution.php> (last visited Dec. 29, 2009).

<sup>38</sup> See Haloush & Malkawi, *supra* note 7, at 335–36 (discussing the non-binding nature of ODR services); see also John B. Sprenzel, *Salary Arbitration in the National Hockey League: Taking the Next Step with Online Dispute Resolution*, 62 DISP. RESOL. J. 64, 66 (2007) (discussing

arbitration processes exist and should continue to expand with the rise in e-contract disputes and technological advancements.<sup>39</sup>

### A. *Prevalent Internet Usage in Dispute Resolution*

By the late 1990s, policymakers began promoting the possibilities for ODR to handle increasing e-commerce disputes, especially in international contexts involving thorny jurisdictional and travel concerns.<sup>40</sup> ODR websites began to emerge, but have been difficult to track due to their constant ebb and flow.<sup>41</sup> Nonetheless, some websites have survived as portals for locating neutrals, facilitating various in-person ADR procedures, and conducting ODR processes.<sup>42</sup> These ODR processes include a range of negotiation, mediation, and arbitration programs that foster parties' resolution of their disputes through use of e-mails, chat rooms, video conferencing, and secure virtual hearings.<sup>43</sup> ODR also may include algorithm-based processes that generate suggested settlements based on a single factor (usually monetary), or sometimes on a broader range of factors.<sup>44</sup> Most ODR options are non-binding, but some blind-bidding procedures produce final settlements and limited OArb has emerged to provide binding awards.<sup>45</sup>

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single factor monetary settlements based on blind bidding).

<sup>39</sup> See John R. Strout, *Online Arbitration: A Viable Solution for Resolving Disputes that Arise From Online Transactions*, 1 J. AM. ARB. 75, 79–80 (2001). (discussing how online businesses are likely to embrace online arbitration, and to organize oversight groups to further foster such dispute resolution).

<sup>40</sup> Stylianou, *supra* note 36, at 117–18 (highlighting ODR's emergence as the "forerunner" for settling cross-border disputes).

<sup>41</sup> In my own research, I have found that many listed ODR sites and providers no longer exist while new ones continually emerge. This led to creation of a chart that attempts to track the currently existing ODR options. See Amy J. Schmitz, ODR Provider Chart (July 15, 2009) (on file with author).

<sup>42</sup> An example is Cybersettle. See Miller-Moore & Jennings, *supra* note 20, at 38.

<sup>43</sup> See, e.g., American Arbitration Association (AAA), Welcome to the Online Experience, [http://services.adr.org/eroom/faces/welcome\\_and\\_steps.jspx](http://services.adr.org/eroom/faces/welcome_and_steps.jspx) (last visited Jan. 13, 2010).

<sup>44</sup> Bruce L. Mann, *Smoothing Some Wrinkles in Online Dispute Resolution*, 17 INT'L J.L. & INFO. TECH. 83, 90–98 (2009) (providing taxonomy of terms regarding ODR processes); Sprentzel, *supra* note 38, at 66–68 (providing list of ODR options).

<sup>45</sup> See, e.g., Smartsettle.com, Smartsettle's Visual Blind Bidding, <http://smartsettle.com/resources/25-articles/31-smartsettle-visual-blind-bidding?tmp> (last visited Dec. 29, 2009).

## 1. Online Administration of Traditional ADR

Many traditional ADR institutions' websites provide portals for disputants to locate and choose dispute resolution services.<sup>46</sup> They usually also include links to their rules and procedures,<sup>47</sup> as well as additional resources regarding ADR.<sup>48</sup> These websites are therefore marketing tools for ADR institutions as well as useful resources for parties seeking ADR services or already subject to ADR or arbitration agreements under an institution's rules. These websites also benefit arbitrators and mediators in advertising their services and remaining connected in ADR circles. Furthermore, disputants and neutrals can use these portals to connect, communicate, and conduct various steps and processes that minimize scheduling hassles and aid efficient dispute resolution.

The American Arbitration Association (AAA), a mainstay dispute resolution institution, provides rules and other dispute resolution resources on its website.<sup>49</sup> It also offers AAA Webfile for electronic filing and pre-hearing submissions.<sup>50</sup> In addition, the AAA had posted Supplementary Procedures for Online Arbitration parties may agree to follow in conjunction with the AAA's Commercial Dispute Resolution Procedures. These supplementary procedures allow for arbitration to be administered over the Internet through parties' online submissions via e-mail attachments to an Administrative Site monitored by the AAA. An arbitrator then renders an award based on these submissions.<sup>51</sup> Although the AAA no longer posts these rules due to nonuse, the AAA in reality administers many of its cases partially or entirely online due to parties' comfort with Internet communications.<sup>52</sup>

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<sup>46</sup> See, e.g., Judicial Arbitration and Mediation Services (JAMS), Locations, <http://www.jamsadr.com/locations/> (last visited Jan. 10, 2010).

<sup>47</sup> See, e.g., JAMS, ADR Clauses, Rules, and Procedures, <http://www.jamsadr.com/rules-clauses/> (last visited Dec. 29, 2009).

<sup>48</sup> See, e.g., JAMS, ADR Spectrum: Mediation, Arbitration, <http://www.jamsadr.com/adr-spectrum/> (last visited Dec. 29, 2009).

<sup>49</sup> AAA, Rules and Guides, <http://www.adr.org/sp.asp?id=28751> (last visited Dec. 29, 2009).

<sup>50</sup> Miller-Moore & Jennings, *supra* note 20, at 36–37.

<sup>51</sup> See MARTIN DOMKE, 2 DOMKE ON COMMERCIAL ARBITRATION, app. at G-6 (Larry E. Edmondson ed., Thomson/West 2002) (including the AAA Supplementary Procedures for Online Arbitration); AAA, Supplementary Procedures for Online Arbitration (on file with Baylor Law Review).

<sup>52</sup> E-mail from Ryan Boyle, AAA Vice President of Statistics and In-House Research, to author, Assoc. Prof., Univ. of Colo. Law School, July 23, 2009 (on file with author).

Judicial Arbitration and Mediation Services (JAMS) also has a website that provides links to the rules and procedures for the various dispute resolution processes it offers.<sup>53</sup> The JAMS website likewise allows parties to file claims, select neutrals, and choose hearing locations online.<sup>54</sup> JAMS does not offer further online case facilitation services or other ODR options.<sup>55</sup>

Similarly, National Arbitration Forum (NAF) hosts a website that provides information about its services, rules, and procedures.<sup>56</sup> It no longer facilitates its ODR system for resolution of New Jersey No-Fault Automobile Insurance Personal Injury claims due to a ruling that the system infringed on Cybersettle's patent for its online double-blind bidding process.<sup>57</sup> NAF also recently halted its consumer arbitration services pursuant to a settlement of a lawsuit the Minnesota Attorney General had filed against NAF for consumer fraud, deceptive trade practices, and false advertising.<sup>58</sup>

The Better Business Bureau (BBB) website provides dispute settlement resources and some online processing for car-related and other claims, but does not actually conduct and facilitate its ADR processes online.<sup>59</sup> Some

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<sup>53</sup> JAMS, ADR Clauses, Rules, and Procedures, <http://www.jamsadr.com/rules-clauses> (last visited Dec. 29, 2009).

<sup>54</sup> JAMS, e-JAMS, <http://www.jamsadr.com/e-jams/> (last visited Jan. 9, 2010); JAMS, Practice-Arbitration, <http://www.jamsadr.com/arbitration-practice/> (last visited Jan. 9, 2010).

<sup>55</sup> See JAMS, e-JAMS, <http://www.jamsadr.com/e-jams/> (last visited Jan. 9, 2010) (indicating that online case facilitation is not yet available through JAMS).

<sup>56</sup> NAF, Arbitration Overview, <http://www.adrforum.com/main.aspx?itemID=324&hideBar=False&navID=178&news=3> (last visited Jan. 9, 2010).

<sup>57</sup> See Michele Markel, *Cybersettle Verdict Upholds Patents for Online Dispute Resolution*, IBSL Internet Law News Portal, Mar. 6, 2007, [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?s=latestnews&id=1612](http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1612).

<sup>58</sup> See Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUS. WK., July 19, 2009, available at [http://www.businessweek.com/investing/wall\\_street\\_news\\_blog/archives/2009/07/big\\_arbitration.html](http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html) (discussing the lawsuit against NAF and the large impact this will have on credit card and other consumer arbitrations NAF has administered in the past).

<sup>59</sup> See BBB, Dispute Resolution Processes and Guides, <http://www.bbb.org/us/Dispute-Resolution-Services/Process> (last visited Dec. 8, 2009); Memorandum from Stefanie Mann, Research Assistant, Univ. of Colo. Law School, to author (June 30, 2009) (on file with author) (documenting telephone conversation with a BBB representative confirming that any BBB arbitrations are held in their offices, although they do have capabilities for teleconferencing out-of-state people into the hearings); see also BBB, Code of Business Practices, <http://www.bbb.org/us/bbb-accreditation-standards> (last visited Dec. 8, 2009) (requiring companies seeking the BBB seal to respond to consumer claims and seek to resolve those claims

other websites are even more limited in their ODR offerings. For example, Mediate.com assists parties in locating mediators.<sup>60</sup> It also allows mediators to market their services and access additional training and ADR resources.<sup>61</sup> The site does not, however, allow for online case submissions or ODR of any kind.<sup>62</sup>

## 2. Single Variable Blind-Bidding Processes

Cybersettle has emerged as one of the foremost ODR companies,<sup>63</sup> known for its patented<sup>64</sup> double-blind bidding process focused on a single variable: money.<sup>65</sup> Through this bidding process, disputants or their attorneys submit confidential monetary offers and demands for settlement of their claims.<sup>66</sup> The case is then settled instantly if the offer is equal to or greater than the demand.<sup>67</sup> If the offers and demands are sufficiently close, Cybersettle suggests a settlement amount in the middle of these numbers that the parties may accept or reject.<sup>68</sup> Parties also may choose to work with a neutral who will facilitate negotiations over the telephone in an effort to help the parties reach a mutual resolution.<sup>69</sup>

This bidding process has settled thousands of disputes, mainly involving insurance, personal injury, and workers compensation claims.<sup>70</sup> However, it is only appropriate for resolution of claims where there are no unresolved

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without litigation).

<sup>60</sup> Mediate.com, About Mediate.com, <http://www.mediate.com/aboutris/aboutus.cfm> (last visited Dec. 8, 2009).

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> Russell Weiss, *Some Economic Musings on Cybersettle*, 38 U. TOL. L. REV. 89, 89 (2006).

<sup>64</sup> *See* Markel, *supra* note 57 (discussing Cybersettle's patent).

<sup>65</sup> Weiss, *supra* note 63, at 89, 98.

<sup>66</sup> *See* Cybersettle.com, Web Assisted Claim Settlement, <http://www.cybersettle.com/pub/home/products/claimresolution.aspx> (last visited Dec. 29, 2009); Cybersettle.com, How Cybersettle Works, <http://www.cybersettle.com/pub/home/demo.aspx> (providing video demonstration of double-blind system).

<sup>67</sup> Cybersettle.com, Web Assisted Claim Settlement, *supra* note 66; *see also* Hon. Arthur M. Monty Ahalt, *What You Should Know About Online Dispute Resolution*, 20 PRAC. LITIGATOR 21, 25–26 (2009).

<sup>68</sup> *See* Cybersettle.com, How Cybersettle Works, *supra* note 66.

<sup>69</sup> *Id.*; Miller-Moore & Jennings, *supra* note 20, at 38–39 (discussing Cybersettle.com).

<sup>70</sup> *See* Cybersettle.com, About Cybersettle, <http://www.cybersettle.com/pub/home/about.aspx> (last visited December 29, 2009).

liability issues and nuisance value has been established.<sup>71</sup> In other words, the claim has boiled down to a point where the parties simply are focused on reaching an acceptable settlement number and need not address fault or air emotions. Furthermore, rift between the parties' "walk-away" numbers must not preclude settlement.<sup>72</sup>

Cybersettle's process is therefore inappropriate for most cases but it can save parties' time and money in settling simple money-focused claims. For example, the City of New York saved over \$11 million in claim resolution costs in 2004 alone when it first began using Cybersettle to resolve a variety of claims filed against the City.<sup>73</sup> The City has therefore continued to use Cybersettle since that time, helping to reduce the City's backlog of lawsuits and its average claim resolution times.<sup>74</sup> It also has expanded its use of Cybersettle from sidewalk, roadway, personal injury, and other similar cases to include personal property, subrogation and medical malpractice claims.<sup>75</sup>

Nonetheless, critics of the program question the program's necessity and true value. They ask, "Why not pick up the phone and say 'here's my demand and give an offer?'"<sup>76</sup> The process is quite limited in its focus on monetary settlements and cannot address the range of liability issues typically involved in most cases.<sup>77</sup> Even seemingly simple insurance claims often include gray areas regarding not only fault, but also extent of injuries

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<sup>71</sup> Cybersettle.com, Auto & General Liability, <http://www.cybersettle.com/pub/home/products/claimresolution/generalliability.aspx> (last visited Dec. 29, 2009) (noting its use in injury claims resulting from auto, general liability, or uninsured motorist claims and stating guidelines advising that liability issues must have already been resolved).

<sup>72</sup> See *id.* (advising those with claims "MOST IMPORTANTLY – submit walk-away numbers").

<sup>73</sup> Cybersettle.com, Products and Services, <http://www.cybersettle.com/pub/home/products.aspx> (last visited Dec. 29, 2009).

<sup>74</sup> Claude Solnik, *For NYC and Others, Cybersettle Presents Quick Claim Alternative*, LONG ISLAND BUS. NEWS, May 12, 2006, available at <http://www.allbusiness.com/north-america/united-states-new-york/4082386-1.html> (noting New York's reported cost and time savings from Cybersettle's use, but adding some criticisms); see also Cybersettle.com, New York City to "Cybersettle" More Cases Online, <http://www.cybersettle.com/pub/16/section.aspx/3> (last visited Dec. 29, 2009).

<sup>75</sup> *NYC Expands Use of ODR*, 62 DISP. RESOL. J. 6, 6 (2007) (discussing partnership with NYC and its beneficial use in over the 3,900 cases).

<sup>76</sup> Solnik, *supra* note 74 (noting New York's reported cost and time savings from Cybersettle's use, but adding some criticisms).

<sup>77</sup> Weiss, *supra* note 63, at 97–99.

and other damages.<sup>78</sup> Furthermore, the algorithm-based process raises concerns that repeat users may cheat the system with statistical modeling.<sup>79</sup> The process also requires a sort of gambling that favors those with more power and ability to shoulder risk.<sup>80</sup>

Still, this bidding process has established a place in the ODR landscape for quickly settling monetary claims and its "double-blind" nature allows offers to remain secret until a settlement is reached.<sup>81</sup> Disputants often just want the cash now, and would rather drop a claim than continue to struggle in obtaining a more substantive determination on their claims' merits.

### 3. Non-binding Multivariable ODR Processes

Some ODR programs go beyond Cybersettle's single-variable process to allow for consideration of various factors as means for accelerating parties' negotiations. For example, Smartsettle provides software programs that foster parties' settlement of their disputes through neutral and secure online negotiations guided according to parties' concerns and priorities regarding any number of issues and factors.<sup>82</sup> The program allows parties to negotiate on their own schedules through asynchronous communications using an e-mail and alert system that tells parties when another has posted a response on Smartsettle's secure server.<sup>83</sup> Using this system, parties may negotiate with or without the help of a third-party facilitator.<sup>84</sup> Furthermore, they can use a facilitator to pass along their respective proposed solutions without revealing their ultimate preferences.<sup>85</sup>

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<sup>78</sup> See *id.* at 97–98.

<sup>79</sup> *Id.* at 96, 98.

<sup>80</sup> *Id.* at 95–99 (noting concerns and suggesting that Cybersettle allow for more consideration of trade-offs among broader issues than money).

<sup>81</sup> *Id.* at 96–99.

<sup>82</sup> Smartsettle.com, Smartsettle's Visual Blind Bidding, <http://smartsettle.com/resources/25-articles/31-smartsettles-visual-blind-bidding?tmp> (last visited Dec. 29, 2009).

<sup>83</sup> See Smartsettle.com, Products, <http://smartsettle.com/products> (last visited Dec. 29, 2009) (both e-mail and text message alerts are available).

<sup>84</sup> See Smartsettle.com, Product Pricing, <http://www.smartsettle.com/products/smartsettle-infinity/pricing/23-pricing/20-product-pricing.html> (last visited Dec. 8, 2009) (showing the price for a negotiator).

<sup>85</sup> See Smartsettle.com, Smartsettle Facilitator Checklist, <http://www.smartsettle.com/training/smartsettle-how-to/255-facilitator-checklist> (last visited Jan. 9, 2010) (providing a checklist to facilitators).

Use of Smartsettle's program requires investment of time and money.<sup>86</sup> Smartsettle markets two main products, Smartsettle One for single-issue disputes involving two parties and Smartsettle Infinity for handling cases involving unlimited issues and parties.<sup>87</sup> Smartsettle One works with most web browsers and is less expensive, while Smartsettle Infinity is a more complex stand-alone program that models the problem, manages parties' preferences, and offers solutions in light of an unlimited number of qualitative and quantitative issues.<sup>88</sup> Both programs nonetheless use Smartsettle's algorithms for rewarding parties' quick acceptance of solutions within what the program deems the Zone of Agreement.<sup>89</sup> The program license fees range from \$100 to \$1700 depending on chosen features and capacities,<sup>90</sup> and users typically must spend an additional \$150 to \$1000 for online training to use the program.<sup>91</sup> Smartsettle also charges separate fees for additional and professional services.<sup>92</sup>

SquareTrade previously offered a similar web-based forum for parties to negotiate their disputes with or without a professional mediator using an online chat format.<sup>93</sup> However, it was different from Smartsettle in that it used a simpler design geared specifically for warranty disputes regarding products sold online. Although the SquareTrade/eBay ODR partnership has ended, eBay had allowed its customers to use this process for free, or subject to a \$15 fee if they chose to engage the assistance of a mediator.<sup>94</sup>

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<sup>86</sup> See Memorandum from Bryan Shannon, Research Assistant, Univ. of Colo. Law School to author (March 2007) (on file with author) (reporting that Smartsettle's free online trial indicated that the system was quite complicated and it would likely take considerable time to gain sufficient proficiency to adequately present one's case).

