

*Domestic and International
Developments
in
Online Dispute Resolution*



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and

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by

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Table of Contents

I. Introduction	1
II. Some Examples of ODR.....	2
III. Technology and Dispute Systems Design.....	6
IV. An Example of an Online Mediation	8
A. Joint Session: Starting the Mediation— Setting the Ground Rules	8
B. Caucusing with Each Party in Private Spaces.....	12
C. Private-Caucus Messages	13
D. Return to Joint-Session Space	25
E. ODR in ADR	32
V. Looking Forward.....	37

I. Introduction

Online Dispute Resolution (ODR), sometimes referred to as Technology Mediated Dispute Resolution, continues to progress as a field. ODR is in its 18th or 28th year, depending on how one counts.²

As evidenced by the presentations at the 15th Annual World Online Dispute Resolution Forum in The Hague in 2016, hosted at the Peace Palace, the Netherlands, people in the field from around the world continue to:

- (1) discuss how technology can be part of dispute resolution, as well as
- (2) put in place technology solutions for dispute resolution.

In the United States, the principal clearinghouse in this field is the National Center for Technology and Dispute Resolution at the University of Massachusetts.³ Founded in 1998, it is the premier American research institution on the design and implementation of ODR. Its annual Cyberweek⁴ brings together interested persons from around the world to provide information on developments, demonstrations of technologies, discussions of emerging topics, and more. These dialogue spaces have also seen the emergence of the International Journal of Online Dispute Resolution, in which thought leaders in the field from around the world exchange ideas on the subject. In sum, ODR is a vibrant space at this time as individuals and entities examine how technology can be of assistance to dispute resolution.

² Ethan Katsh is universally recognized as a founder of the field through his book, *The Electronic Media and the Transformation of Law* (Oxford University Press, 1989) and his 1999 pilot project that developed into a system at Ebay.

³ www.odr.info

⁴ <http://www.adrhub.com/page/cyberweek-2016>. Now done in conjunction with the Werner Institute of Creighton University, InternetBar.Org, ODR Latinoamerica, and Modria.

II. Some Examples of ODR

When speaking of ODR, the broadest definition would be the use of technology spaces in some manner in the process of resolving disputes. In that vision, the ubiquitous use of email and other communications technology as a means for negotiation makes us all ODR users no matter what actual process of dispute resolution (negotiation, mediation, arbitration or some hybrid) in which we are involved.⁵

Email-based customer service (for example, Apple iTunes) is a form of customer-service ODR that takes advantage of asynchronous email to address customer concerns with their iTunes accounts. Moving beyond email, structured online platforms may also be made part of a company's web presence to address claims. eBay and Paypal address some 60 million claims a year and Amazon or Buy have similar numbers.

As technology evolves, so does the manner in which the technology can be used. For example, the introduction of FaceTime-type technology as an alternative to the classic telephone or physical, face-to-face interaction with an insurance company provides another means for technology to assist the resolution of disputes in a cost-effective manner.

The development of web-camera technology and Skype has been a vehicle to facilitate at least preliminary interviewing of persons at a distance, as well as other key tasks of organization. Technology providers, such as GotoMeeting.com, have integrated similar technologies to their text- and phone-based platforms, as an enhancement of the interaction process.⁶ A dispute-resolution-technology provider, Modria.com, has thought more broadly about workflow management developing software that can both facilitate intake of disputes as well as management of those disputes through resolution.

⁵ Use of an online tool, such as Doodle, to agree on a teleconference might not be thought of as ODR, but in a way, it is. The reason is that it quickly narrows the options for a meeting time so that the most promising options can be known by all at the same time and a decision made. Contrast that with exchanging emails or phone calls among a group of people to see when they can meet. This would be ODR as a tool to aid negotiation and decision-making more than dispute resolution, but that does not detract from its efficacy.

⁶ <http://www.gotomeeting.com/online/>

An emerging example for ODR in the United States and Canada is the use of technology in Property Tax Assessment Appeals.⁷ In this setting, individuals can file online their appeal with a local government for a property-tax assessment and have the appeal examined through an online process. Another arena is in the continuing integration of technology in dispute-resolution institutions, such as the American Arbitration Association (AAA) New York No-Fault Insurance cases providing new online tools to appellants and insurance carriers, and new case-management tools to AAA staff and neutrals.⁸ Another example is the work of the CPR International Institute for Conflict Prevention and Resolution (CPR), who is currently engaged in several cutting-edge initiatives to develop ODR for on-line transactions and in business relationships, such as its Business-to-Business Pilot Projects.⁹

Reinventing forms of dispute resolution powers part of the growth of ODR. For example, the case appraisal and crowd-sourced dispute-resolution vision of icourthouse.com has been taken to another level in China. TaoBao, the large Chinese consumer-to-consumer marketplace that is part of Alibaba.com, has developed a “community arbitration” process for dispute resolution by community members who have registered as “dispute assessors.”¹⁰ These dispute assessors—as a community—examine claims concerning:

- (1) disputes over an item’s categorization;
- (2) disagreements over the monetary aspect of the transaction; and
- (3) disputes involving general breach of contract.¹¹

TaoBao hopes that, by resolving disputes through community arbitration, the platform’s buyers and sellers will receive judgment on their disputes within just two days, down from the three to five days it now takes TaoBao’s customer service to reach a judgment.¹²

⁷ Alachua County, Florida., Orleans Parish, Louisiana, Durham County, North Carolina, Davidson County, Tennessee and in British Columbia, Canada are locales where such systems have been implemented. See <http://www.modria.com/newsroom/durham-county-n-c-selects-modria-resolution-center-power-property-tax-appeals/>

⁸ <http://www.modria.com/newsroom/american-arbitration-association-selects-modria-power-new-york-fault-caseload/>

⁹ <http://www.cpradr.org/AcrossBorders/CPRODROverview.aspx>

¹⁰ <http://evigo.com/9696-china-taobao-users-will-play-judge-jury-e-commerce-disputes/>

¹¹ *Id.*

¹² *Id.*

Other developments outside the United States are the establishment, under the Business Practices and Consumer Protection Authority Act, of Consumer Protection BC in British Columbia, Canada. This not-for-profit entity is dedicated to:

- (1) delivering consumer protection services throughout British Columbia;
- (2) promoting fairness and understanding in the marketplace; and
- (3) administering in the public interest any Act that is delegated to it.

As a portal for a wide range of consumer disputes, Consumer Protection BC provides online tools to any British Columbia consumer or business to assist them in resolving their disputes.¹³

The national consumer agency of Mexico also provides an ODR mechanism for a wide range of consumer disputes.¹⁴ A further portal on dispute resolution and new technologies, ODRLatinamerica.com, provides resources and training on how to put in place ODR solutions.¹⁵

As predicted in 2002 and as we can see from this brief presentation of a few examples, ODR continues on a 3-pronged path of

- ongoing growth in simpler contexts;
- adoption in traditionally handled offline disputes; and
- experimentation and use in more complex multi-party, multi-issue, and cross-border disputes.¹⁶

Since 2010, work has continued in Working Group III on Online Dispute Resolution of the United Nations Commission on International Trade Law (UNCITRAL) in Vienna.¹⁷ Representatives and Observers from 60 nations, the European Union, the League of Arab States, as well as non-governmental organizations have come together to examine the role of ODR in addressing

¹³ <http://www.consumerprotectionbc.ca/about-us/policies> and <http://www.consumerprotectionbc.ca/odr>

¹⁴ See http://concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp

¹⁵ www.odrlatinoamerica.com

¹⁶ Ethan Katsh, *Online Dispute Resolution: The Next Phase*, Lex Electronica, vol. 7, n°2, Printemps / Spring 2002 available at http://www.lex-electronica.org/docs/articles_140.htm (Last visited on June 11, 2014).

¹⁷ http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html

business-to-business and business-to-consumer, cross-border transactions.¹⁸ In 2013, the European Union has adopted a Directive on consumer ADR,¹⁹ as well as a Regulation on consumer ODR²⁰ for cross-border online consumer transactions. These developments spurred further growth in the offerings of ODR as these instruments became fully applicable over the period up to early 2016.



¹⁸ U.N. Comm. on Intern'l Trade Law, Rep. of Working Group III (Online Dispute Resolution) on the work of its twenty-ninth session, Mar. 24–28 2014, U.N. Doc. A/CN.9/801 (Apr. 4, 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/021/92/PDF/V1402192.pdf?OpenElement>

¹⁹ Directive 2013/11, of the European Parliament and of the Council of 21 May 2013 on the Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

²⁰ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), 2013 O.J. (L 165) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>



Technology and Dispute Systems Design

What is emerging is a somewhat chaotic picture of how technology can play a role in dispute systems design, and in changing the manner in which we interact with dispute resolution.²¹ Whether in formal state- or federal-adjudicatory structures, such as court and court-annexed processes, or more informal ADR processes, the question for those in the ODR field is how technology can be harnessed to provide meaningful conflict resolution. It is the quality of this ongoing dialogue between persons from the computer science and ADR fields that is shaping ODR present and future.

Whether we are discussing high-volume, low-monetary value cases, high-monetary, low-volume disputes, individual or collective redress, or other concerns, the task is to see to what extent offline processes should be emulated online. For example, the manner of importing the idea of a neutral mediator or arbitrator from the offline world into technology brings challenges. Proper coding that emulates a neutral mediator or arbitrator requires deconstructing how concepts such as discretion will or will not be channeled in the technology. Blind bidding processes online depend on true automation for their legitimacy and acceptance by participants; there cannot be any systematic bias. The computer scientist helps define the code that makes that type of neutrality true.

Other aspects of the offline space may also be reinterpreted. For example, a neutral's name alone on a screen provides little information about them.²² But if the neutral puts up a picture next to their name, that picture could be of them or of someone else that the neutral decides to be in the online space. This aspect of an online presence makes us think more deeply about what it means to act independently or impartially in the online space when presenting oneself.