<sup>87</sup> See Smartsettle.com, Products, *supra* note 83.

<sup>88</sup> See *id.*

<sup>89</sup> See Smartsettle.com, <http://www.smartsettle.com/> (last visited Dec. 12, 2009) (The website does not explicitly explain how this works but does provide a demonstration and further resources for understanding this algorithm-based multivariable system.).

<sup>90</sup> Smartsettle.com, Product Pricing, *supra* note 84.

<sup>91</sup> See Smartsettle.com, Training, <http://www.smartsettle.com/training> (follow "click here for pricing" hyperlink) (last visited Dec. 29, 2009).

<sup>92</sup> Smartsettle.com, Product Pricing, *supra* note 84 (providing pricing for technical support, co-facilitation, lead facilitation, and complex modeling).

<sup>93</sup> See SquareTrade.com, About Us, <http://www.squaretrade.com/pages/about-us-overview> (last visited Dec. 29, 2009); Ina Steiner, *Giving Shoppers Confidence Through SquareTrade Warranties* (Oct. 18, 2009), <http://auctionbytes.com/cab/abu/y209/m10/abu0249/s03> (SquareTrade CEO stating that the online dispute resolution service ended in early 2008).

<sup>94</sup> See SquareTrade.com, About Us, <http://www.squaretrade.com/pages/about-us-overview>



Overall, these ODR processes are continually in a state of flux, as new providers, technologies and techniques emerge. Furthermore, ODR's ability to transcend jurisdictional boundaries has inspired its growth abroad.<sup>95</sup> Many of the most active providers are based in the United Kingdom and Europe.<sup>96</sup> Nonetheless, these ODR processes are mainly non-binding and therefore lack FAA and New York Convention enforcement.<sup>97</sup> Furthermore, they are dependent on parties' post-dispute agreements or prior arrangements with repeat clients or online sales portals.<sup>98</sup>

### *B. Adjudicatory Online Arbitration (OArb)*

As outlined above, prevalent ODR processes provide no third party determination on the merits of the parties' claims.<sup>99</sup> They rely instead on automated number-swapping or parties' mutual settlement, sometimes through contrived or complicated processes. Furthermore, these non-binding ODR processes are ineffective in more complicated, legally unclear, or emotional cases. They cannot mimic their off-line mediation and negotiation counterparts because such facilitative processes usually rely on intangibles of F2F interactions. OArb, however, focuses on evidentiary submissions and provides disputants with opportunity to present their cases and obtain a substantive determination on their claims. Moreover, binding OArb provides finality necessary for quick access to remedies.

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(last visited Dec. 29, 2009); eHow, How to Use Square Trade for eBay Dispute Resolution, [http://www.ehow.com/how\\_2108445\\_use-square-trade-ebay-dispute.html](http://www.ehow.com/how_2108445_use-square-trade-ebay-dispute.html) (last visited Dec. 29, 2009)

<sup>95</sup> See Haloush & Malkawi, *supra* note 7, at 328–29

<sup>96</sup> *Id.*; see, e.g., e-Mediator.co.uk, Consensus Mediation, <http://www.consensusmediation.co.uk/e-mediation.html> (last visited Dec. 29, 2009) (UK-based provider incorporating mediation techniques in its e-mediations); Electronic Consumer Dispute Resolution (ECODIR), Online Dispute Resolution Process, <http://www.ecodir.org/odrp/> (last visited Dec. 29, 2009) (EU provider offering e-commerce dispute resolution through a three step process proceeding through negotiation, mediation, and non-binding recommendation); The Mediation Room, What We Do, <http://www.themediationroom.com> (last visited Dec. 29, 2009) (provider based in England and Wales that offers an electronic platform for online mediation).

<sup>97</sup> See, e.g., ODR World, Arbitration, <http://www.odrworld.com/case4.php> (last visited Jan. 9, 2010) (noting that the "decision rendered may be drawn into a legally binding agreement").

<sup>98</sup> See *id.*

<sup>99</sup> See *infra* notes 82–98.

### 1. Emergence of Quasi-OArb

Adjudicatory online dispute resolution processes are rare among ODR alternatives, with one study indicating that such arbitration-like processes handled only 1% of cases settled online.<sup>100</sup> This is despite the rise in Internet transactions, and the prevalence of arbitration provisions in consumer credit card and cell phone contracts. These arbitration provisions impact many consumers, including the 84% of college students who have at least one credit card and an average of 4.6 cards each.<sup>101</sup>

These consumer arbitration clauses nonetheless do not usually allow for OArb. Furthermore, many of the online arbitration services are not necessarily binding.<sup>102</sup> For example, ODR World offers an online “arbitration” process in which parties submit their disputes to a neutral online arbitrator who helps parties reconcile disputes and issues a decision on any unresolved issues.<sup>103</sup> Parties and arbitrators must make all communications and document submissions for the process through an online Message Board or Online Chat, and complete the process within four months or 122 days.<sup>104</sup> However, an arbitrator’s decision only becomes binding if the parties contractually agree to accept the decision after it is made.<sup>105</sup>

Some evaluative but non-binding online arbitration programs have developed in certain contexts. For example, a non-final online administrative resolution process under the Uniform Dispute Resolution Procedures (UDRP) through Internet Corporation for Assigned Names and Numbers (ICANN) has shown some success.<sup>106</sup> Parties have used the

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<sup>100</sup> Gilliéron, *supra* note 10, at 308–09 (noting the rarity of online arbitration among ODR alternatives and citing relevant studies).

<sup>101</sup> Beckie Supiano, *Credit-Card Use Continues Rise Among College Students, Study Finds*, CHRON. OF HIGHER EDUC., Apr. 13, 2009, available at <http://chronicle.com/article/Credit-Card-Use-Continues-Rise/42731/> (emphasizing how credit card use was up from 76 percent in 2004, and that 30 percent of the students used their credit cards to pay tuition bills).

<sup>102</sup> See, e.g., ODR World, *supra* note 97 (noting that the “decision rendered may be drawn into a legally binding agreement”).

<sup>103</sup> *Id.* (explaining its online arbitration services).

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* Fees for this arbitration process range from \$380–\$1,200 depending on the case subject matter. See ODR World, Fees, <http://www.odrworld.com/fee.php> (last visited Dec. 29, 2009).

<sup>106</sup> See Jason M. Osborn, Note, *Effective and Complementary Solutions to Domain Name Disputes: ICANN’S Uniform Domain Name Dispute Resolution Policy and the Federal*

UDRP online procedure to obtain a relatively quick and cheap determination of who may use a contested domain name.<sup>107</sup> These UDRP procedures allow parties to present their cases online to a panel that must provide each party “a fair opportunity to present its case.”<sup>108</sup> The panel then produces a written non-binding decision on the parties’ claims within 14 days of the panel’s appointment.<sup>109</sup> Although the process is not truly OArb and has been subject to criticism, it provides an example of how adjudicatory ODR has been used for dispute resolution in specialized areas.<sup>110</sup>

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*Anticybersquatting Consumer Protection Act of 1999*, 76 NOTRE DAME L. REV. 209, 214 (2000). The UDRP was adopted on August 26, 1999, and the implementation documents were approved on October 24, 1999. Internet Corp. for Assigned Names and Numbers (ICANN): Rules for Uniform Domain Name Dispute Resolution Policy, 39 I.L.M. 952 (2000) [hereinafter UDRP Rules]; World Intellectual Property Organization (WIPO), Arbitration Rules, <http://www.wipo.int/amc/en/arbitration/rules/index.html> (last visited Dec. 29, 2009).

<sup>107</sup>Osborn, *supra* note 106, at 239–40 (explaining the relatively low costs of using the UDRP rather than litigating).

<sup>108</sup>See UDRP Rules, *supra* note 106, at 958–59 (the panel consists of one or three “arbitrators” at the election of either party). Panelists must be impartial and independent, and all communications between panelists and the parties must be made through a case administrator appointed by the dispute resolution provider. *Id.* These rules mimic those of the AAA. See AAA COMMERCIAL ARBITRATION RULES, R-2, R-3, R-12, R-13, R-17, available at <http://www.adr.org/sp.asp?id=22440>.

<sup>109</sup>See *Virtual Countries, Inc. v. Republic of South Africa*, 148 F. Supp. 2d 256, 259–61, 265 n.10 (S.D.N.Y. 2001) (explaining UDRP’s development, and doubting that ICAAN would amend the UDRP’s non-binding administrative procedure to provide for binding arbitration); *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 751–53 (E.D. Va. 2001) (the UDRP proceedings do not constitute binding arbitration under the FAA); see also *Lockheed Martin Corp. v. Network Solutions, Inc.*, 141 F. Supp. 2d 648, 651–52 (N.D. Tex. 2001) (explaining UDRP’s purpose and process, and noting that the average time from filing to decision is fifty-two days).

<sup>110</sup>Proceedings must be online unless the panel specifically determines that it is “an exceptional matter” and therefore an in-person, telephonic, or teleconferenced hearing is necessary. UDRP Rules, *supra* note 106, at 959. In addition, they only cover cancellation and transfer of the domain names abusively registered and not claims for damages or injunctive relief other than return of a domain name. Osborn, *supra* note 106, at 221; see also Luke A. Walker, Note, *ICANN’s Uniform Domain Name Dispute Resolution Policy*, 15 BERKLEY TECH. L.J. 289, 299–300 (2000); *Noodle Time, Inc. v. Max Mktg.*, 39 I.L.M. 795, 797 (2000) (Eresolution, Arb.) (UDRP panel finding Max Marketing had acquired the *benihanaoftokyo.com* domain name in violation of UDRP cybersquatting rules and ordering transfer of the domain name to the complainant). Any judicial determination of a respondent’s appeal will trump the panel’s decision, provided that ICANN receives documentation regarding the lawsuit within ten days after it is notified of the decision. Osborn, *supra* note 106, at 219 (citing UDRP Procedure 4k).

## 2. Binding OArb

Binding OArb has developed in fits and starts. This is perhaps due to rising negativity toward off-line arbitration, along with distrust in online systems and unwillingness to give binding control to an unseen arbitrator. OArb programs also have failed due to lack of advertising and inadequate power to require parties' participation or compliance with awards.<sup>111</sup> For example, The Virtual Magistrate was created in 1996 to provide an adjudicatory arbitration process for resolving disputes regarding harmful Internet postings subject to the parties' agreement.<sup>112</sup> However, The Virtual Magistrate handled very few cases over time and appears to no longer exist.<sup>113</sup>

Nonetheless, some binding OArb processes have developed. In international cases, for example, the international arm of the AAA, the International Centre for Dispute Resolution (ICDR), offers an Online Dispute Resolution Program for Manufacturer/Supplier Disputes.<sup>114</sup> This Program allows parties to attempt to settle small claims through an automated online negotiation method or have their case transferred to an arbitrator who delivers a decision on the parties' claims within 30 days based on the parties' online document submissions.<sup>115</sup> This ICDR online option for small manufacturer or supplier disputes requires a \$500 fee for the negotiation phase and an additional \$1,000 for arbitration.<sup>116</sup>

VirtualCourthouse.com offers a marketplace for neutrals and disputants, as well as means for parties to resolve their disputes through CMC (reserving F2F hearings only if necessary).<sup>117</sup> These ODR services may include facilitated negotiation, mediation, neutral case evaluation, or

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<sup>111</sup> See Gilliéron, *supra* note 10, at 308 (making an example of Virtual Magistrate, a service that failed for those very reasons).

<sup>112</sup> *Id.*

<sup>113</sup> See *id.* at 308–09 (noting the failure and likely reasons for that failure of Virtual Magistrate); Memorandum from Stefanie Mann, Research Assistant, Univ. of Colo. Law School, to author (June 15, 2009) (on file with author) (noting the non-existence of the prior Virtual Magistrate website and receiving no reply to e-mail sent to the last known Director inquiring about the site's continued existence).

<sup>114</sup> See International Centre for Dispute Resolution (ICDR), ICDR Protocol for Manufacturer/Supplier Disputes, <http://www.adr.org/sp.asp?id=35067> (last visited Dec. 29, 2009).

<sup>115</sup> *Id.* (providing the five basic steps involved in the process).

<sup>116</sup> *Id.* (noting fee for the process).

<sup>117</sup> Ahalt, *supra* note 67, at 23; see also VirtualCourthouse.com, About Us, <http://www.virtualcourthouse.com/about.asp> (last visited Dec. 29, 2009).

arbitration.<sup>118</sup> If parties agree to binding arbitration, they use the site to electronically file claims, choose a neutral to resolve their disputes, and submit exhibits and supporting materials for their cases to the assigned neutral in a secure online environment.<sup>119</sup> The neutral then reviews the presentations and renders a binding decision, generally within 24 hours after the parties have completed their case presentations.<sup>120</sup>

VirtualCourthouse.com's OArb process uses a Dispute Resolution Engine (DRE) as "middleware" to connect the parties regardless of whether they have disparate operating systems, and incorporates a combination of multimedia technologies and business processes with a user-friendly interface.<sup>121</sup> This OArb process has been used to settle hundreds of personal injury, real estate, construction, and contract disputes.<sup>122</sup> The fee for this process is usually \$400, which includes the \$300 neutral fee and \$50 filing fee per party.<sup>123</sup> Parties can therefore use this OArb process to resolve their claims for \$200 each, but their costs go up for more complicated cases and those that require F2F hearings.<sup>124</sup> Nonetheless, the process may not be appropriate in multiparty disputes or cases involving emotional issues or large amounts of money.<sup>125</sup>

net-ARB provides a similar OArb process, but it is conducted purely through e-mail instead of using a central portal for sharing case presentations.<sup>126</sup> Disputants using this process present their cases in e-mails to the arbitrator who renders a binding award that explains the reasons for that award.<sup>127</sup> net-ARB's website indicates that its awards are binding and subject to limited review (thus assuming FAA enforcement), but allows for

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<sup>118</sup> VirtualCourthouse.com, *supra* note 117.

<sup>119</sup> The parties select a neutral through an online negotiation, and case presentations typically include supporting medical bills, doctor reports, pictures, and other relevant evidence. *Id.*; see also Ahalt, *supra* note 67, at 23.

<sup>120</sup> The parties may complete case presentations in a few hours or days, and usually less than thirty days. Virtual Courthouse.com, How Does it Work?, <http://www.virtualcourthouse.com/rules.asp> (last visited Dec. 29, 2009).

<sup>121</sup> Virtual Courthouse.com, *supra* note 117.

<sup>122</sup> Ahalt, *supra* note 67, at 26.

<sup>123</sup> Virtual Courthouse.com, Fees/Pricing, <http://www.virtualcourthouse.com/pricing.asp> (last visited Dec. 29, 2009).

<sup>124</sup> *Id.*

<sup>125</sup> Ahalt, *supra* note 67, at 25.

<sup>126</sup> net-ARB, How net-ARBitration Works, [http://www.net-arb.com/how\\_arbitration\\_works.php](http://www.net-arb.com/how_arbitration_works.php) (last visited Dec. 29, 2009).

<sup>127</sup> *Id.*

non-binding or semi-binding awards per the parties' express agreement.<sup>128</sup> net-ARB also emphasizes its diversely educated panel of arbitrators from five of seven continents who render decisions based on "equity and common law" instead of one nation's particular laws.<sup>129</sup>

net-ARB is different from VirtualCourthouse.com in that it uses a trustmark "Consumer Confidence Program" (CCP) that online merchants can join in order to post the "Verified Trust Seal" on their websites.<sup>130</sup> This seal certifies that the company has agreed to "uphold principles of net-honesty," arbitrate any customer disputes using net-ARB and abide by all net-ARB determinations.<sup>131</sup> Customers of that company then have the option to pay a \$199 filing fee to arbitrate using this OArb process.<sup>132</sup>

Mediation Arbitration Resolution Services (MARS) offers a similar trustmark program that allows a member merchant to post the MARS "Shop with Confidence" trustmark on its websites to indicate that it will abide by MARS consumer protection guidelines and seek to resolve customer disputes using MARS' ODR process if disputes cannot be settled through its internal customer service process.<sup>133</sup> MARS' ODR process begins when the customer files a complaint to which the merchant must reply within 72

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<sup>128</sup> net-ARB, Frequently Asked Questions, <http://www.net-arb.com/FAQ.php> (last visited Dec. 29, 2009).

The site states that its awards are binding like court decisions but "only better" because they "cannot be appealed," thus seemingly assuming the FAA would apply to their enforcement, unless parties expressly agree otherwise. *Id.* If parties need to have an award enforced as a judgment in court, they must get a copy of an Affidavit of Arbitration from net-ARB for a \$35 processing fee. *Id.*

<sup>129</sup> net-ARB is an American company but markets itself as "the first and only truly worldwide arbitration service provider" with much broader coverage than AAA or NAF. *See id.*

<sup>130</sup> net-ARB, <http://www.net-arb.com> (last visited Dec. 11, 2009).

<sup>131</sup> The program is discussed on several pages of the company's website, advertising the program as a beneficial process for individuals and companies. *See id.*; *see also* net-Arb, Consumer Confidence Program, [http://www.net-arb.com/consumer\\_confidence/member\\_benefits.php](http://www.net-arb.com/consumer_confidence/member_benefits.php) (last visited December 29, 2009). net-ARB was also offering "limited time offer for FREE MEMBERSHIP" to companies as means to "convert more shoppers into customers." net-ARB, Outsource Difficult Customer Issues, [http://www.net-arb.com/arbitration\\_uses/outsource\\_customer\\_service\\_problems.php](http://www.net-arb.com/arbitration_uses/outsource_customer_service_problems.php) (last visited Dec. 29, 2009).

<sup>132</sup> The customer pays the fee, but it may be reallocated to the company in the award. net-ARB, What Will Arbitration Cost?, [http://www.net-arb.com/what\\_will\\_arbitration\\_cost.php](http://www.net-arb.com/what_will_arbitration_cost.php) (last visited Jan. 10, 2010). No fee is assessed, however, until an arbitration agreement is signed by both parties. net-ARB, How it Works, [http://www.net-arb.com/how\\_arbitration\\_works.php](http://www.net-arb.com/how_arbitration_works.php) (last visited Dec. 29, 2009).

<sup>133</sup> MARS, <http://www.resolvemydispute.com/> (last visited Dec. 29, 2009).

hours.<sup>134</sup> Both parties then receive passwords that provide them with access to MARS' secure Case Summary Information where all communications are posted.<sup>135</sup> The parties communicate asynchronously through this Case Site pursuant to MARS' e-mails alerting them when others post communications on the site.<sup>136</sup>

The MARS ODR process is stepped in that parties first attempt to settle through online negotiations, then mediation, and finally binding arbitration of any remaining disputes they could not settle through the prior facilitative processes.<sup>137</sup> In the OArb phase, the neutral that facilitated the parties' mediation serves as the arbitrator and issues the Certificate of Binding Settlement.<sup>138</sup> The merchant members of the Shop with Confidence program must abide by any arbitration award, but customers retain the option to reject a decision and pursue other remedies.<sup>139</sup> MARS reports to the FTC and other consumer protection organizations any member merchants who fail to participate in any customer-instigated ODR processes and lists such merchants on the MARS "Wall of Shame."<sup>140</sup> Merchants in the Shop with Confidence program must pay a \$120 annual service fee, and consumers pay \$10 to file a complaint.<sup>141</sup> There is an additional \$30 fee if the parties request a mediator or an arbitrator, and an extra charge equal to three percent of the award for resolution by an arbitrator.<sup>142</sup>

## II. OARB'S ATTRIBUTES

Litigation plays an important role in dispute resolution and development

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<sup>134</sup> MARS, Online Dispute Resolution Demo, <http://www.resolvemydispute.com/odrdemo.html> (last visited Dec. 29, 2009).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; see also MARS, Consumer Information, <http://www.resolvemydispute.com/consumer-information.php#4> (last visited Dec. 28, 2009).

<sup>140</sup> MARS, Shop with Confidence, <http://www.resolvemydispute.com/direct-start.php> (last visited Dec. 29, 2009).

<sup>141</sup> MARS, Shop with Confidence Fees, <http://www.resolvemydispute.com/mrates.php> (last visited Dec. 29, 2009).

<sup>142</sup> *Id.*; see also MARS, Consumer Information, <http://www.resolvemydispute.com/consumer-information.php#1> (last visited Dec. 28, 2009) (noting that companies and individuals also may use the MARS ODR system to resolve their disputes outside of the "Shop With Confidence" program per the same fee schedule).

of the law, but is not necessary for resolution of all claims and can best fulfill its public functions if ADR keeps these private claims out of court.<sup>143</sup> Furthermore, ODR in general has been touted for its convenience, speed, low-cost, and travel and paper savings.<sup>144</sup> At the same time, OArb in particular has the enhanced potential to provide these benefits due to its binding nature, reliance on documentary evidence, and allowance for increased access to information and remedies. This is especially true with respect to consumer claims, and may help address escalating concerns regarding onerous pre-dispute consumer arbitration clauses requiring traditional F2F proceedings.<sup>145</sup>

### A. Convenience and Cost Savings

Many have promoted ODR generally for its convenience, stress reduction and cost savings. Unlike traditional in-person dispute resolution methods, ODR allows parties to communicate from anywhere using their own or other Internet access at times convenient for their schedules. This also allows consumers to forego having to travel, miss work, “dress up,” or arrange for child care to attend F2F hearings and meetings.

ODR rescues consumers from the often high travel costs associated with choice of venue clauses in consumer contracts that designate the companies’ home location for any litigation, arbitration or other dispute resolution processes.<sup>146</sup> For example, consumers are often subject to clauses in credit card contracts requiring that they pursue claims in New York City or Los Angeles although they may live in a small Midwestern

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<sup>143</sup> See generally Michael Moffitt, *Three Things to Be Against ('Settlement' Not Included) – A Response to Owen Fiss*, FORDHAM L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1412282> (discussing Owen Fiss’s article “Against Settlement” and the respective roles of litigation and settlement, or ADR, in the dispute resolution landscape).

<sup>144</sup> See Ahalt, *supra* note 67, at 25 (discussing the speed and low costs of ODR).

<sup>145</sup> See Berner, *supra* note 58 (discussing lawsuits against NAF regarding its consumer arbitrations and including public posts strongly criticizing and lamenting consumer arbitration).

<sup>146</sup> The Consumer Due Process Protocol suggests fair procedures for arbitration clauses and addresses these location concerns by requiring that hearings be “at a location which is reasonably convenient to both parties,” but not all companies abide by this suggestion in their arbitration clauses and the Protocol does not address choice of venue clauses regarding litigation. See National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, Principle 7, available at <http://www.adr.org/sp.asp?id=22019> (last visited Dec. 29, 2006) [hereinafter Protocol]; See also *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1176–78 (N.D. Cal. 2002) (imposing a company’s location of arbitration in its home state of California).



town and have little means for traveling.<sup>147</sup> Consumers also may be subject to clauses designating venues in foreign locations due to the surge in e-commerce and global contracting.<sup>148</sup>

Furthermore, OArb is particularly conducive to asynchronous communication because it mainly involves parties' exchange of information, documents, exhibits, and other evidence. It does not require the same degree of interaction, and F2F contact, as more facilitative non-binding dispute resolution methods such as mediation. Instead, asynchronous postings and communications in OArb allow parties to post and carefully review briefs, affidavits, documents and other evidentiary submissions on their own schedules. The parties need not take time off of work, as they often must for F2F courtroom or arbitration processes.

OArb also allows for relatively inexpensive and convenient preservation of case submissions and records in one virtual location.<sup>149</sup> Arbitrators and parties can then access the materials and carefully review them at convenient times, thereby eliminating or minimizing the monetary and environmental costs of copying and sending paper records. Arbitrators also can communicate with parties in a transparent manner through a central secure portal, and avoid even the casual *ex parte* communications that often occur during breaks at F2F hearings.<sup>150</sup>

Although consumers have increasingly criticized arbitration, convenience and cost savings of Internet communications can make OArb a more attractive and affordable alternative for resolving their claims.<sup>151</sup> Consumers often forego filing claims due to the inconvenience of attending F2F proceedings, especially if it means they have to travel far from home,

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<sup>147</sup>Theodore Eisenberg & Geoffrey R. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1486-92 (2009) (finding that New York is often the designated venue for litigation due to its history and importance as the financial center of the United States).

<sup>148</sup>See Christopher B. Conley, Comment, *Parallel Imports: The Tired Debate of Exhaustion of Intellectual Property Rights and Why the WTO Should Harmonize the Haphazard Laws of the International Community*, 16 TUL. J. INT'L & COMP. L. 189, 206 (2007) (modern business contracts typically contain foreign venue or arbitration clauses).

<sup>149</sup>See Gilliéron, *supra* note 10, at 313 ("For the consumers, ODR is not only cheaper, it is often the single method of dispute resolution available, as one is unlikely to be willing to bring a costly action into court for a small value at stake, particularly if one has little chance of being able to enforce the decision abroad.").

<sup>150</sup>See, e.g., net-ARB, *supra* note 126 (site uses a central portal to resolve disputes).

<sup>151</sup>See Gilliéron, *supra* note 10, at 313 (explaining the convenience and speed of ODR).

take time off of work, and shoulder extra child care concerns and costs.<sup>152</sup> This is especially true with respect to small claims, like those often at stake in e-contract disputes.<sup>153</sup> OArb thus opens up new avenues and possibilities for consumers to empower themselves and obtain remedies on their claims.

### *B. Empowerment and Comfort of Anonymity*

Consumer empowerment through OArb also results from the anonymity and comfort of communicating from one's home or office. Litigation is often very traumatic and stressful for everyone, and especially for consumers and other individuals unfamiliar or intimidated by the courtroom experience. Even seasoned attorneys get nervous walking into a courtroom. The trauma can be tenfold for individuals who may have never even been inside of a courthouse, particularly if they are not represented by counsel.

To a lesser extent, F2F arbitration and ADR processes also can be quite stressful. These ostensibly more casual processes have the capacity to foster facilitative and beneficial discussions, and alleviate some of the anti-settlement or defensive posturing of more formal and adversarial procedures. However, F2F interactions and communications make many disputants uncomfortable and may augment power imbalances, especially when individuals are intimidated by more powerful corporate opponents and their armies of attorneys. Furthermore, traditional F2F arbitration generally involves the usual stress of litigation-like procedures such as exhibit presentations, witness testimonies and cross examinations.

While F2F communications can be necessary or therapeutic for some parties, others benefit from the new avenues that CMC creates for virtually "speaking out" and asserting claims against companies without the tensions and stresses of hearings and meetings.<sup>154</sup> Individuals have become comfortable with text messaging and using the Internet to communicate through e-mail and other CMC methods. They also have discovered ways

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<sup>152</sup> See *id.* at 312–13.

<sup>153</sup> Fred Galves, *Virtual Justice As Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, U. ILL. J. L. TECH. & POL'Y 1, 10 (2009).

<sup>154</sup> David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 140–41 (2008) (noting how "[t]echnology can protect parties from uncomfortable or threatening face to face confrontations and offer vulnerable individuals a place where their communications can appear as forceful as the statements of someone who is physically much larger and louder" although it also creates risks for "cyberbullying").

to express emotion, and have begun developing textual cues such as "LOL" for "laugh out loud" to express humor and "☺" to express happiness or agreement.<sup>155</sup>

However, these cues suffer misinterpretation risks that may be more problematic than those of F2F cues to the extent that they cannot be immediately clarified through personal F2F contact.<sup>156</sup> For example, "LOL" can cause misunderstandings when the sender uses it in response to sad news to indicate "lots of love" but the recipient reads it as "laugh out loud."<sup>157</sup> Nonetheless, a social code for these cues has been developing through the cues' regular use and common acceptance.<sup>158</sup> Furthermore, ambiguities can be clarified through follow-up phone calls, e-mails, or other CMC.

As noted above, CMC also may create comfort and empowerment benefits for consumers by providing a sense of anonymity and allowing them to submit and respond to evidence and testimonies from the comfort of their computers.<sup>159</sup> Most individuals feel more at ease when they need not travel to or locate meeting or hearing venues. It is natural for disputants and their attorneys to arrive at F2F hearings distracted by the preceding travels, including concerns regarding lost luggage, tight flight schedules, and even parking problems. Privacy and comfort of communicating from one's home base eliminates such distractions.

Moreover, social and power pressures can weigh heavily on individuals when they must review papers across the table from their opponents. F2F communications and visual contact create stress and tensions that add further distractions from central factual and legal issues.<sup>160</sup> Some individuals become more defensive, adversarial, and even offensive when

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<sup>155</sup> See Hoffman, *supra* note 21, at 7–8 (noting the opportunities for ODR in resolving individuals' disputes and allowing for emotional expression through "e-cues" but warning how these cues are currently confusing at times).

<sup>156</sup> *Id.* at 7.

<sup>157</sup> *Id.* On a personal note, I experienced the "LOL" misunderstanding in an e-mail exchange with my mom who is new to using e-mail.

<sup>158</sup> *Id.* at 7–8.

<sup>159</sup> See Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25 (2004) (proposing that anonymity of CMC may help ease distrust and anger).

<sup>160</sup> See Stylianou, *supra* note 36, at 125 (noting how ODR allows parties to focus on the substantive issues, although this lack of F2F contact also has its drawback for facilitative processes).

they are F2F with opponents.<sup>161</sup> Defensive posturing can lead parties' discussions off-course and dilute the substance of case presentations. Furthermore, even friendly banter of F2F meetings can sidetrack discussions and increase the time and expense of the proceedings, especially when they involve attorneys and neutrals who are paid by the hour.

Privacy and anonymity may also lead parties to be more forthright and truthful in their statements. Although it seems that anonymity would prompt dishonesty, it actually may create a space for comfortable but contained communications. This space allows for more reasoned responses with awareness that all submissions are preserved on the Internet or in another electronic record.<sup>162</sup> Most people now know how difficult it is to truly delete or erase Internet communications from a computer, and would presumably be even more careful with submissions and communications in OArb administered through a central portal.

The comfort and freedom from having to go into a courtroom or other formal hearings also may allow consumers to forgo or minimize costs of legal representation. Parties often feel compelled to pay the costs of hiring attorneys when they face intimidating or unfamiliar proceedings, but may feel less pressure to employ attorneys in OArb involving fewer procedural formalities and no F2F dealings. OArb processes also may be more automated, again easing need for counsel's direction. Nonetheless, OArb comes with legal impacts and issues, and therefore consumers should remain free to hire counsel. Indeed, it may be wise for consumers to at least seek legal advice in assessing their claims and options and determining whether their cases are even appropriate for OArb.<sup>163</sup>

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<sup>161</sup> See COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS 66 (2002) ("Because of the asynchronous nature of online communication and the lack of face-to-face immediacy, online communication is often less likely to escalate to accusations, name calling, and violence than face-to-face communication. In addition to simply having more time to think about what you want to say, the emotional heat that can be generated by face-to-face confrontation is less intense in online interaction. This dynamic has come to be called *cooling distance*.").

<sup>162</sup> See *id.*

<sup>163</sup> There is also need for more research regarding trust-building in F2F versus CMC processes. See Gilliéron, *supra* note 10, at 316 (noting trust-building of F2F communications more with respect to facilitative negotiation and mediation, and emphasizing how assumptions regarding ODR must be tested).

### C. *Efficient Evaluations and Access to Remedies*

OArb is particularly attractive for consumers' claims because of its speed toward a final resolution, and thus their access to remedies. Litigation and other F2F processes usually take longer than ODR due to need for travel and schedule coordination, not to mention the back logs that often stall litigation and even arbitration.<sup>164</sup> Furthermore, OArb may lead to a final resolution more quickly than online mediation, negotiation, and other non-binding processes because OArb necessarily ends the disputes according to a neutral third parties' evaluation of the parties' cases. It does not rely on the parties to reach a mutual solution and precludes the parties from simultaneously or later asserting their claims in court. This means that parties can go into OArb knowing that it will end their disputes and provide answers on their claims.

The online aspect of OArb and associated time and convenience benefits discussed above also foster speedy awards. These awards can then be efficiently communicated to parties and preserved online. This allows parties to take the awards and immediately have them enforced, and cuts out many of the intermittent steps that often stall consumers' access to remedies through F2F court and arbitration processes.

Furthermore, FAA enforcement presumably applicable to OArb bolsters speedy award enforcement. As noted above, the FAA provides for special enforcement remedies, including liberal venue provisions,<sup>165</sup> immediate appeal from orders adverse to arbitration,<sup>166</sup> and arbitral immunity.<sup>167</sup> It also directs courts to strictly enforce arbitration awards with very limited

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<sup>164</sup> See *id.* at 314–15 (noting this as an assumed benefit but questioning its accuracy in light of some studies indicating that ODR may take longer when not time limited).

<sup>165</sup> See 9 U.S.C. § 9 (2006) (supplementing general venue options); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000) (holding FAA venue provisions are permissive and therefore expand possible sites for federal motions to confirm, vacate, or modify an arbitration award).

<sup>166</sup> See 9 U.S.C. § 16 (2006) (specifying appeal provisions); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86–87 (2000) (reiterating that section 16 expands traditional immediate appeal provisions).

<sup>167</sup> See *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990), *cert. denied*, 498 U.S. 850 (1990) (holding arbitrators absolutely immune from liability in damages for all acts within the scope of the arbitral process). Arbitrators also have been immune from suit under state common law due to their special role as final judges of law and fact. See *Kabia v. Koch*, 713 N.Y.S.2d 250, 256 (N.Y. Civ. Ct. 2000) (holding Judge Koch was an arbitrator entitled to immunity from liability for statements made on People's Court because his determinations were "final and binding").

review, and aims to protect arbitration's private, flexible, and independent process.<sup>168</sup>

OArb backed by the FAA also should benefit from United States Supreme Court pronouncements that have reinforced arbitration's efficiency and finality.<sup>169</sup> In recent years, the Court highlighted arbitration's streamlined process in holding that the FAA required television's "Judge Alex" to proceed with arbitration without first getting a California Labor Commissioner's administrative opinion on his California Talent Agency Act claims.<sup>170</sup> The Court in *Hall Street* also confirmed the finality of FAA arbitration in ruling that the FAA precludes contractual expansion of judicial review of arbitration awards beyond the limited grounds provided in FAA sections 9 through 11.<sup>171</sup>

Although some have critiqued arbitration's finality, this finality can be very beneficial for consumers who usually lack the resources to pursue costly appeals processes.<sup>172</sup> It eases costs and burdens of appeals for consumers.<sup>173</sup> For example, consumers with small-dollar claims regarding an e-contract usually just want a remedy but cannot deal with the costs and burdens of litigation, let alone challenges of awards or other claim

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<sup>168</sup> FAA award enforcement "is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). Section 10 prescribes limited grounds for judicial review focused on preservation of basic procedural fairness and section 11 allows for judicial modification or correction of certain apparent errors in an award. *See id.* at 175. The FAA does not, however, permit a court to question the merits of an arbitration award. *See id.* at 176; *see also* Schmitz, *supra* note 28, at 124-34 (discussing the FAA's finality and pro-efficiency remedial provisions).

<sup>169</sup> *See, e.g., Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency).

<sup>170</sup> *See Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (Ferrer alleging his contract to pay Preston for his services was unenforceable under the TAA because Preston had acted as a talent agent without the required license).

<sup>171</sup> *See Hall St. Assocs.*, 128 S. Ct. at 1404 (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency). This decision has been subject to scholarly critique. *See, e.g., Alan Scott Rau, Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2008) (critiquing the *Hall Street* opinion and result, and raising important questions regarding its application in the wake of *Hall Street*).

<sup>172</sup> *See Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) (explaining that lack of finality practically means beginning at square one in court, leading to substantially increased expense and delay).