Information collection about neutrals could change the level of transparency for all parties. In the offline world, one would expect frequent ADR disputants to gather a knowledge base about various neutrals; one-time disputants could well lack access to that knowledge base. Thus over time such a repeat player might systematically object to a certain neutral because of the pattern that the data provides as to the decision-making/facilitation by that neutral.

²¹ Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 *Harvard Negotiation Law Review* 151 (2012).

²² I remember in one of the International Competitions for Online Dispute Resolution, for example, one party misinterpreted the gender of the other party's counsel and adjusted their manner of proceeding based on that assumption. In the offline environment, these types of information cues would be immediately known.

In contrast, the online technology may enormously facilitate the review by any party of the history of a decision maker/facilitator, making information previously available only to repeat players accessible to all. In designing an ODR space, one question as to neutrality would be the extent to which the aggregation of information about neutrals could be provided to anyone accessing the system—an enhancement of transparency that might be more cumbersome in the offline space.

Each of the technology providers in the ODR space have to grapple with these offline questions, and think anew about how to create online processes while remaining loyal to the kinds of ideas that assure legitimacy. Some form of legitimacy of course can be provided by virtue of being the online aspect of a longstanding offline provider's work. Yet, the legitimacy of the online brand will exist only to the extent it remains loyal to fundamental characteristics that create legitimacy for the users.

The parties' expectation of the process is often shaped by culture. For example, the arbitrator's focus on an orderly procedure that culminates in an award in one culture may be considered inappropriate, if that culture views the goal of the arbitration as more about settlement of the dispute. The standard structures in the offline world may permit arbitrators to slide into the mediator role as appropriate. In the online environment, the question becomes how to design a space to facilitate such role-shifting by the neutral, in ways consistent with the expectations of the parties.

While the essence of ADR processes in the online space might have exemplars from the offline space, one may find the process done differently online. For example, conducting an online arbitration means being in one's own office while also being connected to a virtual space; this means that all the other parties and arbitrators are in the same space, but also possibly not, at any given moment. Over time, that sense of when one is fully committed to an online process and when one is disconnected might replace the offline experience of all actors meeting physically in one room to resolve a dispute.

Another aspect is the extent of separation between processes. In the offline world, when we think of a motion to compel arbitration for example, there is a view of a process at a court interpreting a given statute and facts, and making a decision. If that court were to be more intimately connected somehow with the designated arbitration-services provider, one could imagine that the court process to arbitration process might be streamlined beyond the wildest imagination of persons in the offline space. Moreover, assuming that there is an appeal process for that first-level court decision, one can imagine the appeals process occurring also in an online space (possibly on the documents) in a further streamlining of our vision of what it means to "appeal" or "go to court."

IV. An Example of an Online Mediation

To help understand what is possible in ODR, we have included the messages below in a recent role play case. The mediator was an online mediation course student, and the fictional parties were played by other trainees. It was undertaken live on the themediationroom.com platform. Although it is a role play, it was for all intents and purposes a real dispute, i.e., undertaken in real time. Names have been changed. The messages are in three sections—messages jointly between the parties and the mediator, and the two caucus sessions in which the mediator and one party caucus out of “view” of the other party. Because of the format of an article and the absence of the various functionalities on an ODR program in this written space, the messages have been gathered under several headings.

A. Joint Session: Starting the Mediation— Setting the Ground Rules

Emily, the mediator, initiates the online mediation in a joint-session space by sending this message to the two parties, setting the ground rules.

1.1 Mediator Message to both Parties in the Joint-Session Space

28 Jan 2009 09:36am GMT

[Mediator]

*new*Opening statement-introduction

Reply

Posted by Mrs Emily Wilde

Hi, my name is Emily Wilde and I will be your mediator.

I am very glad you agreed to use mediation process in resolving your dispute. I would like to congratulate you taken decision because the most important issue in the whole mediation process is the willingness to talk with another party which shows that you are responsible people who want to have own input in the settlement's shape.

My role as your mediator is to help you reach satisfied settlements in a fast and efficient manner and to manage the whole process from technical and organization aspects. I would like to stress that I am impartial and I will be treating both parties the same rules. I am not decisions and opinions maker, so my role is to help you understand why the dispute occurred and how you can work out own solution, which needs some compromises from both of you.

I am certified ODR mediator with legal /IT and telecom market/ and psychological background. I resolve a lot of disputes connected with IT and telecom market, so your case is friendly for me. You can find more information about my work and mediation successfully ended on my website. Below, I write down some needed information regarding ODR platform tools and how the whole process will look like, its stages, etc.