<sup>173</sup> *See id.*

determinations.<sup>174</sup> As one court emphasized, "a nonfinal arbitration is, in the last analysis, an oxymoron."<sup>175</sup>

### III. OARB HURDLES AND CONCERNS

As an initial matter, many have become so negative toward traditional consumer arbitration that they would likewise shirk consumer OArb.<sup>176</sup> Furthermore, commentators voice concerns regarding ODR in general due to uncertainties regarding enforcement and jurisdiction, distrust and skepticism of online methods, and lack of F2F interactions.<sup>177</sup> Some also have voiced concerns with respect to arbitrator neutrality and training, resource imbalances, and lack of legal representation. While these concerns do raise issues for policymakers to address in developing OArb systems, they need to be empirically tested for their accuracy and should not be assumed or overstated.<sup>178</sup>

#### A. Enforcement of Online Arbitration

Facilitative and optional ODR processes are different from this Article's conception of OArb because they are not binding and thus do not produce binding awards enforceable under the FAA.<sup>179</sup> This is why courts have concluded that the non-final dispute resolution procedure prescribed by the

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<sup>174</sup> See Lenden Webb, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT'L ARB. 337, 338 (2004) (discussing how small-dollar claim amounts coupled with expensive litigation and time-consuming processes places traditional court dockets out of consumers' reach).

<sup>175</sup> *Saika*, 56 Cal. Rptr. at 923 (voiding trial *de novo* provision in physician's contract with his patient).

<sup>176</sup> See generally Berner, *supra* note 58 (highlighting consumers' blog posts criticizing arbitration). Consumers may simply reject any sort of private dispute resolution system, and fear that any such process is biased. As one consumer, "Ima American," posted on a BusinessWeek blog regarding the NAF lawsuit: "I've had the opportunity to interact with many consumers who had to deal with these ARBI-TRAITORS and saw with my own eyes how BAD the NAF has been. We're better off in a REAL court, thank you very much." *Id.*

<sup>177</sup> See, e.g., Dr. Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary*, 38 U. TOL. L. REV. 317, 326-30 (2006) (discussing enforcement and jurisdiction); Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 U. TOL. L. REV. 163, 178-79 (2006) (discussing online methods); Kravec, *supra* note 3, 125-31 (discussing lack of F2F interactions).

<sup>178</sup> See, e.g., *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 751 (E.D. Va. 2001) (holding that certain aspects of UDRP render the FAA provisions for judicial review of arbitration award inapplicable).

<sup>179</sup> See Strout, *supra* note 39, at 77-83.

ICANN UDRP discussed above is not arbitration governed by the FAA.<sup>180</sup> The UDRP process is not sufficiently final to be “arbitration” because it does not necessarily end the disputes or supplant litigation.<sup>181</sup>

OArb that ends with a final award is arbitration subject to the FAA and its strict enforcement as discussed above.<sup>182</sup> Although e-contracts have raised concerns regarding illusory consent, courts generally enforce them when there is some manifestation of assent through means such as clicking or checking “I accept” before completing an e-transaction.<sup>183</sup> Furthermore,

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<sup>180</sup> *Parisi*, 139 F. Supp. 2d at 751; *see also* *Lockheed Martin Corp. v. Network Solutions, Inc.*, 141 F. Supp. 2d 648, 651–52 (N.D. Tex. 2001) (explaining UDRP’s purpose and process, and noting that the average time from filing to decision is fifty-two days); *Virtual Countries, Inc. v. Republic of South Africa*, 148 F. Supp. 2d 256, 259–61, 265 n.10 (S.D.N.Y. 2001) (explaining UDRP’s development, and doubting that ICAAN would amend the UDRP’s non-binding administrative procedure to provide for binding arbitration).

<sup>181</sup> *See Parisi*, 139 F. Supp. 2d at 751; Osborn, *supra* note 106, at 222 (citing UDRP Procedure 4k); WIPO, Report of the First WIPO Internet Domain Name Process, ¶¶ 134, 138, 150, 196 (last modified April 1999), available at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>. Advisors for WIPO clearly distinguished the UDRP “administrative procedure” from “arbitration,” emphasizing that the latter is governed by “a well-established international legal framework” that “recognizes the choice of the parties to submit a dispute to arbitration as excluding the jurisdiction of the court in respect of the dispute. [Thus] [t]he arbitral award . . . is not just binding, but also final, in the sense that the courts will not entertain an appeal on the merits of the dispute.” *Id.* ¶ 230. The advisors therefore concluded that the UDRP does not require “arbitration” although parties are encouraged to voluntarily agree to arbitrate disputes in order to reap arbitration’s finality and efficiency benefits. *Id.* ¶¶ 230–35; *see also* *Broadbridge Media, L.L.C. v. Hypercd.com*, 106 F. Supp. 2d 505, 508–09 (S.D.N.Y. 2000) (refusing to enjoin plaintiff’s Internet domain name lawsuit despite plaintiff’s ongoing UDRP proceeding to retrieve the domain name, finding the UDRP does not prohibit parallel litigation but instead allows a complainant to bring suit before, during, or after the administrative proceeding). In 2009, the WIPO Arbitration and Mediation Center completed 2107 cases filed under the UDRP. *See* WIPO, Total Number of Cases per Year, <http://www.wipo.int/amc/en/domains/statistics/cases.jsp> (last visited Dec. 29, 2009).

<sup>182</sup> *See supra* notes 22–29 and accompanying text.

<sup>183</sup> Arbitration clauses have been the target of fairness concerns in consumer cases due to consumers’ lack of bargaining power and illusory assent to form contracts containing these clauses. *See* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382–86 (1996) (critiquing the courts’ “drifting away from, or perhaps abandoning altogether, society’s traditional notions of meaningful consent”); Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 29–33 (2002). *But see* Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 741–54 (2002) (questioning claims that form arbitration provisions in consumer contracts as unfair); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77



courts enforce arbitration clauses with a pro-efficiency glaze in order to foster time and cost savings,<sup>184</sup> and the Electronic Signature Act (ESign) makes electronic contracts enforceable to the same extent as paper contracts.<sup>185</sup>

Accordingly, this legal regime makes post-dispute OArb agreements such as those used by MARS and net-Arb enforceable under the FAA.<sup>186</sup> The current FAA also supports general enforcement of pre-dispute OArb agreements in paper and e-contracts.<sup>187</sup> It should be noted, however, that this would change if the proposed Arbitration Fairness Act (AFA) is enacted to bar the enforcement of pre-dispute arbitration agreements in consumer, employment and franchise agreements.<sup>188</sup>

Furthermore, pre-dispute clauses may not be governed by the FAA where they only offer online arbitration as an option. For example, eBay's User Agreement for its customers does not mandate OArb for resolution of disputes, but instead provides customers with the option of using OArb to assert their claims under \$10,000 against eBay.<sup>189</sup> Otherwise, consumers must pursue their claims in California court, which could be especially expensive and difficult for the many eBay users who live outside of California.<sup>190</sup> Accordingly, most consumers with qualifying claims are likely to choose OArb, but that does not make eBay's provision a true arbitration agreement enforceable under the FAA.<sup>191</sup> Similarly, the same is

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N.Y.U. L. REV. 429, 435–51, 485–86 (2002) (explaining why electronic contracts are not adhesive and promote efficiency).

<sup>184</sup> See Strout, *supra* note 39, 77–83 (2001) (emphasizing the importance of finality for online contract disputes and online arbitration's enforcement under the FAA).

<sup>185</sup> Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2006) (act making electronic contracts enforceable to the same extent as written contracts; effective October 1, 2000).

<sup>186</sup> See *supra* notes 126–142 and accompanying text (discussing arbitration programs of MARS and net-Arb).

<sup>187</sup> See *supra* note 27 and accompanying text.

<sup>188</sup> Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (bill barring enforcement of pre-dispute arbitration agreements in these typically uneven bargaining contexts).

<sup>189</sup> See eBay, Your User Agreement, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Dec. 12, 2009) (allowing OArb as an option for claims under \$10,000 but not requiring it).

<sup>190</sup> See *id.*

<sup>191</sup> In addressing PayPal's and eBay's ODR processes, a court concluded that the applicable terms of service did not require ODR processes in lieu of litigation. *Attaway v. Omega*, 903 N.E.2d 73, 80 (Ind. Ct. App. 2009).

true regarding the identical OArb clause in Second Life's User Agreement, which offers OArb to customers pursuing claims under \$10,000 in lieu of litigation in California.<sup>192</sup>

Still, online merchants likely will increasingly include pre-dispute OArb clauses in their e-contracts as OArb provisions and processes gain acceptance and trust.<sup>193</sup> As noted above, courts now routinely enforce e-contracts and the FAA model is there for enforcement of OArb clauses.<sup>194</sup> Furthermore, the same has been generally true in international transactions under the New York Convention and the UNCITRAL convention for enforcing arbitration awards.<sup>195</sup> The UNCITRAL Model Law also endorses enforcement of electronic signatures and contracts, and judicial trends suggest increasing acceptance of online transactions and proceedings in light of continually rising regularity of the Internet's usage.<sup>196</sup>

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<sup>192</sup> See Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Dec. 12, 2009) (using the identical contract provision giving customers the choice of California litigation, or OArb as an option for claims under \$10,000). Interestingly, the eBay and Second Life provisions are identical, except that the eBay agreement requires litigation in Santa Clara, California, while the Second Life contract requires litigation in San Francisco, California. Both clauses use the same language for their OArb options, specifying that a party electing arbitration must initiate the process with an established provider mutually agreed upon by the parties, and all proceedings must be online, by telephone, or based on written submissions but must not require any F2F processes unless mutually agreed upon by the parties. Compare eBay, Your User Agreement, *supra* note 189, with Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Dec. 12, 2009).

<sup>193</sup> See Strout, *supra* note 39, at 79–80 (discussing how online businesses are likely to embrace online arbitration, and to organize oversight groups to further foster such dispute resolution).

<sup>194</sup> See Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 15–18 (2002) (noting model is in place although questions remain regarding the applicable law).

<sup>195</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 67 (3d ed. 1999); The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. 1–16 (1958), reprinted in *id.* at 491–94 app. A [hereinafter NY Convention]; United Nations Comm'n on Int'l Trade Law, Status: 1958–Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Dec. 12, 2009). See generally Int'l Council for Commercial Arbitration (ICCA), *International Handbook on Commercial Arbitration* (Jan Paulsson et. al eds., 2006) [hereinafter *Arbitration Handbook*] (generally discussing international commercial arbitration).

<sup>196</sup> See Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial to its Success*, 12 AM. REV. INT'L ARB. 441, 444–45 (2001) (discussing enforcement of online arbitration).

International OArb is nonetheless subject to problematic choice of law, jurisdiction, and enforcement questions.<sup>197</sup> E-contracts often raise these types of issues due to the difficulty of locating parties and determining the place of contract execution in cyberspace.<sup>198</sup> Furthermore, it is difficult to define the "seat of the arbitration" for OArb, as is often required to determine the law applicable for enforcement of any arbitration agreements and awards as well as the law the arbitrators will use in deciding the parties' claims.<sup>199</sup> These jurisdiction and choice of law questions may be resolved, however, by the parties' agreement or development of a *lex mercatoria*, or delocalized "law" incorporating general contract principles and e-commerce norms.<sup>200</sup>

Choice of law questions nonetheless create additional concerns for OArb agreements and proceedings because many countries refuse or are reluctant to enforce pre-dispute arbitration agreements in consumer and electronic contracts.<sup>201</sup> In the European Union (EU), for example, e-merchants generally cannot require consumers to resolve disputes through OArb although they may offer it as an option.<sup>202</sup> The European Council Directive on Unfair Terms in Consumer Contracts also limits any OArb requirements that would hinder consumers' rights to take legal action.<sup>203</sup>

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<sup>197</sup> See *id.* at 46–47; see also Ghoshray, *supra* note 177, at 326.

<sup>198</sup> See Ghoshray, *supra* note 177, at 326 (drawing attention to the jurisdictional quandary one is confronted with when contractual disputes arise concerning online transactions).

<sup>199</sup> See Gilliéron, *supra* note 10, at 321–24 (highlighting jurisdiction issues).

<sup>200</sup> See *id.* at 323 (noting arguments for delocalized law in OArb).

<sup>201</sup> See Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823, 829–44 (2004) (explaining United States enforcement versus European Union refusal to enforce pre-dispute arbitration agreements in consumer cases); Geneviève Saumier, *Consumer Dispute Resolution: The Evolving Canadian Landscape*, 1 CLASS ACTION DEF. Q. 4, 52–57, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1291960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291960) (last visited Dec, 12, 2009) (noting how U.S. enforcement of pre-dispute arbitration clauses in consumer cases differs from Canadian provincial legislation that preserves class action access by denying effect of arbitration clauses in consumer contracts); Gilliéron, *supra* note 10, at 321–25 (discussing EU refusal to enforce pre-dispute agreements requiring consumers to submit disputes to ODR for binding resolution).

<sup>202</sup> Gilliéron, *supra* note 10, at 322; see also Haitham A. Haloush & Bashar H. Malkawi, *The Liberty of Participation in Online Alternative Dispute Resolution Schemes*, 11 SMU SCI. & TECH. L. REV. 119, 119, 124–31 (2007) (urging that "consent should be at the forefront" of an ODR scheme and arguing that any mandatory ODR requirements would not be enforceable and may not be workable).

<sup>203</sup> See Haloush & Malkawi, *supra* note 202, at 129–31 (discussing the European Council directives essentially preserving consumers' choice with respect to dispute resolution mechanisms).

This may help explain why eBay's and SecondLife's agreements state arbitration as an option.<sup>204</sup> E-merchants like eBay may be reluctant to include pre-dispute arbitration clauses of any sort in their consumer contracts in light of their broad domestic and international customer bases. Furthermore, they may fear courts' application of unconscionability or other contract defenses to refuse or limit enforcement of arbitration clauses. Some also have suggested that OArb for consumer cases should be limited to allow consumers, but not companies, to require compliance with pre-dispute OArb agreements.<sup>205</sup> Nonetheless, courts may favor enforcement of OArb over traditional consumer arbitration agreements due to OArb's cost-savings, speed, and protection for opening consumers' access to remedies.<sup>206</sup>

At the same time, non-legal forces fostered by registration requirements and other control mechanisms also may serve as de facto enforcement mechanisms for OArb agreements and awards.<sup>207</sup> For example, Internet Service Providers (ISPs) may disconnect consumers that do not abide by OArb requirements.<sup>208</sup> E-merchants may also refuse to do further business with consumers and others who do not comply with OArb clauses and determinations.<sup>209</sup> Such pro-active industry or company control, however, should be pursued with caution. It may be too harsh or augment power imbalances.

Perhaps more preferably, reputation incentives and e-community norms

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as a means for addressing the disparity of bargaining power they share with merchants who offer form contracts "on a take-it-or-leave-it basis" and often enjoy repeat player advantages in arbitration).

<sup>204</sup> See *supra* notes 189, 192 and accompanying text.

<sup>205</sup> Chi-Chung Kao, *Online Consumer Dispute Resolution and the ODR Practice in Taiwan—A Comparative Analysis*, 5 ASIAN SOC. SCI. 113, 119 (2009), available at <http://www.ccsenet.org/journal.html> (discussing the one-sided option for ODR enforcement).

<sup>206</sup> It seems that since contract law may even require enforcement of agreements to pursue non-binding ADR, then contract law would also allow for enforcement of agreements to use OArb where benefits of enforcement would outweigh any detriments. See Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 20–66 (2004) (discussing enforcement of even agreements to pursue non-binding dispute resolution under contract law).

<sup>207</sup> See Gilliéron, *supra* note 10, at 324 (noting non-legal enforcement).

<sup>208</sup> *Id.* at 323–24.

<sup>209</sup> See *id.* at 324 (citing a theory where "e-merchants and their consumers could be seen as a close-knit community where the bad behaviour [sic] of one would quickly lead to exclusion from the community").

may effectively augment OArb compliance. These forces have become increasingly powerful and important.<sup>210</sup> Although some argue that this importance is minimized for consumers as “one-shot” players, online ratings and blogs have great influence on consumers’ purchases.<sup>211</sup> For example, consumers using eBay reference seller ratings in making purchases and may post their own comments and ratings for dealers on eBay’s website.<sup>212</sup>

Many consumers also would simply honor OArb clauses in order to take advantage of the time and cost savings it offers for resolving claims.<sup>213</sup> Moreover, it often may be the only viable means for pursuing small claims on e-contracts.<sup>214</sup> Companies seeking to retain consumers’ business and contain dispute resolution costs are also likely to comply with any OArb clauses and awards. Companies also may be required to comply under a trustmark program such as those discussed above.<sup>215</sup>

E-communities are also beginning to establish online “community courts” for adjudicating disputes among buyers and sellers. For example, eBay-India is implementing an online court for users to present their feedback disputes to a 100-person jury of other eBay members who review the record and render a decision based on their votes as to whether the feedback should be posted.<sup>216</sup> Regardless of whether this community court scheme is legally enforceable, disputants’ interests in preserving their eBay access and reputations likely ensure their compliance with peer decisions. Furthermore, the peer community element creates an atmosphere of trust and respect, which makes such processes particularly attractive for intra-

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<sup>210</sup>See Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 U. TOL. L. REV. 163, 167 (2006) (noting that “although they are not law, norms can mirror, supplement, and even replace law in regulating ODR).

<sup>211</sup>*Id.*; see also Gibbons, *supra* note 194, at 28–29 (arguing that although reputation is an important enforcement mechanisms among merchants within a community, it is less important for consumers who only have isolated “one-shot” transactions with merchants).

<sup>212</sup>See Gilliéron, *supra* note 10, at 324 (highlighting the importance of reputation exemplified by eBay’s rating system); see also *infra* notes 140–1422 and accompanying text (discussing trustmark systems that may include “wall of shame” mechanisms to punish those who do not abide by OArb promises).

<sup>213</sup>See *infra* Part IV.

<sup>214</sup>See *infra* Part IV.A (discussing consumers’ need to weigh the cost of litigation against the size of their claim).

<sup>215</sup>See *supra* notes 130–32 and accompanying text (discussing trustmark systems).

<sup>216</sup>Hon. Bruce T. Cooper, *Online Dispute Resolution Comes of Age*, 20 PRAC. LITIGATOR 33, 33, 35 (2009) (discussing eBay-India’s “Community Court”).

community disputes.<sup>217</sup>

Accordingly, policymakers, e-merchants, consumers, and OArb providers must take lingering jurisdiction and enforcement issues into account.<sup>218</sup> These issues should not be overstated, however, in light of the various means through which enforcement and compliance may occur. Furthermore, policies can be developed to clarify and bolster enforcement, and more robust trustmark systems may be created to ensure OArb compliance.

### *B. Distrust in Operability and Privacy of Internet Systems*

As noted above, there have been concerns regarding the safety, reliability and privacy of ODR due to its reliance on the Internet and software programs.<sup>219</sup> Computers crash, hackers hone their abilities to tap into private systems, and viruses infect digital programs and files.<sup>220</sup> Disputants therefore have good reason to be skeptical of using digitally driven systems and programs for resolving their claims. Indeed, working with computers, electronics, and technologically dependent mechanisms can be maddening.<sup>221</sup>

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<sup>217</sup> See *id.* (also noting that other community court processes are being developed, providing two examples, [www.PeoplesCourtRaw.com](http://www.PeoplesCourtRaw.com) and [www.AllRise.com](http://www.AllRise.com)). Some “community courts,” however, do not appear to truly be for resolving disputes, but more for allowing Internet users to air their “rants” and opinions on various public and private matters. See People’s Court Raw, <http://www.peoplescourtraw.com/howItWorksChoose.php> (last visited July 17, 2009) (providing how its processes work for raising rants and arguments of various sorts, essentially allowing anyone to post their arguments via web videos and collect votes and comments from other site users—including friends and family they are encouraged to recruit for favorable votes); AllRise About Us, <http://www.allrise.com/general/about> (last visited Jan. 17, 2010) (presenting the site as supplying a means for people “to take out their aggressions toward injustices”). Ironically, the Terms of Use for AllRise require that any disputes arising out of use of the site must be resolved in California federal and state courts. AllRise Terms of Use, <http://www.allrise.com/general/legalterms> (last visited Jan 17, 2010).

<sup>218</sup> See Gilliéron, *supra* note 10, at 321–23.

<sup>219</sup> See *supra* Part I.B.2; see also Hon. Frank G. Evans et al., *Enhancing Worldwide Understanding Through ODR: Designing Effective Protocols for Online Communications*, 38 U. TOL. L. REV. 423, 426–27 (2006) (noting that given various computer concerns, “it is not surprising that many doubt the advantages of relying on this new computerized world”).

<sup>220</sup> See Evans et al., *supra* note 219 (noting computer concerns).

<sup>221</sup> In the course of researching and writing this article alone, I lost drafts and files along with significant time dealing with computer “crashes” and a virus that caused quite a bit of angst and extra work!

OArb can only succeed if participants trust that their submissions and communications will be safely received by their intended recipients, and remain securely stored on a dedicated case site or portal. Parties to OArb must feel confident that their communications will be private and inaccessible by "hackers" or others on the Internet. Privacy remains a key benefit of arbitration and ADR, despite some commentators' concern for greater transparency in ODR.<sup>222</sup> Privacy inspires the full disclosure and frank discussions that are often necessary for dispute resolution.

Fears regarding reliability and security of CMC are nonetheless overstated. Internet reliability is continually improving, and limited publication of OArb decisions could address transparency concerns.<sup>223</sup> Companies and individuals regularly use the Internet to pay bills, buy and sell goods and services, and store important data.<sup>224</sup> It is also now common to use the world wide web for social interaction and keeping in touch with friends and family, which often includes sharing photographs and engaging in personal dialogue.<sup>225</sup> This all evidences growing trust in CMC and cyber systems, regardless of whether that trust is warranted in some cases.

At the same time, privacy and reliability can be addressed in implementing OArb programs and using encryption and security devices.<sup>226</sup> Anti-virus and anti-malware programs have become commonplace and are freely or cheaply available for computer programs and operating systems.<sup>227</sup>

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<sup>222</sup> See Anita Ramasastry, *Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 166 (2004) (discussing the conflicts that arise between privacy and transparency in ODR).

<sup>223</sup> See *infra* notes 376–81 and accompanying text (proposing Internet publication of OArb reports with confidential information redacted to foster fairness, neutrality, and trust).

<sup>224</sup> Computer systems have become the norm for a plethora of business and personal processes. See Evans et al., *supra* note 219, at 423–24, 428 (also noting how growing use of the Internet for common communications is especially prevalent among young people).

<sup>225</sup> Facebook and Twitter are some of the more staid examples of social interaction websites. Innumerable websites and chat rooms exist for communications that are often too revealing. See Don Willmott, *Social Networking Primer* (July 2009), [http://www.aarp.org/leisure/activities/articles/social\\_networking\\_primer.html](http://www.aarp.org/leisure/activities/articles/social_networking_primer.html).

<sup>226</sup> Thomas D. Halket, *The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties*, 81 ST. JOHN'S L. REV. 269, 304–05 (2007) (noting how the technology exists for protecting security, although policymakers must take care to ensure some level of equality with respect to its use in dispute resolution).

<sup>227</sup> See, e.g., McAfee.com, Virus, Spam, Spyware Protection, <http://home.mcafee.com/Store/Default.aspx?cid=11344> (last visited Jan. 15, 2010) (providing a virus scanning program for \$29.99); see also Lavasoft.com, *Download Security Software for Spyware Removal*, [http://www.lavasoft.com/products/ad\\_aware\\_free.php](http://www.lavasoft.com/products/ad_aware_free.php) (last visited Jan. 15,

Furthermore, ODR providers take special measures to ensure the security of their programs and incorporate their own Internet security measures in their systems.<sup>228</sup>

Many providers also conduct all their processes and store case communications on a dedicated password-protected and secure server.<sup>229</sup> For example, MARS' process discussed above is conducted entirely through a private Case Summary Site that stores all submissions and communications.<sup>230</sup> Parties only receive e-mails alerting them of others' postings so that they may then use their dedicated passwords to access the Case Site and post responses, thereby eliminating direct e-mails to other parties or the arbitrator.<sup>231</sup> Other ODR providers continue to conduct processes through direct e-mails, but the reality is that companies and individuals have been communicating through direct emails for some time and this can be just as secure as communicating through a central portal.<sup>232</sup>

### *C. Fear Regarding "Unseen" Nature and Neutrality of OArb Providers*

Although ODR has been lauded as providing great promise for efficient dispute resolution, businesses and individuals have not fully embraced it to the extent some hoped.<sup>233</sup> Many ODR providers have come and gone, and public and private initiatives to advance ODR have made little headway.<sup>234</sup> For example, the FTC's 2000 public workshop to advance ODR for resolution of consumer e-contract disputes seems to have fallen by the wayside.<sup>235</sup>

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2010) (providing a free download of Ad-Aware, an anti-malware scanning program).

<sup>228</sup> See, e.g., *supra* notes 133–36 and accompanying text (discussing MARS' program).

<sup>229</sup> See *id.* at note 135 (discussing MARS' password protection feature of its program).

<sup>230</sup> See *id.* and accompanying text (discussing MARS program).

<sup>231</sup> See *supra* notes 135–36 and accompanying text (discussing MARS' process).

<sup>232</sup> See Strout, *supra* note 39, at 80–81 (highlighting how the technology exists to allow for secure online arbitration through e-mails, central portals, web conferencing and secure chat rooms).

<sup>233</sup> See Jason Krause, *Settling it on the Web*, 93 A.B.A. J. 42, 43 (2007) (noting that while "[o]nline dispute resolution was supposed to take over the legal profession," instead, "after the dot-com bust, [it] seemed to fail").

<sup>234</sup> See *supra* note 11 and accompanying text (providing the FTC's public initiatives as an example).

<sup>235</sup> See *id.* (noting how the FTC's initiatives have made little progress and research has revealed no further activity after the roundtable).



Nonetheless, prominent online businesses have begun to incorporate ODR in their practices and services.<sup>236</sup> PayPal, a widely used online payment system, incorporates ODR in its services through its Dispute Resolution Program and access to its Resolution Team.<sup>237</sup> Through PayPal's Resolution Center, sellers and buyers using the PayPal system can resolve disputes by first seeking to negotiate a settlement and then receiving a dispute determination from PayPal.<sup>238</sup> PayPal's Resolution Team also works with buyers and sellers online to help them settle their claims before they resort to litigation or chargeback disputes filed with the buyers' credit card company.<sup>239</sup>

While programs such as PayPal's exemplify more acceptance of ODR, they also raise the sorts of neutrality concerns that have hindered OArb's advancement. Company-implemented or sponsored OArb arouses suspicion regarding pro-business bias.<sup>240</sup> Some fear that in-house programs favor their implementing companies, and outside administrators favor the sellers that subscribe to their services.<sup>241</sup> However, in programs such as PayPal's, the process and decision-makers should remain relatively neutral since PayPal is not actually a party in the disputes. It also seems that PayPal would aim to provide a neutral dispute resolution program in order to preserve its reputation and customer base.<sup>242</sup>

At the same time, trustmarks can create potential for building confidence in OArb and combating reluctance companies and individuals

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<sup>236</sup> See *infra* notes 237–39 and accompanying text (discussing PayPal's incorporation of ODR in its Dispute Resolution Program).

<sup>237</sup> PayPal, Seller Guide to PayPal Dispute Resolution, <http://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/cps/securitycenter/sell/SellerGuide-outside> (last visited Jan. 17, 2010).

<sup>238</sup> *Id.*

<sup>239</sup> PayPal, Protection for Sellers, <https://www.paypal.com/cgi-bin/webscr?cmd=xpt/Marketing/securitycenter/sell/SellerProtection-outside> (last visited Jan 17, 2010); PayPal, Resolving Issues for Sellers, <https://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/Marketing/securitycenter/sell/ResolveIssue-outside> (last visited Jan. 17, 2010) (also indicating that any PayPal decision is not binding in that a buyer may file a chargeback with their credit card company).

<sup>240</sup> See Kao, *supra* note 205, at 117 (stating that "[i]f an ODR system is financially dependent on the businesses, . . . it is difficult to persuade consumers to view the ODR process as impartial").

<sup>241</sup> See *id.*

<sup>242</sup> PayPal gets business by being listed as an online merchant's preferred payment system for buyer purchases, and therefore one may wonder whether PayPal would have incentive to favor the merchant. Nonetheless, PayPal also has incentive to appear fair in order to maintain buyers' good will so that buyers will feel comfortable using PayPal for their purchases on other websites.

may have in using ODR.<sup>243</sup> Through these trustmark programs, online merchants may subscribe to use a provider's OArb services for customer complaints and aim to augment consumers' confidence in Internet transactions. As noted above, some providers such as net-Arb and MARS use their trustmark programs to market their services and attract companies to adopt their dispute resolution services.<sup>244</sup> Adopting merchants may then post the associated trustmark logo on their sites to indicate their commitments to fair consumer dealings and using ODR to resolve consumers' claims. They hope that this will bolster their credibility and consumer trust in their websites.<sup>245</sup>

Trustmark programs must be carefully structured and implemented to ensure that they are meaningful and unbiased.<sup>246</sup> Reputation interests can help combat concerns regarding the neutrality of ODR systems.<sup>247</sup> However, an independent trustmark and registration program such as that suggested below may be necessary to ensure neutrality. A properly regulated program also could ensure that subscriber merchants abide by trustmark-associated standards of honesty and foster consumer confidence in the authenticity of the trustmark and OArb programs they require.<sup>248</sup>

#### *D. Technological and Presentation Imbalances*

The use of OArb and other ODR processes raises important concerns about due process and imbalances with respect to technological resources and skills. A "digital divide" still exists in the United States and throughout

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<sup>243</sup> See Gilliéron, *supra* note 10, at 316–17 (noting how trustmarks and seals may be used for trust-building and helping to boost consumers' confidence in ODR programs).

<sup>244</sup> See *supra* notes 130–31 and accompanying text (discussing trustmark programs in use).

<sup>245</sup> Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 849 (2001) (discussing the BBB's seal program for boosting consumer confidence and merchants' commitment to consumer protection).

<sup>246</sup> See Kao, *supra* note 205, at 117 and *infra* notes 355–64 and accompanying text (discussing trustmark concerns).

<sup>247</sup> See Kao, *supra* note 205, at 117 (stressing that consumers will not trust, and thus may refuse to use, ODR systems that appear biased due to financial connections with the companies that use their services).

<sup>248</sup> See Global Business Dialogue on Electronic Commerce (GBDe) Consumer Confidence Issue Group (CCIG), *Reflection of Alternative Dispute Resolution, Trustmark and Data Privacy Activities* 48, 50–51, [http://www.gbd-e.org/ig/CC/CCIG\\_Recommendations\\_2008.pdf](http://www.gbd-e.org/ig/CC/CCIG_Recommendations_2008.pdf) (Draft Version 2008) (providing an outline and graphic for an international trustmark for use in consumer contracts).

the world.<sup>249</sup> Computers, Internet services, web cameras, and other technological equipment cost money. Furthermore, remote residential locations or government regulations may prevent consumers from having access to the high speed Internet and other technological services they would need to submit evidence and engage in virtual hearings or other processes that may be required for OArb.<sup>250</sup>

This divide is shrinking, however, as access to technologies becomes free or increasingly inexpensive for companies and individuals.<sup>251</sup> Computers have become cheaper over time with the development of more efficient production methods, and even web cameras can now be purchased for \$20 or less.<sup>252</sup> In addition, local libraries, public schools and universities, and other city and county offices may offer free or inexpensive Internet access and other technology services.

Still, access to technologies is often imbalanced among the parties to a dispute, especially with respect to consumer claims. A large corporate merchant may have all the most advanced technologies and equipment for submitting evidence and engaging in hearings online. They also may have teams of software and information technology experts who can assist company personnel with ODR processes, and may provide additional training or dedicated consultants to assist with using particular OArb programs.

In contrast, consumers may be at the mercy of long lines to use a library computer, let alone any additional equipment the library may provide. Furthermore, consumers with their own computers generally have slower

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<sup>249</sup> See François Senécal & Karim Benyekhlef, *Groundwork for Assessing the Legal Risks of Cyberjustice*, 7 CAN. J.L. & TECH. 41, 54–56 (2009) (noting the “digital divide” questions, as well as the questions regarding use of various technologies).

<sup>250</sup> See Halket, *supra* note 226, at 305 (noting how access may not be open to all).

<sup>251</sup> See Jason Krause, *supra* note 233, at 43 (highlighting the declining prices of technologies necessary for effective ODR).

<sup>252</sup> I do not even have a web camera, let alone use a “BlackBerry” or “text messaging” – and assume these things are beyond my means. However, a quick search on the Internet uncovered webcams for as low as \$10. See Walmart.com, [http://www.walmart.com/search/searching.do?search\\_query=webcam&search\\_constraint=0&tab\\_value=48\\_All&ic=48\\_0&ref=&search\\_s ort=4&selected\\_items=+](http://www.walmart.com/search/searching.do?search_query=webcam&search_constraint=0&tab_value=48_All&ic=48_0&ref=&search_s ort=4&selected_items=+) (last visited Dec. 2, 2009) (listing a possibly lower quality web camera for \$10, along with 48 other items at various prices but many under \$30). There were also offers for a free BlackBerry with a new cellular phone contract. See Wirefly, [http://www.wirefly.com/phones/rim/?referringdomain=wirefly\\_g&refcode1+GPS\\_9021\\_00](http://www.wirefly.com/phones/rim/?referringdomain=wirefly_g&refcode1+GPS_9021_00) (last visited Jan. 17, 2010). Of course, a new phone contract can be quite expensive and require a commitment many cannot make for two years of services at a set monthly rate.

and older systems. They also usually lack additional equipment, and must pay for outside computer “doctors” or other technological assistance to help them address computer and Internet issues. In addition, consumers may lack resources for training or other assistance in using particular OArb systems. Moreover, they may not be as familiar or comfortable with the Internet and use of emerging technologies, especially if they are not part of the current tech-driven generation.<sup>253</sup>

Policymakers and OArb providers must therefore address equality and due process concerns.<sup>254</sup> There will always be imbalances with respect to technology access, resources and skills, just as there are with respect to any legal and other resources that may advance parties’ presentations of their cases in litigation, arbitration and ADR. Even if parties were ordered to use the same level and type of technologies, they still may have vastly divergent skill levels in using those technologies and expressing themselves through e-mails and digital evidentiary submissions. Policies must therefore aim to protect a base level of procedural fairness for all disputants, and seek to ensure that all parties may present their cases for resolution through a substantially fair, neutral and reliable process.<sup>255</sup>

### *E. Elimination of F2F Communications and Lack of Voice*

Human interaction is often very important for building trust and facilitating productive and satisfying dispute resolution processes.<sup>256</sup> F2F discussions, body language, and other nonverbal cues, play an important role in creating comfort and sparking frank discussions that lead to mutually beneficial, or at least tolerable, settlements.<sup>257</sup> This is especially true with

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<sup>253</sup> For example, my mom is very limited in her use of the Internet as a new-comer to e-mail, while my nephews are quickly becoming quite tech-savvy although they live in a very small rural community.

<sup>254</sup> See Halket, *supra* note 226, at 269–305 (focusing on equality questions regarding use of technologies in arbitration).

<sup>255</sup> See *id.* at 293–95, 305 (proposing how arbitrators in general should approach questions regarding use of technology to improve efficiency and make arbitration more cost-effective without jeopardizing due process); see also Thomas D. Halket, *Improving Arbitration Through Technology: A Quest for Basic Principles*, 62 DISP. RESOL. J. 54, 56–61 (2007) (also discussing fair use of technology in arbitration).

<sup>256</sup> See Gilliéron, *supra* note 10, at 325 (noting how crucial the issue of human interaction is with respect to ODR, although few have addressed this salient consideration).

<sup>257</sup> See *id.* at 316 (discussing this trust issue as “probably the biggest and toughest issue ODR designers have to work on”).

respect to non-binding processes such as negotiation and mediation, which only end disputes if the parties are able to consensually and voluntarily reach a resolution of their claims.