ODR Platform functionalities

ODR platform submits to all parties of mediation process much more flexibility functionalities which give the parties opportunities to reach settlement more faster and efficient. As the mediator, I will contact you by email, phone or VOIP, Skype, depends on what kind of communication you prefer. ODR platform gives me opportunities to easy managing private and joint sessions with you. For example, it is possible to have the private session with one party while the other party may raise a question emailing it to me. We can arrange joint session and, depending on situation, turn it into the private session, while one party has time to consider and analyze issues raised during joint session and come back again to mutual discussion. We can plan in easily and fast way dates of private and joint sessions and adjusted them to all parties schedule. Planning dates of private and joint sessions in advance give you more comfort of preparing yourselves to such sessions and pointed out all issues important to you.

How to use ODR platform

Using ODR platform is very easy and convenient for you. To this letter, I attach short separate handy instruction about: (i) how to post a new message/replying to a message; (ii) how to read messages, (iii) how to attach a document to a message; (iv) how to access message area; (v) how to access joint or private session. If you have any questions or doubts how to use platform, please feel free to contact me.

Managing the mediation process

So, after the beginning which is my opening statement to you, I would like to ask you several questions within private session which give me more information about the case and your attitude to it and needs. Than, we can have joint session during which we could discuss some ideas of the dispute's solution. If you get a consensus in relation to main issues, I will help you to create the settlement, which will take the agreement form. Number of joint and private sessions will depend on your needs and

situation's development. I wish we finished the mediation within seven days from today because the case is not so much complicated.

To help you reach satisfied settlement in fast and efficient manner I will have to organize and manage our mediation according to certain order. So, at the beginning, I would like to set up with you rules binding us during the whole process. Please find below some rules tested in ODR practice:

(i) questions and responses receiving from you will have a deadline given by me, of course, adjusted to the value of raised issue for the whole process, I also impose on myself a discipline in giving you responses and explanations in strict time framework;

(ii) responses which do not bring any progress in reaching the settlement will be omitted;

(iii) sometimes, I will be checking your conviction in the responses using the scale of responses;

(iv) sometimes, I will be checking to be sure whether given response includes exact wording about what you wanted to say;

(v) please try to write short and clear questions and responses, lengthy, unclear responses are time consuming and not to be read in full;

(vi) please do not use any sense of humor which may be misinterpreted by the other party.

If you have any suggestions improving our co-operation, please feel free to write them down till tomorrow morning.

Please, write me back who will be the representative from KLTelCom's side? I understand that Lin Dub is representing by himself.

I look forward to hearing from you soon.

Best regards,

Emily

This leads to an exchange between the mediator and the company representative as to who represents the company.

1.2 *Company Representative Party*

28 Jan 2009 10:19am GMT
[Party 2]
*new*Representation
Reply
Posted by Mr Lee Yoong
KL Telcom Sdn Bhd
Hello Mrs Wilde.
Thank you for explaining the process. To answer your question I, Lee Yoong, CEO of KLTelcom will represent the company.
I will communicate now in the private area.
Lee

Then, the mediator in the joint-session space starts the caucusing process.

1.3 *Mediator*

28 Jan 2009 01:00pm GMT
[Mediator]
*new*responding to my questions
Reply
Posted by Mrs Emily Wilde
Dear Mr. Dub and Mr. Lee,
I have just send you some questions in your private area. I would appreciate your answers tomorrow morning before 11 a.m. which allows me to manage the process efficiently.
take care
Emily

B. Caucusing with Each Party in Private Spaces

That same day, the mediator sends individual messages to each of the parties in their respective private caucus spaces in which only the mediator and one party has access.

1.1 *Initial Private-Caucus-Space Message of the Mediator to the Programmer Party*

28 Jan 2009 12:13pm GMT

[Mediator]

*new*private question

Reply

Posted by Mrs Emily Wilde

Lin,

1. Could you write me in short words your position on the case, in particular what happened on the way that the dispute arose. As far as my information is concerned, you worked for the company in the past, so I can assume, you have knowledge about the company's process of concluding contracts and if you still co-operate together, you should have good rapports with the company.

2. Later on could you answer me on the following questions:

(i) what is really important for you in this case - to keep full ownership of all rights to modified software because you need this know-how /source codes/ for further consultant work or there are other reasons?

(ii) do you care about future co-operation with your client like writing new software or doing maintenance work regarding the company's systems?

2.2 *Response in the Private Caucus of the Programmer Party to the Mediator*

*new*private question

29 Jan 2009 08:59am GMT

Posted by Mr Lin Dub

Hello Mrs Wilde,

Basically my position is that I was hired for a very specific programming job, which I

completed to the satisfaction of my client and was then put in a very uncomfortable position when my client demanded the rights to the software I had created for them as opposed to receiving only the license to use the software.

With hindsight being 20/20 I am obviously deeply regretting there was no formal contract signed at the outset of the job where KLT could have stipulated they would require the rights, nor did anyone mention this at any time. I am more than happy to provide the full rights, just not at the price agreed upon to create the software (\$7,750)

I appreciate you asking me what is most important to me here, because the answer to that is my reputation and my relationship with my clients and colleagues. My only motivation for keeping the rights to the software for myself is their financial worth. I can't afford to stay in business if I were to write software and then hand over lucrative ownership rights for such a small fee. Having said that, I think this is probably a misunderstanding and one which I would have hoped could have been resolved by now, but the fact remains that KLT have no right to take the position they are taking and I don't want to feel as though I am being taken advantage of.

I do care very much about my relationship with KLT (as I do will all my clients) and I would certainly hope there is a professional future to that relationship. If we could resolve this dispute quickly and amicably and retain that relationship, that would be an ideal outcome for me. However, I do feel just as strongly that in this matter, misunderstanding or not, KLT are very much in the wrong.

This is my first time trying to resolve a dispute in this manner and in fact the first dispute I have had with a client, so my apologies if I haven't provided enough information or replied in the correct time frame.

Please let me know what other information I can provide you.

C. Private-Caucus Messages

1.1 Initial Private-Caucus Message of the Mediator to the Company Representative Party

28 Jan 2009 12:51pm GMT

[Mediator]

*new*private questions

Reply

Posted by Mrs Emily Wilde

Hallo Mr. Lee,

Nice to meet you as well. I am glad that you are personally involved in the case and I really do appreciate you can devote your value time to the issue.

1. Could you write me in short words your position on the case, in particular what happened on the way that the dispute arose. As far as my information is concerned, Mr. Dub worked for the company in the past, so I can assume, both parties have knowledge about the process of concluding contracts and if you still co-operate together, you should have good rapports with each other.

2. Later on could you answer me on the following questions:

(i) what is really important for you in this case - to keep full ownership of all rights to modified software because you want to have full control on the ownership of all rights to the whole software in a case of a possibility of doing by your own eventual changes or modification of the software or there are other reasons?

(ii) do you care about future co-operation with Mr. Dub, within a light of writing by him for the company new software, additional software's modification or doing maintenance work regarding the company's systems?

1.2 Response in the Private-Caucus Space of the Company-Representative Party to the Mediator

*new*private questions

28 Jan 2009 01:25pm GMT

Posted by Mr Lee Yoong

KL Telcom Sdn Bhd

1. Had it not been for Lin stating that all rights in his work would belong thim, I would have paid his invoice. But now that he has claimed that, I have not paid as I do not want to do anything that might be interpreted as agreeing to him having such rights. I now insist he signs to acknowledge we own all rights before we will pay him. I trust you agree that is entirely reasonable?

The position is really quite simple. Lin Dub agreed to write some add-on routine to software we own but now is claiming he is entitled to full ownership of the software he has written. This was never agreed and I am not now prepared to pay him for what he has done save on the basis he gives up this ridiculous claim.

It was surely for him to specify this condition at the outset not after the work has been done. Had he done so I would have refused.

Please tell him he has no case in law and that can be the end of the matter.

2. Yes it is very important that we keep full ownership. Its not just in order to make modifications but simply to ensure we have full control of the producr for commercial reasons. I do not want to have to obtain his consent for the scope of our use or exploitation of the software or to share revenue with him.

3. Lin is a very good programmer ,as we know from when he worked with us. But we can live without him. There are plenty of others. But my preference is to co-operate with him.I just wish he would see sense.He is a good programmer but a very bad businessman. He is trying to build up his own business but all he is doing is upsetting a good customer. He probably wants to be able to resell the routines he has written. Imagine if he sold it to a competitor!

Hope this helps.

Having now heard the positions of both sides, the mediator gets to work caucusing with each side. First, the mediator caucuses with the programmer party.

2.1 The Mediator in the Private-Caucus Space with the Programmer Party

29 Jan 2009 04:11pm GMT

[Mediator]

*new*responding your message

Reply

Posted by Mrs Emily Wilde

Dear Mr. Lin,

Thank you for your response. I am very glad you decided to resolve a dispute using ODR platform which, I can assure you, will be more convenient and efficient for you. I am OK with a scope of information you provided me. I also do appreciate your straight-forward position on the case and your needs.

Mr. Lee also admitted that the issue of the ownership of rights to modified software was not settled down between parties in explicit way. For the company it is very important to have full control on the whole software. Mr. Dub said as well that he does care about future co-operation with you because you are a good programmer and he can see professional relationship with you in future.

I wrote Mr. Lee that you also do care about good and professional future co-operation and that you are willing to relinquish full ownership of right to modified software for additional payment.

Could you write me back what is your suggestion concerning additional fee? Please take into consideration a possibility of earning money for new work within future co-operation. I understand that the ownership of rights to modified software is a lucrative issue and must be paid on an appropriate level, but I would like only suggest that this additional fee shall be affordable and real for the company in this situation /where the parties did not agreed on the issue at the outset/. Parties shall find a compromise if they want to resolve a dispute in an efficient and fast way, which means that both parties' needs must be real and adjust to circumstances and parties shall not discourage each other by unreal claims.