However, as discussed above, F2F interaction is less important with respect to OArb because it relies on a third-party arbitrator's determination of the parties' claims instead of the parties' post-dispute and mutual agreement. This means that parties in OArb must focus on their case presentations, and need not engage in interactive dialogue. In fact, they are better off if they are not distracted by animosities or subjective biases that may cloud their presentations of the relevant facts and evidence.<sup>258</sup> Furthermore, OArb programs may benefit from forms and automated systems that address resource and skill imbalances by assisting parties in presenting their cases in an efficient and effective manner.<sup>259</sup>

As noted above, we are learning ways to communicate emotions through text-based messages, easing need for F2F communications to air feelings.<sup>260</sup> Expanded use of textual cues and emotive phrases can provide therapeutic benefits similar to those of F2F hearings.<sup>261</sup> CMC broken up with online time lapses also may help temper would-be bullies and cause parties to be more attentive to the content of their communications.<sup>262</sup> Furthermore, OArb at least allows consumers to air their concerns through CMC rather than merely "lumping it" or giving up their claims due to costs or hassles of F2F processes.<sup>263</sup> Consumers also have become more aware

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<sup>258</sup> See Larson & Mickelson, *supra* note 154 and accompanying text (noting the emotional aspects of F2F interaction).

<sup>259</sup> See T. Schultz et al., *Electronic Communication Issues Related to Online Dispute Resolution Systems*, <http://www2002.org/CDROM/alternate/676/index.html> (last visited Jan. 17, 2010) (discussing ODR from a law and justice point of view and noting how different processes and programs can further or hinder fair dispute resolution).

<sup>260</sup> See Larson & Mickelson, *supra* note 154, at 144 (discussing text-based communications' increased usage and capacity for creating and expressing feeling, especially with respect to its use in the deaf community); see also *supra* notes 154–55 and accompanying text (noting expansion and development of emotion through textual cues).

<sup>261</sup> See *supra* notes 154–55 and accompanying text (explaining that F2F communications can be therapeutic for some parties, while others benefit from the new avenues that CMC creates for virtually "speaking out" and asserting claims against companies without the tensions and stresses of hearings and meetings).

<sup>262</sup> See Schultz et al., *supra* note 259 (discussing how lack of F2F interaction may benefit the process).

<sup>263</sup> See Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075,

that that their chances are very slim of getting into a courtroom to air any complaints.<sup>264</sup>

More varied technologies beyond text-based messages are also expanding to allow for real-time or virtually F2F communications.<sup>265</sup> For example, witness testimonies may be presented through real-time and camera recordings in order to allow for effective cross examination and assessment of witness credibility.<sup>266</sup> Technologies such as teleconferencing, Skype and LiveOffice allow for virtual hearings, and are becoming cheaper and more accessible for individuals of all income levels as efficient production and competition among service providers increase.<sup>267</sup> As suggested below, virtual world arbitration hearings using avatars and digital courtrooms also may become more common and accessible in the near future.<sup>268</sup>

#### IV. CAPITALIZING ON OARB'S POTENTIAL FOR RESOLVING CONSUMER CLAIMS

Unless consumers are adamant to pursue claims against merchants for emotional and "justice" reasons, they usually will give up on claims if the merchant fails to provide a timely resolution through informal channels

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1085–86 (2009).

<sup>264</sup> See *id.* at 1088–89 (noting the use of binding arbitration clauses in consumer contracts that preclude class actions limiting consumers' ability to litigate).

<sup>265</sup> See Krause, *supra* note 233, at 43–44 (discussing advances in web technology).

<sup>266</sup> See Julia Hörnle, *Online Dispute Resolution—The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration*, Apr. 5, 2002, <http://www.bileta.ac.uk/> (follow "Conference Papers" hyperlink; then follow "Conference: 17th BILETA Annual Conference 2002" hyperlink; then follow "Online Dispute Resolution-The Emperor's New Clothes-Benefits and Pitfalls of Online Dispute Resolution" hyperlink) (last visited Dec. 9, 2009) (noting that video-conferencing may be used to replace traditional face-to-face hearings for examining and cross-examining witnesses); *but see* Robert Bennett Lubic, *Reducing Costs and Inconveniences in International Commercial Arbitration and Other Forms of Alternative Resolution Through Online Dispute Resolution*, 15 AM. REV. INT'L ARB. 507, 511–15 (2004) (noting that video conferencing "does not provide an exact equivalence to face-to-face interaction").

<sup>267</sup> See Krause, *supra* note 233, at 43–44. As noted above, access to these programs is expected to grow as technological resources become cheaper and more publicly available. See *supra* notes 249–52 and accompanying text (discussing growing access of technology to combat concerns regarding imbalances).

<sup>268</sup> See *infra* Part IV.B.3 (proposing use of virtual worlds in OArb); see also Krause, *supra* note 233.

such as phone calls and e-mails.<sup>269</sup> This is because it often is too costly and inconvenient for consumers to pursue claims, especially when they are bound by arbitration or choice of venue provisions requiring in-person proceedings in far away locations.<sup>270</sup> OArb may therefore give consumers a new and needed avenue for low-cost and convenient dispute resolution that simultaneously pleases companies with efficiency benefits. However, as Professors Katsh and Rifkin highlighted with respect to ODR nearly ten years ago, any process must be designed to address cost, convenience, trust and expertise considerations.<sup>271</sup>

#### A. Cost

E-merchants should adopt OArb programs and contract clauses to save them from the costs of F2F dispute resolution processes. Many e-merchants already include pre-dispute arbitration clauses in their consumer contracts in hopes of escaping costs and publicity of litigation.<sup>272</sup> Litigation is expensive, especially due to the attorneys' fees and other legal costs that are usually involved in these more formal processes.<sup>273</sup> Companies also seek the finality of arbitration which is lacking with respect to non-binding ADR processes.

Cost is a key factor, if not the most important determinant, in consumers' decisions to pursue or forego claims they have against merchants, especially e-merchants who may be difficult to even locate.<sup>274</sup> Furthermore, consumers must balance costs of pursuing claims against the size of their claims, which is usually small in typical e-contract disputes.<sup>275</sup> They also must temper this computation by the likelihood they will succeed on their claims, and be able to actually collect any award.

OArb can be an attractive alternative for resolving consumer claims because it can be carried out more cheaply than in-person dispute resolution

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<sup>269</sup> See *supra* notes 146–53 and accompanying text.

<sup>270</sup> See Kao, *supra* note 205, at 118 (recognizing that if ODR incurs unreasonable costs to consumers, it will become unaffordable and unapproachable for consumers).

<sup>271</sup> ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 74–92 (Jossey-Bass 2001) (providing early materials on ODR).

<sup>272</sup> See Mandelbaum, *supra* note 263, at 1081–82.

<sup>273</sup> See Kao, *supra* note 205, at 118 (noting that “in the US there are around 100 million Americans denied access to the justice system due to the high cost of litigation”).

<sup>274</sup> See *id.*

<sup>275</sup> See Protocol, *supra* note 146 (noting that disputes arising out of consumer transactions often involve relatively small amounts of money).

processes. Some OArb and ODR services are already provided for free or relatively low costs by independent providers and through merchant-affiliated programs.<sup>276</sup> There is also momentum for increased use of OArb and competition among providers, as merchants, consumers, and policymakers recognize and promote its potential for cheaply and efficiently resolving consumer disputes.<sup>277</sup>

OArb and other ODR processes also save parties from the substantial expenses of traveling to F2F meetings and proceedings.<sup>278</sup> OArb also may eliminate or ease parties' legal costs because it is less formal and intimidating than litigation and F2F arbitration. In addition, it may be less legalistic to the extent that it has not been "judicialized" like F2F arbitration hearings and OArb providers may be dedicated to application of general legal and equitable principles instead of location-specific law.<sup>279</sup> Cost-savings also result from OArb's use of asynchronous communications, which allow parties to make factual and evidentiary submissions on their own schedules and without having to miss work or arrange for childcare.<sup>280</sup>

Nonetheless, OArb services are not necessarily cheap, and their costs usually increase with the complexity of the case.<sup>281</sup> ODR systems also may be fairly complex and require additional training.<sup>282</sup> Consumers also may incur extra costs simply by purchasing technological equipment and high speed Internet access necessary for adequately presenting their cases.<sup>283</sup>

There also are hidden dangers of free or cheap OArb services linked with online merchant subscribers. As noted above, some providers use trustmark programs for marketing to companies who then agree to resolve

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<sup>276</sup> See *supra* notes 66–142 and accompanying text (discussing various ODR and OArb services and costs associated with them).

<sup>277</sup> See, e.g., Strout, *supra* note 39, at 79, 82, 90 (concluding that although online arbitration must address some problems, it is "a viable solution for solving online disputes").

<sup>278</sup> See *supra* Part II.A.

<sup>279</sup> See Gillieron *supra* note 10, at 323–24 (addressing OArb's lack of location connections and tendency to rely on general principles).

<sup>280</sup> See *supra* Part II.A.

<sup>281</sup> See *supra* notes 86–87, 114–16, 121–23 and accompanying text (discussing how some providers' costs go up with case complexity).

<sup>282</sup> See *supra* note 91 and accompanying text (discussing non-binding ODR programs that require fairly expensive training).

<sup>283</sup> See Halket, *supra* note 226, at 305–06 (noting that although many technical aids are available at low or no cost, low cost and equal availability are "not universal givens for all technical aids in all situations").



eventual disputes with their consumers through that provider's services.<sup>284</sup> Although these trustmarks can be beneficial for consumers when they promote commercial honesty and open avenues for cost-effective and fair dispute resolution, they raise concerns regarding providers' potential bias toward the merchants that subsidize the OArb services through subscription fees.<sup>285</sup> These OArb providers also may be inclined to favor e-merchants to foster their mutual marketing schemes and interests.<sup>286</sup>

Accordingly, a well-designed OArb system should address these relative cost and bias concerns. As an initial matter, service providers can ease consumers' up-front fees by allowing for payment of fees after disputes are resolved.<sup>287</sup> Some providers already allow for allocation of fees in the arbitration award in order to ease access problems caused by high up-front fees, such as those that have been criticized in F2F arbitration for making it inaccessible for some consumers.<sup>288</sup> Post-resolution fee payment also may help consumers feel more comfortable in submitting disputes to an unseen arbitrator for final resolution online.

Bias and cost concerns also may be addressed through government regulation of the providers and oversight of trustmark programs and OArb services.<sup>289</sup> One scholar has proposed structured government control of ODR, including government funding of services to address bias and trust issues that may hinder ODR's development and acceptance.<sup>290</sup> Such government intervention and subsidization, however, may not be feasible in light of current budget deficits and other spending needs.<sup>291</sup>

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<sup>284</sup> See *supra* notes 243–47 and accompanying text (highlighting these connections and questioning neutrality).

<sup>285</sup> See Mandelbaum, *supra* note 263, at 1089–90.

<sup>286</sup> See *infra* note 364 and accompanying text.

<sup>287</sup> See *supra* note 132 and accompanying text.

<sup>288</sup> See *supra* note 132 and accompanying text (noting providers that do not require payment until after an agreement is signed between the parties to use the OArb service); see also *Mazera v. Varsity Ford Mgmt. Servs.*, 565 F.3d 997, 1004 (6th Cir. 2009) (highlighting how up-front payment of arbitration fees can chill consumer claims).

<sup>289</sup> See Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71, 89–93 (2004).

<sup>290</sup> *Id.* (proposing government control model).

<sup>291</sup> Government-provided dispute resolution services can be very effective and help consumers obtain remedies through a trusted system. See, e.g., Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 Tul. L. Rev. 735, 742–50, 783–85, 803–04 (2009) (discussing government programs for resolving consumers' financial services claims, and noting how it has been successful in

Neutrality could therefore be addressed through less government-dependent registration and oversight by a private or quasi-governmental body, as discussed below in addressing trust issues.<sup>292</sup> Furthermore, OArb system expenses could be subsidized by registration fees, which providers should accept as a cost of marketing and doing business online.<sup>293</sup> Because OArb generates little overhead or other expenses, the registration fees should be kept to a minimum.<sup>294</sup> However, the fund should be sufficient to allow for strict caps on any fees charged to consumers for filing OArb claims against e-merchants.

### *B. Convenient, Efficient, and Effective Communications*

Convenience goes hand-in-hand with costs and efficiency to the extent that parties generally find dispute resolution processes more convenient if they are relatively cheap and efficient.<sup>295</sup> Convenience also relates to the time and place for the related processes and communications, which again impact efficiency and cost.<sup>296</sup> Convenient and efficient dispute resolution, however, should not leave parties dissatisfied by cutting off their ability to adequately present their claims and feel “heard.” OArb processes must therefore be designed to be not only quick and convenient, but also sufficiently flexible and innovative to allow for emotive and effective communications.

#### 1. Flexible Communications

ODR in general is more convenient than F2F litigation, arbitration, or other ADR processes because they save parties from having to attend hearings or meetings in person.<sup>297</sup> Consumers can therefore engage in ODR

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fostering neutrality). However, the United States has embraced private dispute resolution and already stressed government funds will unlikely be dedicated to consumer dispute resolution in the near future despite rising consumer protection concerns. The Congressional Budget Office estimated the federal budget deficit to reach \$1.6 trillion in 2009—the highest since World War II. Congressional Budget Office, CBO Summary, *available at* [http://www.cbo.gov/ftpdocs/105xx/doc10521/2009BudgetUpdate\\_Summary.pdf](http://www.cbo.gov/ftpdocs/105xx/doc10521/2009BudgetUpdate_Summary.pdf) (last visited Dec. 26, 2009).

<sup>292</sup> See *infra* Part IV.C.2.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> See *supra* Part II.A.

<sup>296</sup> *Id.*

<sup>297</sup> See Hörnle, *supra* note 266 (“The obvious advantage of such virtual meetings is that they

processes from the comfort of their own homes, wearing their pajamas if they so desire. They also need not deal with locating and traveling to hearing sites, let alone facing the hassles and high costs of arranging childcare or missing work. Asynchronous communications also enhance OArb's convenience. For example, company personnel handling disputes presumably prefer to respond to work-related ODR communications during the work day. However, consumer complainants may be working or caring for children during the day and therefore only have the time to deal with their personal or home-related claims in the evening or during other off-work hours. Asynchronous communication therefore addresses these different scheduling needs. It also may foster satisfaction and family needs by allowing mothers and fathers to deal with these consumer claims after their children have gone to sleep at night.

At the same time, asynchronous communications are usually quite effective in OArb<sup>298</sup> and can be supplemented with teleconferencing or Skype where necessary for cross-examination and full assessment of witness credibility.<sup>299</sup> OArb providers should therefore allow for asynchronous submissions of party statements, briefs, affidavits, and other evidentiary documents, as well as photos of important items and video-recordings of testimony and relevant sites. However, online arbitrators must use their discretion to require that the parties have virtual meetings when necessary for real-time witness testimony and party presentations. The key is for arbitrators to foster the flexibility of OArb processes while remaining attuned to the needs of each particular case.

## 2. Time-Restricted and Tailored Processes

Convenience and cost-savings can disappear when dispute resolution processes are delayed and seem to never end. Indeed, this is a main criticism of litigation due to courts' backlogs and sometimes indeterminate schedules.<sup>300</sup> Furthermore, F2F arbitration and other ADR processes can suffer similar lag when there are difficulties in setting meetings and

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can be held at a distance, obviating the need to travel.").

<sup>298</sup> See Lubic, *supra* note 266, at 515.

<sup>299</sup> See Schultz et al., *supra* note 259 (noting the differences between communication methods in ODR and arbitration).

<sup>300</sup> See James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 300 (2006) (noting that delays in the litigation process, particularly case backlogs, are a criticism of litigation).

hearings that fit parties' varied schedules, as well as the neutrals' own "day job" duties as practicing lawyers or other relevant employment.<sup>301</sup>

OArb and other ODR processes usually avoid these scheduling and time delays because they do not require F2F meetings. However, they also can fall prey to delays when they are not time-restricted. For example, an online process becomes a nuisance if parties do not respond to communications in a timely manner. Processes also are ineffective if parties are permitted to continue submitting additional evidence and arguments without end.

Non-binding ODR also may be especially vulnerable to delays and never-ending dialogue because it relies on the parties' mutual settlement but lacks the inherent limit inducements of F2F meetings. For example, having to attend F2F mediation meetings can prompt parties to either reach a settlement or declare an impasse and proceed to litigation or arbitration because they wish to avoid investing additional time and resources attending such meetings.<sup>302</sup> However, parties to online mediation may be inclined to continue submitting communications from the comfort of their own homes or offices. In addition, when and if the parties finally declare an impasse, they then face all the additional time and costs of starting a new dispute resolution process.

In contrast, OArb is binding and necessarily culminates in a neutral third party's determination. Furthermore, online arbitrators can take charge of disputes to a greater degree than mediators due to their decision-maker role. Arbitrators are paid to make decisions, unlike mediators who are hired solely to foster interaction and rapport among the parties. Arbitrators should therefore be vigilant in enforcing OArb rules placing tight time restrictions on parties' submissions and responses, and abiding by duties to render awards shortly after submissions are closed, usually within 7 to 14 days.<sup>303</sup> They also should exercise their discretion and control in curtailing the volume of evidentiary submissions.

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<sup>301</sup> Unlike judges, arbitrators generally only decide disputes part-time or "on the side," and are often very busy with their own legal practices.

<sup>302</sup> Cf. Lubic, *supra* note 266, at 512–13 (explaining the speed, convenience, and expense advantages of ODR over ADR arbitral proceedings).

<sup>303</sup> See *supra* notes 120–34 and accompanying text (discussing current OArb services and the time restrictions many include).

### 3. Innovative Technologies and Techniques

Tailored and time-restricted OArb processes should not squelch expression or hinder parties' abilities to adequately present their cases. Regimented blind bidding processes for trading settlement offers and demands may quickly end parties' disputes, but they do not allow parties to tell their stories or obtain substantive determinations of their claims.<sup>304</sup> Of course, disputants sometimes just want to swap settlement numbers.<sup>305</sup> However, they can do that for free without assistance of an online program. Furthermore, disputes often involve evidentiary questions and grey issues the parties want answered. This is where OArb can come in to provide a more satisfactory process than simple number-swapping.

It is therefore important for OArb to remain efficient but allow for various types of presentations and submissions. Currently used CMC methods such as documentary submissions, e-mails, chat rooms, and video-conferencing may be more than sufficient for resolving many cases. However, OArb could make better use of Skype and Live Office when necessary for more effective presentation of parties' arguments or witness testimony. These CMC devices may be necessary, for example, when parties or witnesses are not comfortable or skillful presenting themselves in writing. Real-time video also may be salient for effective cross-examination and assessment of a witness's credibility.