I look forward to hearing from you soon and I am waiting for the answer from Mr. Lee.

take care

Emily

2.2 *The Programmer Party in the Private-Caucus Space Responds to the Mediator*

[Party 1]

*new*responding your message

30 Jan 2009 01:36am GMT

Posted by Mr Lin Dub

Emily,

It is promising to hear that Mr. Lee and myself both seem to be interested in an amicable solution here and hopefully one which maintains our professional relationship.

The standard price I charge to create a piece of software and providing the client with the full rights to that software (essentially creating an IP or a product) is \$25,000 USD. This is the figure I would have presented KLT with at the outset if I had any idea they wanted to retain the rights. Within the industry I consider this a very reasonable and competitive rate and I personally could certainly make more than that price on this particular software by selling it to other clients.

However I think you'll find Mr. Lee unwilling to agree to pay this amount as I have already presented him with that figure and it's rejection is what has led us here.

I have been trying to come up with an alternative price which we can both live with. I

imagine Mr. Lee probably isn't willing to pay any considerable amount up front, so I would like to raise the suggestion of a percentage share of sales of the software. Presuming KLT wish to retain the rights of the software in order to sell it on themselves, the resources they have to do so are far greater than my own and would inevitably bring in a larger customer base. If we were to agree to a percentage split between us this might be a solution.

What do you think? perhaps you could suggest this to Mr. Lee

2.3 Mediator in the Private-Caucus Space Responds to the Programmer Party

30 Jan 2009 01:20pm GMT

[Mediator]

*new*responding your solution

Reply

Posted by Mrs Emily Wilde

Lin,

I am glad you try to think creatively on resolving the dispute. Well done. Only looking for alternative ways and trying to see the other's party interest /not only own/ could bring a positive outcome.

I suggested your idea to Mr. Lee and waiting for his response. I will contact you asap.

take care

Emily

Turning to the company-representative party in light of the caucusing with the programmer party, the mediator enters the other private-caucusing space.

3.1 Mediator in the Private-Caucus Space to the Company-Representative Party

29 Jan 2009 02:38pm GMT

[Mediator]

*new*responding your message

Reply

Posted by Mrs Emily Wilde

Dear Mr. Lee,

1. Thank you for your fast response. I was waiting for Mr. Dub's answer so I'm replying right now.

I understand from your message about the importance of having full control of the whole software for the company, which is connected with having full ownership of rights. This is reasonable. I also agree with you that you have to have a clear written statement concerning the ownership of rights before you pay Mr. Dub and before you start to use this modified software. Such a professional company you lead must be in compliance with legal provisions, in particular in such strategic matters like software's operation.

2. You admitted as well, that the issues of passing ownership of rights was not settled down between the parties at the outset. The same circumstance is admitted by Mr. Dub. Each party understood the issue of ownership of rights in a different way before you went into co-operation. It happens, and now we have to find out an efficient and fast solution for both parties. As you are a very high level manager, you are aware that if you want to resolve a dispute using your own efforts, you have to find out a compromise, which means you get something from another party instead of giving something to another party. You also admitted you prefer to co-operate with Mr. Dub because he is a good programmer. It is also important in this kind of co-operation that Mr. Dub knows what are the company's needs, he has also historical and internal knowledge about the company's activity.

3. Mr. Dub says he also cares about future relationship with you but he has to also think about his own business now. I do not think so, that his intention is to resell the program he wrote for you to your competitors. He told me, that he treats you as his strategic client and he realizes that having full ownership of rights to modified software is very important for your commercial activity.

4. Mr. Dub suggests to relinquish all ownership of rights to modified software but for a higher price.

5. Could you write me back asap what is your position as regards his proposal? It is possible for you to give any suggestion of additional fee for passing ownership rights? Such a solution could help you, as the CEO of the company, put focus on doing business and earning money instead of wasting time for arguing and could keep good rapport with Mr. Dub for future co-operation.

3.2 *Company-Representative Party in the Private-Caucus Space to the Mediator*

[Party 2]

*new*responding your message

29 Jan 2009 03:38pm GMT

Posted by Mr Lee Yoong

KL Telecom Sdn Bhd

No I'm sorry but paying a higher price for what we have already agreed is to just give in to his demands. I will not pay him more money than the fee agreed. He is trying to trick me into more money. He knows he has no rights in the software. Please confirm I am right in law.

3.3 *Mediator in the Private-Caucus Space to the Company-Representative Party*

29 Jan 2009 10:14pm GMT

[Mediator]

*new*responding your message

Reply

Posted by Mrs Emily Wilde

Dear Mr. Lee,

I can understand your irritation but the fact is we do not have explicit provisions written down in the contract in relation to regulations of the ownership of rights to the modified software. Your position without any alternative solution will not bring us to the settlement. We know actually your and Mr. Dub's official statements and standing by them will change nothing.

As I mentioned in my previous message, we have to find out a compromise where there is no room for a winner and for a looser, there is a room only for winners.

As far as my legal knowledge is concerned, if you want to possess an ownership of rights to work done within meaning of intellectual property law, you always have to write it down in a clear and explicit words in a contract. If there are no such clear statements, work done within a contract's subject can be used only on a license conditions given by an author. I understand, such situation is not acceptable for you.