New and improved transcription programs also have developed that convert the computer user's spoken words into text.<sup>306</sup> This can be helpful for those who have trouble writing or typing. Transcription can also be coupled with translation to bridge lingual divides.<sup>307</sup> Admittedly these programs can be expensive and still have kinks to be worked out; however, they can enable individuals to engage in written dialogue regardless of their native languages and typing skills.

Communal courts also provide promise for new forms of OArb. As noted above, eBay India is already using an e-community court for

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<sup>304</sup> See Lubic, *supra* note 266, at 512 (describing Cybersettle's blind bidding system as one in which parties simply make a number of offers and demands toward settlement of their dispute by a computerized program).

<sup>305</sup> See *id.* (noting that Cybersettle settled 68,000 cases over a span of four years).

<sup>306</sup> See, e.g., NCH Software, <http://www.nch.com.au/express/index.html> (last visited Dec. 26, 2009).

<sup>307</sup> See, e.g., Kwintessential, Foreign Language Translation and Transcription Service, <http://www.kwintessential.co.uk/translation/transcription.html> (last visited Dec. 26, 2009).

resolution of disputes between buyers and sellers on its website.<sup>308</sup> This court is an ODR process through which e-community members can have their feedback disputes decided by a vote of other eBay users. Although such processes currently are limited to narrow types of disputes and are mainly non-binding, OArb may utilize this peer process more in the future as e-communities like eBay continue to grow and thrive.<sup>309</sup>

There are also exciting possibilities for use of virtual courts in OArb to allow for expanded means of expression and case presentations in a video game-like digital atmosphere online. Virtual worlds have developed that allow users to assume the form and identity of digitized avatars and interact on social and economic levels with other avatars in an on-going community that exists purely online.<sup>310</sup> Players buy and sell virtual world goods, go to virtual stores and own virtual real estate.<sup>311</sup> Unsurprisingly, these interactions lead to disputes among those in the virtual world ranging from avatar “assaults” to breach of virtual real estate sales.<sup>312</sup> Some therefore advocate communal dispute resolution systems and virtual courts to cheaply and efficiently resolve these in-world disputes.<sup>313</sup>

LambdaMOO, one of the first virtual worlds, developed a system for petitioning “wizards” (the founder and some long-time players) to enact in-world legislation, as well as an OArb process for resolution of in-world disputes.<sup>314</sup> This OArb system staffed by volunteers allows disputants to

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<sup>308</sup> See Cooper, *supra* note 216 and accompanying text (discussing eBay’s community court).

<sup>309</sup> For example, such peer-voting could be used for binding resolution of disputes regarding postings on such social sites as Facebook and MySpace.

<sup>310</sup> See Jason T. Kunze, *Regulating Virtual Worlds Optimally: The Model End User License Agreement*, 7 NW. J. TECH. & INTELL. PROP. 102, 105–07 (2008); see also Brendan James Gilbert, *Getting to Conscionable: Negotiating Worlds’ End User License Agreements Without Getting Externally Regulated*, 1, 3–5 (Buffalo Legal Studies Research Paper No. 1375408, 2009), available at <http://ssrn.com/abstract=1375408> (last visited Jan. 17, 2010) (discussing the rise of virtual worlds and their governance through end-user license agreements (EULAs)).

<sup>311</sup> See Kunze, *supra* note 310, at 105–07.

<sup>312</sup> *Id.* at 102–10, 116–17 (discussing virtual rights within virtual worlds and the need for an online dispute resolution system coupled with peer feedback to foster community expression and satisfaction); see also Joshua A.T. Fairfield, *Anti-social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 435–36 (2008) (describing virtual worlds and their governance per EULAs).

<sup>313</sup> See Fairfield, *supra* note 312, at 429–33 (proposing that disputes regarding virtual transactions could better be handled through an intra-communal common law system).

<sup>314</sup> See Jennifer L. Mnookin, *Virtual(y) Law: The Emergence of Law in LambdaMoo*, J. COMPUTER-MEDIATED COMM. (1996), <http://jcmc.indiana.edu/> (discussing law and politics in LambdaMOO).

choose a communal arbitrator, submit their disputes to the arbitrator and other site users who wish to contribute, and obtain peer feedback along with the arbitrator's decision on their claims.<sup>315</sup> That decision is not appealable, but other arbitrators can review and overturn it by a majority vote.<sup>316</sup>

LambdaMOO's system has been criticized as being too limited and corrupted by participants' selfish agendas.<sup>317</sup> However, the system exemplifies an e-community OArb process that allows for expanded dialogue among peers in resolving disputes.<sup>318</sup> Furthermore, virtual spaces like LambdaMOO can be used as laboratories for parties to present their claims as avatars in a digital court, which may be especially convenient and satisfying for individuals who need such visual aid to adequately communicate and express themselves.<sup>319</sup>

Similarly, the growing virtual world of Second Life also provides a laboratory for development of such interactive OArb processes. Second Life has gained great popularity with almost six million avatar residents who have created a vibrant market for exchanging in-world goods for real world dollars to the tune of over \$250 million per year.<sup>320</sup> This has led real world companies such as Adidas, Ford and IBM to set up virtual shops in Second Life, and given law firms new territory for creating truly paperless offices that service real clients.<sup>321</sup>

Second Life accordingly has generated real-world disputes regarding members' avatar actions and virtual ownership rights, and it had required

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<sup>315</sup> *Id.*; see also Sarah E. Galbraith, *Second Life Strife: A Proposal for Resolution on In-World Fashion Disputes*, 2008 B.C. INTELL. PROP. & TECH. FORUM 090803, 1, 28–34 (2008) (explaining LambdaMoo's petition process).

<sup>316</sup> See Mnookin, *supra* note 314, at 3–13; see also Galbraith *supra* note 315, at 32–34.

<sup>317</sup> See Gilbert, *supra* note 310, at 7–8 & n.20 (discussing criticisms).

<sup>318</sup> See Mnookin, *supra* note 314, at 3–15 (noting the benefits of the give-and-take allowed through this system despite system criticisms and the debate between "formalizers" and "resisters" who have very different ideas about how the system should run).

<sup>319</sup> See *id.* at 19–22 (emphasizing how this can be used for experimentation and legal autonomy).

<sup>320</sup> Kunze, *supra* note 310, at 106 (discussing the very real economic and social consequences of virtual world interactions in Second Life).

<sup>321</sup> Galbraith, *supra* note 315, at 9–14 (noting how real businesses have entered Second Life to market their products and make real money); Attila Berry, *Lawyers Earn Actual Cash in Virtual World*, Legal Times, July 30, 2007, at 15–16, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005488400&slreturn=1&hbxlogin=1> (discussing one D.C. law firm's success in setting up an office in Second Life, and "landing real clients and making real money through the virtual world").

that those disputes be resolved through F2F arbitration proceedings until a court held the pre-dispute arbitration clause in its user agreement unconscionable.<sup>322</sup> The court found the clause unduly oppressive because it imposed high fees and travel costs on individuals by mandating in-person arbitration in California.<sup>323</sup> This led to Second Life's new dispute resolution clause, discussed above, allowing individuals to choose OArb for claims under \$10,000, but otherwise requiring litigation in California.<sup>324</sup>

At the same time, the Faculty of Law of the Lisbon New University in collaboration with the Portuguese Ministry of Justice has set up an e-Justice Centre in Second Life that provides avatars the option of using its mediation and arbitration services.<sup>325</sup> This Centre has a 3D building in the virtual world, complete with meeting rooms.<sup>326</sup> Here is where avatars can meet to first attempt to mutually settle their disputes through mediation, and then arbitrate unresolved issues through a relatively quick and inexpensive process that ends disputes with an arbitrator's binding determination.<sup>327</sup>

These types of 3D communal courts are particularly well-suited for virtual worlds such as Second Life due to the unique issues involved in virtual transactions and parties' proven access to and comfort with avatars and online interactions. However, these 3D courts are likely to expand for resolution of other e-contract disputes as technologies continue to develop and become more accessible for companies and consumers.<sup>328</sup> Furthermore, they offer another form of presentation and expression beyond the currently text-heavy norms.<sup>329</sup> Nonetheless, these virtual processes should only be used when the parties have access to the necessary technologies and are comfortable with these interactive virtual processes. Moreover, the game-

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<sup>322</sup> *Bragg v. Linden Research Inc.*, 487 F. Supp. 2d 593, 605–06 (E.D. Pa. 2007) (finding that consumers were powerless but to accept Linden's arbitration clause).

<sup>323</sup> *Id.*

<sup>324</sup> See *supra* note 192 and accompanying text.

<sup>325</sup> E-Arbitration-T Project—Online Dispute Resolution, *e-Justice Centre, ODR in Second Life*, <http://www.e-arbitration-t.com/2008/02/28/e-justice-centre-odr-in-second-life/> (last visited Jan. 17, 2010).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (explaining that parties' fees include only 1% of the value of the dispute and a deposit in escrow of up to 5% of the case value to guarantee that they will abide by the settlement or arbitration decision).

<sup>328</sup> See *supra* notes 310–13 and accompanying text (recognizing the potential expansion of online communal courts as online communities continue to grow).

<sup>329</sup> See *supra* notes 156–58 and accompanying text (discussing the shortcomings of text-heavy norms).



like atmosphere of these virtual courts must not undermine the seriousness of the process.

### C. Trust

Trust is important with respect to OArb, just as it is with respect to any online dealings.<sup>330</sup> Consumers and companies will not submit disputes to OArb if they do not trust OArb mechanisms and providers.<sup>331</sup> Merchants that require consumers to resolve disputes through OArb and OArb providers must earn trust through forthright, honest and reliable services. They should develop, post, and abide by due process protocols similar to those of the Consumer Due Process Protocol, which calls for clear notice of arbitration clauses and how to obtain information regarding the arbitration process, preservation of consumers' access to small claims court, and measures ensuring "reasonable cost to consumers."<sup>332</sup> Trust also should be fostered through provider registration, verified trustmarks, and consumer education for OArb programs.

#### 1. Disclosure

An initial step for building trust is to establish merchant disclosure rules for contract terms requiring consumers to resolve disputes through OArb.<sup>333</sup> This could be done through a required grid-like form that e-merchants could conspicuously post on their sites with basic information about the merchants' use of OArb, how it works, its binding effects, any consumer fees, and secure links for filing claims and gathering further information. Such simple grid disclosure should be noticeable and user-friendly, and not cause information overload that dissuades consumers from reading the

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<sup>330</sup> See Gilliéron, *supra* note 10, at 316.

<sup>331</sup> See KATSH & RIFKIN, *supra* note 271, at 88.

<sup>332</sup> The Protocol was proposed by the AAA and others through the National Consumer Disputes Advisory Committee. See Protocol, *supra* note 146; *Warranty Woes*, *supra* note 19, at 661–86 (discussing additional reforms and regulations for consumer arbitration); Gibbons, *supra* note 194, at 37–48 (proposing procedural reforms in lieu of a wholesale ban on enforcement of pre-dispute arbitration agreements in consumer contracts).

<sup>333</sup> See Yeon-Koo Che & Albert H. Choi, *Shrink-Wraps: Who Should Bear the Cost of Communicating Mass-Market Contract Terms?*, at 1–4 (John M. Olin L. & Econ. Res. Paper Series, Paper No. 2009–15, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1384682##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1384682##) (proposing enforcement of disclosure ("duty to speak") by requiring an easy-to-read format for disclosure or imposing buyer-friendly terms on sellers who fail to provide sufficient disclosures).

terms.<sup>334</sup>

At the same time, OArb providers could help consumers understand their OArb processes and feel more comfortable resolving disputes online by posting resources and establishing free simulation exercises parties can use in preparing to file OArb claims. Many providers already explain their processes on their websites, and some post demonstrations and additional resources.<sup>335</sup> For example, The Electronic Courthouse sets forth the eight clear steps for how its OArb process works on its website, along with links to its rules of procedure and example cases.<sup>336</sup> The website also will walk interested parties through a sample case.<sup>337</sup>

Disclosure requirements should not be that difficult or costly to implement, and would benefit consumers and companies alike.<sup>338</sup> They could help boost consumer education regarding their e-purchases and options for resolution of disputes, which is currently far from sufficient.<sup>339</sup>

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<sup>334</sup> See *Legislating in the Light*, *supra* note 19 (advancing arguments for grid disclosures); *Warranty Woes*, *supra* note 19, at 628–30 (discussing need for procedural disclosure protections in MMWA consumer arbitration); Shmuel I. Becher & Esther Unger-Aviram, *Myth and Reality in Consumer Contracting Behavior*, 11, 18 (Soc. Sci. Res. Network, Working Paper No. 1443908, 2009), available at <http://ssrn.com/abstract=1443908> (highlighting their findings supporting other evidence that consumers place great importance on contract length in deciding whether to take time to read their contracts).

<sup>335</sup> See, e.g., *supra* notes 82–94, 106–21 (discussing the information Smartsettle, SquareTrade, eHow, net-Arb, and Virtual Courthouse provide on their websites).

<sup>336</sup> The Electronic Courthouse, *How it Works*, [http://www.electroniccourthouse.com/how\\_it\\_works\\_page1.php](http://www.electroniccourthouse.com/how_it_works_page1.php) (last visited Jan. 14, 2010) (stating the steps in a readable manner, taking parties from the first step of agreeing to use OArb through to the final step of obtaining a final and binding decision).

<sup>337</sup> *Id.*; Cooper, *supra* note 216, at 33–38 (article by the owner of The Electronic Courthouse discussing ODR generally and his company's online process); see also Cyber Arbitration, *Methods and Procedure*, <http://www.cyberarbitration.com/methods.php> (last visited Jan. 14, 2010) (online provider of mediation and arbitration explaining its process using web meetings, webex, web conferencing, e-mail, voice chat, and other technologies to help parties resolve disputes).

<sup>338</sup> See Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?*, 104 MICH. L. REV. 837, 838, 845–49 (2006).

<sup>339</sup> Studies indicate that consumers are often unaware of important contract terms due to companies' lack of pre-purchase disclosure. See ABA 2002 Report, *supra* note 8, at 430–32, 442–55 (emphasizing the need for consumer education and disclosure by online merchants and stakeholders along with other recommendations for ODR); see also Gail Pearson, *Financial Literacy and the Creation of Financial Citizens*, 3, 3–27, in *THE FUTURE OF CONSUMER CREDIT REGULATION: CREATIVE APPROACHES TO EMERGING PROBLEMS* (Michelle Kelley-Louw et al. eds., 2008).

OArb providers also may be inclined to accept the minimal costs of increased or regulated disclosure in order to attract customers and foster goodwill among their current clients.<sup>340</sup> Similarly, merchants also may be willing to use OArb for its consumer claims and accept regulated disclosure as means for cutting dispute resolution costs while attracting customers and easing consumer negativity toward merchants they feel are untrustworthy or have "done them wrong."<sup>341</sup>

## 2. Provider Regulation

Currently, there are no licensing or registration requirements for ODR providers.<sup>342</sup> Instead, consumers are vulnerable to illegitimate and incompetent services, and encounter provider websites that give little concrete information about how the companies' ODR processes work, whether they are binding, and how much they cost.<sup>343</sup> Many providers are also very difficult to contact or fail to respond to e-mail inquiries regarding their services.<sup>344</sup> They should therefore be subject to registration requirements that mandate among other things proper arbitration training, as well as secure and dependable processes.

The registration could be done through a central website including a monitored and updated database of registered providers and their arbitrators.<sup>345</sup> This database should be freely accessible and easily searchable to allow consumers and companies to research and verify legitimacy of OArb providers before using their services. It also should include arbitrators' credentials, as well as their OArb opinions and

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<sup>340</sup> See ABA 2002 Report, *supra* note 8, at 430–32, 442–43.

<sup>341</sup> See Gibbons, *supra* note 194, at 36 (describing the balance between the perceived economic advantages of arbitration and the costs to businesses of providing consumers with due process, and explaining that e-merchants "should be willing to bear these costs as long as the costs associated with arbitration remain less than those associated with pursuing traditional litigation").

<sup>342</sup> See *id.* at 5 (noting accreditation of ODR providers as a potential option to increase confidence in the ODR process).

<sup>343</sup> See *id.* at 95–96 (recognizing that information about ODR providers is currently nonexistent).

<sup>344</sup> We encountered this many times in trying to compile research regarding ODR providers. See ODR Provider Chart and backup, last updated June 30, 2009 (on file with author); Memorandum from Stefanie Mann to Professor Amy J. Schmitz, Re: Resolution Forum (June 15, 2009) (on file with author) (explaining providers' failure to respond to inquiries regarding its process and fees).

<sup>345</sup> The database should be monitored and updated to help weed out providers that disappear or fail to maintain required standards.

reports.<sup>346</sup> These posted opinions need not be complicated or expensive, but instead simply provide the parties' names, award amounts, case types, and minimal explanation.<sup>347</sup> Any personal or sensitive information would be redacted, or sealed if necessary to protect special confidentiality concerns.

Such registration and opinion postings would help give providers and arbitrators incentive to remain unbiased and balanced, and empower consumers to gain familiarity and comfort with an OArb process.<sup>348</sup> It also would comport with current momentum for enhanced consumer protection initiatives. For example, President Obama recently proposed the creation of a Consumer Financial Protection Agency (CFPA) to help protect consumers from predatory lending practices such as deceptive advertising and lack of transparency in loan transactions.<sup>349</sup> Although industry groups have voiced opposition to the proposal, many policymakers support this initiative and other consumer protection measures.<sup>350</sup>

A government entity such as the FTC or the proposed CFPA could undertake OArb provider registration and maintenance of the searchable database. This could help ensure neutrality of the database and registration process, and build the public's trust in legitimate OArb providers and processes.<sup>351</sup> In addition, provider registration fees could cover all or most database costs.

Nonetheless, government custody and oversight would create additional duties for already overburdened public entities. It may therefore be preferable for an independent information and communication technology (ICT) group or another private organization unaffiliated with the OArb providers to undertake registration and database maintenance tasks.<sup>352</sup>

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<sup>346</sup> See Gibbons, *supra* note 194, at 21–23 (highlighting transparency as imperative to fair ODR systems).