So, could you think about a solution, which gives Mr. Dub's assurance for getting interesting and developing work within future co-operation with the company, showing him how much money he can earn yet working with you, of course in general numbers, instead of passing full ownership of rights to modified software for just small additional fee in this case, to make him confidence that he does not relinquish his rights for free.

I would appreciate you look for alternative and compromise solutions adjustable to circumstances we have, which could may step forward to resolve our problem.

I look forward to hearing from you soon.

Take care

Emily

3.4 *Company-Representative Party in the Private-Caucus Space to the Mediator*

[Party 2]

*new*responding your message

30 Jan 2009 06:28am GMT

Posted by Mr Lee Yoong

KL Telcom Sdn Bhd

I understand what you say but he knew the arrangements. Never before had he written code for us and claimed it as his own. This is only since he left us and set up in business on his own. I can't see we would think of giving him business future work after this experience.

Are you saying he might return to work for us? We certainly are very busy and recruiting.

3.5 *Mediator in the Private-Caucus Space to the Company-Representative Party*

30 Jan 2009 01:13pm GMT

[Mediator]

*new*Mr. Dub's suggestion

Reply

Posted by Mrs Emily Wilde

Dear Mr. Lee,

I am afraid we have to work out an alternative solution if we still want to have an influence on the settlement's shape.

Please take into consideration, that the situation you described in the past was different from legal point of you we have now. Mr. Dub did not claim codes from the company in the past because he was your employee and according to legal provisions, all intellectual work done by an employee during his employment period, automatically was passed to the company as an employer. So, I am afraid that the company's formal and legal situation in this case is not strong enough to win in a court. Please also remember about lawyer's costs and unknown outcome on which you, at the end of the day, you have no influence because it will be created by a third party - a court.

I was not thinking about returning Mr. Dub's to the company as the employee, I just said, that if you do care about future co-operation with him, maybe you could show him an advantage of the nearest future co-operation, particularly from financial point of view. In the meantime, I got an alternative solution for you from Mr. Dub. I would like you to treat this solution as a path of looking for compromise which you can both live with.

Mr. Dub thinks that you will not accept a price for the ownership of rights to modified software which, according to his calculation, should be \$25,000 USD. So, trying to find out a compromise, he suggests to split between the parties a percentage share of sales of the software. Mr. Dub's opinion is the software is a very important tool for the company and will bring in a larger customer base.

What do you think about it?

I look forward to hearing from you.

Emily

3.6 *Company-Representative Party in the Private-Caucus Space to the Mediator*

[Party 2]

*new*Mr. Dub's suggestion

31 Jan 2009 09:05am GMT

Posted by Mr Lee Yoong

KL Telcom Sdn Bhd

Emily

We are inundated with work at present and could do with someone like Lin working with us. But paying a sales percentage is still paying for something I feel I already own.

I think the only deal would be with him coming back to help us out and work in house with us. If he is prepared to do that I will put together a proposal.

By the way I am not bothered about paying for a court case and the risks. I believe he could not afford to defend.

3.7 Mediator in the Private-Caucus Space to the Company-Representative Party

02 Feb 2009 09:06am GMT

[Mediator]

*new*a solution

Reply

Posted by Mrs Emily Wilde

Dear Lee,

Are you thinking about co-operation with Mr. Dub on employment's basis again? Do you think he will be willing to close his own business and come back to the company as an employee? Maybe, you should work out some kind of business co-operation on exclusive basis, in relation to creating and writing software dedicated for telecommunication's solutions.

I understand that your are not afraid of the case risk in a court, but there is not a point of be bothered or not by court's costs and risk. This is a point of doing efforts and trying to work out a dispute's solution by your own, which is a taking a responsibility for own activities.

Please, write me back more details about your solution which I could present it to Mr. Dub.

I would like to work out some general rules of our settlement by the end of Tuesday.

I look forward to hearing from you.

take care

Emily

3.8 *Company-Representative Party in the Private-Caucus Space to the Mediator*

[Party 2]

*new*a solution

02 Feb 2009 09:29am GMT

Posted by Mr Lee Yoong

KL Telecom Sdn Bhd

Emily

I think the first question is whether he would be interested to work with us again. Tell him we have much work on and he would enjoy working with us again. If the answer is 'yes' I can put a 3 year contract offer to him which will include some additional earnings on sales of what he develops for us. But I am not going to put up figures if he is determined to continue with his own business. The two would not go together.

3.9 *Mediator in the Private-Caucus Space to the Company-Representative Party*

[Mediator]

*new*a solution

02 Feb 2009 09:45am GMT

Posted by Mrs Emily Wilde

OK Lee. I will contact with Mr. Dub and I will be back to you asap.

take care

Emily

Based on this exchange, the mediator now goes to the private-caucus space with the programmer party.