<sup>347</sup> This should add little expense or complication since this information should already be online due to the nature of the OArb process.

<sup>348</sup> In addition, some providers may use random arbitrator assignments to enhance independence. See JULIA HORNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 239–42 (2009) (discussing importance of provider and arbitrator neutrality in ODR and various means for ensuring independence).

<sup>349</sup> David Cho & Michael D. Shear, *Obama Presents Bill to Create Consumer Finance Watchdog*, WASH. POST, July 1, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063004187.html> (discussing the proposal and lobbying efforts that have already begun).

<sup>350</sup> *Id.*

<sup>351</sup> See Schultz et al., *supra* note 259.

<sup>352</sup> See Winn & Jondet, *supra* note 35, at 459–65 (discussing ICT and strategies for

There may be some concerns regarding a private group's independence, but a group invested in growth of technology and e-commerce would have incentive to properly carry out registration duties as means for boosting consumers' satisfaction and trust in online transactions and purchases.<sup>353</sup> Furthermore, an ICT or similar group would understand how Internet processes and products work, who the online "players" are, and what concerns and questions arise in online environments.<sup>354</sup>

### 3. Oversight Through a Trustmark System

Registration may help augment legitimacy and confidence in OArb providers, but do little to boost consumers' confidence in e-merchants' internal OArb processes or use of other OArb mechanisms. Accordingly, registration could be coupled with a centralized seal or trustmark program.<sup>355</sup> For example, the BBB will accredit, and thus essentially provide its trustmark or seal, to companies that agree to and meet the "BBB Standards for Trust."<sup>356</sup> These standards include honoring promises, maintaining honesty and transparency in advertising and selling, and seeking to resolve disputes through internal and external means, including BBB arbitration.<sup>357</sup> Furthermore, companies agree to abide by any BBB arbitration decisions, such as those rendered through BBB's "Auto-line Arbitration" for resolving Lemon Law and automobile defect cases between consumers and car manufactures.<sup>358</sup> Although this voluntary process is not

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developing consumer protection standards and regulations with respect to ICT products).

<sup>353</sup> See Schultz, *supra* note 289, at 91–97 (discussing incentives for ODR providers to support government regulation, and noting that the payment of membership fees for a trustmark could create problems regarding independence of ODR providers).

<sup>354</sup> See Donald J. Leu, Jr. & Charles K. Kinzer, *The Convergence of Literacy Instruction with Networked Technologies for Information and Communication*, 35 *READING RES. Q.* 108, 115–17 (2000) (discussing the continual appearance of new technologies with which people are unfamiliar and the need to train teachers in ICT to improve students' technology literacy).

<sup>355</sup> Others also have offered the possibility for a seal program to boost confidence in ODR. See Gilliéron, *supra* note 10, at 341 (focusing article on the importance and means for building trust in ODR for it to be successful).

<sup>356</sup> BBB, *Code of Business Practices (BBB Accreditation Standards)*, <http://www.bbb.org/us/bbb-accreditation-standards> (last visited Jan. 14, 2010) (requiring companies seeking the BBB seal to respond to consumer claims and seek to resolve those claims without litigation).

<sup>357</sup> *Id.*

<sup>358</sup> BBB, *Description and Rules (For All States Except California)*, <http://www.bbb.org/us/auto-line/us-process/#thirtythree> (last visited Jan. 14, 2010).

OArb per se,<sup>359</sup> the seal program helps build consumer confidence in BBB members despite the fact that they are likely repeat players in BBB arbitrations and subsidize the process through membership fees.<sup>360</sup>

Like the BBB's seal program, a trustmark system for merchants who use OArb must be streamlined, independent and respected. Trustmarks mean nothing if they lack an imprimatur of authenticity like that of the BBB.<sup>361</sup> For example, net-ARB's CCP trustmark program noted above is not regulated or government ensured, and is marketed in a way that raises bias concerns.<sup>362</sup> net-ARB advertises its CCP seal as means to "Turn Shoppers into Customers" and "[s]ave potentially thousands in legal fees."<sup>363</sup> It also warns that "[d]oing business without an arbitration clause is like building a home in a flood plain without insurance."<sup>364</sup> This leaves a visitor to net-ARB's website wondering whether the trustmark program is merely a pro-merchant marketing campaign with no real consumer protection advantages. One also may question net-ARB's incentive to recruit arbitrators inclined to favor the merchant members who are repeat players in its process and presumably use its services to save thousands in

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<sup>359</sup> Because companies desire the marketing benefits of the accepted and trusted BBB seal, this one-sidedness does not seem to dissuade them from accepting the BBB standards and decisions. BBB, *Code of Business Practices (BBB Accreditation Standards)*, <http://www.bbb.org/us/bbb-accreditation-standards> (last visited Jan. 14, 2010); BBB, *Description and Rules (For All States Except California)*, <http://www.bbb.org/us/auto-line/us-process/#thirtythree> (last visited Jan. 14, 2010) (explaining the auto-line arbitration process and consumers' freedom to choose court or arbitration, and to accept or reject any BBB arbitration decision).

<sup>360</sup> See BBB, *Description and Rules (For All States Except California)*, <http://www.bbb.org/us/auto-line/us-process/#thirtythree> (last visited Jan. 14, 2010) (also noting that consumers pay no fee for Auto-Line arbitration because of this company subsidization, but that BBB takes measures to ensure all arbitrators are neutral and have no ties with the respondent manufacturers).

<sup>361</sup> See Gibbons, *supra* note 194, at 20–21 (noting how governments may play a role in ensuring the legitimacy of trustmarks and other such symbols of reliability and fairness).

<sup>362</sup> See *supra* notes 130–32 and accompanying text.

<sup>363</sup> See net-ARB, *Consumer Confidence Program*, [http://www.net-arb.com/consumer\\_confidence/member\\_benefits.php](http://www.net-arb.com/consumer_confidence/member_benefits.php) (last visited Jan. 14, 2010).

<sup>364</sup> *Id.* (also noting that its awards are binding). The site states membership is free, but a merchant may obtain additional marketing benefits such as being featured on the net-Arb website if they follow certain coding rules. E-mail from Lynn, net-ARB Support, to Stefanie Mann, Research Assistant to Professor Amy J. Schmitz (June 23, 2009) (on file with author) (stating membership as free but noting the benefits and additional requirements for being a "Featured Member").

avoiding litigation and perhaps liability.

The same may be feared regarding MARS' Shop with Confidence program to the extent this program also is unregulated and member merchants pay an annual fee to repeatedly use MARS' ODR processes.<sup>365</sup> The listed conditions of the Shop with Confidence trustmark are laudable: merchants agree, among other things, to be honest, transparent, responsive, and fair in marketing and dealing with customers.<sup>366</sup> Merchants also must clearly disclose to customers their use of any self-regulatory or other private dispute resolution processes, and abide by any MARS OArb decisions or face FTC and other consumer organizations' repercussions.<sup>367</sup> Still, one may question whether MARS favors merchant members or fails to ensure companies' trustmark compliance and the impartiality of mediators and arbitrators.

Accordingly, a robust trustmark system for companies' use of OArb should be independent. The same independent entity or group that maintains the OArb provider registration database could issue and monitor the trustmark, thereby lowering overhead and organization costs of the overall program. The trustmark could be similar to the BBB's seal, but go further in expressly communicating to consumers that the companies posting the trustmark will seek to resolve any disputes that cannot be resolved informally through a properly registered OArb provider. Trustmark indication on a company's website could then be linked with the registration website so that consumers could easily verify that the designated OArb service or provider complies with neutrality, training, and quality requirements.

Companies seeking to post the trustmark could also be required to cover all or most costs of the OArb process and allow consumers to choose the provider from the registration database. It may also be beneficial to develop institutional rules and protocols for OArb providers and companies using their processes in order to ensure sufficient uniformity and fairness for OArb.<sup>368</sup> Although this may appear burdensome on companies, it

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<sup>365</sup> MARS, Shop With Confidence Fees, <http://www.resolveydispute.com/mrates.php> (last visited Jan. 17, 2010).

<sup>366</sup> MARS, Merchant/Seller Terms & Conditions, <http://www.resolveydispute.com/odr/MTandC.htm> (last visited Jan. 17, 2010).

<sup>367</sup> MARS, Online Dispute Resolution, <http://www.resolveydispute.com/online-dispute-resolution.php> (last visited Jan. 14, 2010).

<sup>368</sup> Full discussion of what these rules would contain, who would develop them, and how they would be enforced is beyond the scope of this "first steps" discussion of ODR registration and

should be amenable to companies in light of the marketing benefits they would enjoy from posting this sort of verifiable trustmark.<sup>369</sup> Furthermore, companies could garner further marketing benefits from having their adherence to the trustmark communicated to consumers through listings on FTC, state attorney general, and other consumer affairs websites.<sup>370</sup>

#### 4. Transparency and Consumer Education

Litigation produces a public record and thus allows for public access to proceedings and determinations.<sup>371</sup> However, arbitration and other ADR processes are presumptively private, which has been considered both beneficial and problematic.<sup>372</sup> Although parties usually enjoy this privacy, some worry that arbitration's private awards allow companies to hide consumer claims regarding scams, product safety, and other questionable company practices.<sup>373</sup> These awards fail to develop law or generate publicity that may lead to investigations and policy initiatives.<sup>374</sup> Furthermore, companies may augment this secrecy through imposition of confidentiality clauses that preclude consumers from disclosing information and evidence regarding arbitrated claims.<sup>375</sup>

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trustmark suggestions. However, others have proposed special institutional rules, with one book dedicated to making the case for such development. See HORNLE, *supra* note 348, at 243–62 (emphasizing the book's argument for such rules and giving further guidance for suggestions regarding such rules).

<sup>369</sup> See Gilliéron, *supra* note 10, at 316–17 (noting how trustmarks and seals may be used for trust-building and helping to boost consumers' confidence in ODR programs).

<sup>370</sup> See HORNLE, *supra* note 348, at 228–30 (noting how trustmarks may counteract consumers' reluctance to use ODR only if consumers are aware of the trustmark and its meaning).

<sup>371</sup> See, e.g., Schultz, *supra* note 289, at 104–05.

<sup>372</sup> See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212–17, 1228–34 (2005) (discussing benefits and drawbacks of secrecy in arbitration, especially when statutory claims are at stake).

<sup>373</sup> See Christopher Placitella & Justin Klein, *The Civil Justice System Bridges the Great Divide in Consumer Protection*, 43 DUQ. L. REV. 219, 223–27, 231–36 (2005) (emphasizing uneven power structure between consumers and industry and the need for civil litigation to protect consumer interests).

<sup>374</sup> See Mandelbaum, *supra* note 263, at 1082, 1091–92 (explaining that businesses use arbitration to avoid publicity and that arbitration does not produce written decisions on which policymakers can base policy decisions).

<sup>375</sup> Public awards also help consumers uncover evidence of prior violations that could aid their own cases. See *Ting v. AT&T*, 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003) (warning how AT&T could use arbitration's private awards and confidentiality clauses in its arbitration agreements to preclude consumers from proving their claims).



Publication of OArb decisions could help address these concerns and provide some of the public policy benefits of reported judicial opinions.<sup>376</sup> This transparency also could foster consumer awareness, access, and consequential trust with respect to OArb.<sup>377</sup> Publication requirements should nonetheless remain fairly inexpensive and efficient through use of the Internet to preserve claim and award information on a searchable database.<sup>378</sup> Furthermore, published arbitration reports need not include detailed legal authorities or intricate damages calculations that could drive away non-lawyer arbitrators and hinder timeliness of awards.

Arbitrators could simply fill out award e-forms including names of the parties and arbitrators, claim and award amounts, and fee allocations or awards.<sup>379</sup> Any sensitive or personal information and communications could be redacted from these published reports.<sup>380</sup> OArb providers also could be required to publish statistics on their OArb cases and decisions online, including numbers of cases submitted and decided, percentages of results favoring businesses and consumers, types of claims handled, and companies involved.<sup>381</sup>

As noted above, these arbitration reports and related statistics could be provided on the database maintained on a central and independent website.<sup>382</sup> The FTC also may have some input or oversight with respect to

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<sup>376</sup> See Kao, *supra* note 205, at 118.

<sup>377</sup> See *id.*

<sup>378</sup> See *id.* (noting that if ODR incurs unreasonable costs for consumers, it will become unaffordable and that "publication of arbitration decision" does not need to contain anything other than the business's "name, the type of dispute, and the nature of resolution," and can exclude "communications between the parties during the proceedings and the consumer's name").

<sup>379</sup> ME. REV. STAT. ANN. tit. 10, § 1169 (2007). The reporting requirement was all that was left from an original bill proposing to bar enforcement of pre-dispute arbitration contracts in consumer, employment, and insurance disputes. David LeFevre, *Ohio Considers Mandatory Arbitration of Medical Malpractice*, DISP. RESOL. MAG., Summer 2007, at 38 (noting how the adopted law "fell far short" of the sweeping proposals but hoped to foster oversight with less risk if FAA preemption).

<sup>380</sup> See Kao, *supra* note 205, at 118 (suggesting publication of online arbitration decisions with proper confidentiality protections in order to foster much-needed transparency in the process).

<sup>381</sup> See *id.* (providing ideas for fostering transparency in ODR and noting the importance of such transparency).

<sup>382</sup> The NASD already provides reports to some extent as a quasi-public portal for securities arbitration. See, e.g., Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereof, to Provide Written Explanations in Arbitration Awards Upon the Request of Customers, or of Associated Persons in Industry Controversies, 70 Fed. Reg. 41,065 (July 15, 2005) (expanding current NASD award publication rules by proposing amendments allowing parties to

publication of information about statutory warranty claims decided through OArb in light of its duties under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA).<sup>383</sup> For example, the FTC could publish OArb warranty claim information in conjunction with its current obligation to provide publicly-accessible records of consumers' warranty claims and indices compiling information regarding warrantors and products involved in claims, outcomes on claims, and warrantors' compliance with FTC decisions.<sup>384</sup> The FTC also may include OArb warranty claim information in its publicly available statistical summaries, which must be independently audited on an annual basis.<sup>385</sup>

It is true that basic arbitration reports and publication requirements will not create legal precedent per se and may not further the development of law to the extent that reasoned and publicly reported judicial opinions do. However, reported judicial opinions are rare, and OArb transparency would help foster public trust in the processes and hinder companies from breaking or skirting the law.<sup>386</sup> Furthermore, arbitrators competing for corporate and consumer clients would have incentive to publish unbiased and intelligent awards and explanations to signal their neutrality and competence.<sup>387</sup> Publication of OArb awards also could raise consumers' awareness of OArb choices and aid consumers in deciding whether to use a particular arbitrator or OArb provider.<sup>388</sup>

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require that these awards include reasoned opinions); CAL. CIV. PROC. CODE § 1281.96 (West 2005) (requiring arbitration administrators to provide reports for free over the Internet); Press Release, Nat'l Ass'n of Sec. Dealers, NASD Dispute Resolution to Provide Arbitration Awards Online (May 10, 2001), <http://finra.org/PressRoom/NewsReleases/2001NewsReleases/P010078> (discussing how NASD worked with the Securities Arbitration Commentator to publish awards online).

<sup>383</sup> Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA), Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-2312 (2000)).

<sup>384</sup> 16 C.F.R. §§ 703.7–703.8 (2000).

<sup>385</sup> *Id.* § 703.6.

<sup>386</sup> See Boyd N. Boland, *Most Cases Settle: The "Vanishing Trial" from the Perspective of a Settlement Judge*, TRIAL TALK, June/July 2005, at 15–17 (noting that less than 2% of cases go to trial and even fewer lead to published opinions, thus hindering clarification of legal standards).

<sup>387</sup> Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 213–14 (2006) (concluding that the research available indicates that arbitration is less "lawless" than some fear).

<sup>388</sup> *Id.* (also noting this benefit of published decisions). The Taiwanese Science and Technology Law Center (STLC) domain name ODR system exemplifies such transparency by providing a flowchart of its process, a list of neutrals it uses, and decision reports open to public scrutiny. Kao, *supra* note 205, at 118.

At the same time, more general education initiatives should provide consumers with basic information about OArb options and related resources. A registration database including arbitration decisions is not sufficient to educate consumers about OArb because consumers are unlikely to search this database until after they are involved in an OArb process.<sup>389</sup> Accordingly, there should be independent portals for consumer initiatives regarding OArb. This could begin through revival of the FTC roundtables and discussions that seemed to have stalled.<sup>390</sup> The FTC and other consumer organizations also should provide resources and information for consumers and companies seeking to use OArb for resolution of their disputes. These resources must be straightforward, and not simply add to information overload or confuse consumers with superfluous legal jargon.

## V. CONCLUSION

Consumers already negative toward the market and economy are becoming paralyzed in pursuing remedies against online merchants that wrong them. They also have become skeptical of arbitration clauses that appear in many e-contracts amidst reports about how companies use off-line arbitration to curb class actions and effectually escape liability on consumer claims.<sup>391</sup> OArb, however, provides a new avenue for arbitration by moving this binding process online to make it cheaper, faster, and more user-friendly for consumers seeking to obtain remedies on their claims.

This Article therefore sheds new light on consumer arbitration, and advances OArb from the shadows of more publicized non-binding or number-swapping ODR methods. Unlike other methods, OArb provides finality and does not suffer from lack of F2F interactions to the same extent as more facilitative processes due to its reliance on evidentiary submissions. OArb nonetheless faces hurdles and fairness pitfalls that policymakers should address in establishing systems that capitalize on OArb's potential to benefit consumers and companies. Properly regulated OArb would provide

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<sup>389</sup> See Gibbons, *supra* note 194, at 6 ("Consumers do not have the time or the incentive to investigate ODR options until the post-contract dispute arises.").

<sup>390</sup> See *supra* note 11 and accompanying text (discussing FTC's early initiatives).

<sup>391</sup> W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 69 (2007) (noting "skeptics object that businesses use arbitration to prevent" class actions which forces "consumer and employee claimants into individualized proceedings where neither they nor their lawyers can counter the advantages enjoyed by more powerful repeat players").

consumers with realistic means for asserting their claims while augmenting companies' cost savings from avoiding court and class actions, which they may then share with consumers through lower prices and better quality products.