4.1 *Mediator in the Private-Caucus Space to the Programmer Party*

02 Feb 2009 10:08am GMT

[Mediator]

*new*Mr. Lee's proposal

Reply

Posted by Mrs Emily Wilde

Dear Lin,

I've got an alternative solution of our problem from Mr. Lee. He could agree on some additional earnings on a software's sale but in different circumstances. As he wrote in his previous messages that he does care about your future relationships and he appreciates you as a good programmer, he proposes to hire you for limited period with he company as in house programmer on employee basis. Than, he is eager to share with additional earnings on sale of what you develop for KLT. The condition is to stop business activity for employment period.

What do you think about it? As I remember you mentioned in your previous messages that KLT is your big client and you have a hope for future professional co-operation. Maybe, coming back for limited period to the company is not a bad solution. You could acquire additional experience and extra money for extending you business in future.

I look forward to hearing from you soon, because I would like to work out general rules of our case by the end of Tuesday.

Take care

Emily

4.2 Programmer Party in the Private-Caucus Space to the Mediator

[Party 1]

*new*Mr. Lee's proposal

03 Feb 2009 08:15am GMT

Posted by Mr Lin Dub

Emily

This is certainly an interesting proposition and one which my gut reaction to is a positive one. I would have to give this some though of course and be sure on the details, but in general terms I am certainly agreeable to discussing this option.

Just so I have things clear, is the suggestion that I work for KLT for a certain period, as a consultant most likely, for a salary and in addition I receive a percentage share from sales of all software I work on during that period? That is how I have interpreted your comments and that is something I would seriously consider. Of course we would have

to agree on the consultancy period, the salary and possibly most importantly, the percentage share. Also any percentage share we agree upon I would have to insist is applied to the current software too.

Without the percentage share I would effectively be going backward career wise and becoming a KLT employee again. As I'm sure you can appreciate that is not something I wish to consider, so you can appreciate how important it is for me that KLT acknowledge what I could bring them as much as the benefit they can bring me.

You are right of course that the resources KLT have to offer far outweigh my own and I could potentially have far greater market penetration of my software with their backing. In return, I bring not only my development skills (which KLT have already shown they favour) but also my contacts and reputation in the business community.

Please tell Mr. Lee I am happy to discuss this further and would feel more comfortable if he were to suggest figures for the above first.

Thank you for all your help here.

4.3 Mediator in the Private-Caucus Space to the Programmer Party

03 Feb 2009 09:48am GMT

[Mediator]

*new*responding you message

Reply

Posted by Mrs Emily Wilde

Dear Lin,

I am really glad you support Mr. Lee's solution in general. It is very responsible behavior from you side to meet his proposal. I also think, that in such circumstances, such solution could bring you many benefits for you personally and for you business in future.

Well done. I will contact with Mr. Lee to proceed further.

take care

Emily

The mediator then returns to the other private caucus space with the company-representative party.

5.1 Mediator in the Private-Caucus Space to the Company-Representative Party

03 Feb 2009 09:49am GMT

[Mediator]

*new*Mr. Lin's answer

Reply

Posted by Mrs Emily Wilde

Dear Lee,

I have just got the answer from Mr. Lin. Your proposal sounds interesting for him and he is ready to discuss more details. I think we could continue our discussion in a joint session.

take care Emily

[Return to Joint-Session Space](#)

1.1 Mediator

03 Feb 2009 09:50am GMT

[Mediator]

*new*joint session

Reply

Posted by Mrs Emily Wilde

Dear Lee and Lin,

I would like to thank you for your efforts and the engagement you have done so far in our mediation. I am very glad you worked out the frames of mutual settlement and I think we could continue our discussion in a joint session now which will be more efficient and faster for all of us.

Please tell me whether you agree with me and whether you would like to discuss details of our settlement together in the joint session.

take care

Emily

1.2 *Company Representative Party*

[Party 2]

*new*joint session

03 Feb 2009 11:16am GMT

Posted by Mr Lee Yoong

KL Telecom Sdn Bhd

Emily

I'm happy to discuss here so long as , if I make a proposal and it is rejected by Lin, he does not repeat that elsewhere , eg to the court or to others. Please obtain a promise to that effect.

1.3 *Programmer Party*

[Party 1]

*new*joint session

03 Feb 2009 11:22am GMT

Posted by Mr Lin Dub

Lee,

I am happy with the progress we have made so far and the general atmosphere of this discussion. I promise that any proposals made in this area will not be repeated elsewhere.

I am also happy to discuss matters in this joint area.

1.4 *Mediator*

03 Feb 2009 11:46am GMT

[Mediator]

*new*confidential issue

Reply

Posted by Mrs Emily Wilde

Lee, Lin

I am glad you agreed both to continue our mediation in the joint session. All aspects of discussion made within our joint session will be kept as confidential information and will not be disclosed to anybody as the main rule of the whole mediation process.

Lee, could you write down more details about your proposal for Lin.

many thanks

Emily

1.5 *Company-Representative Party*

04 Feb 2009 08:34am GMT

[Party 2]

*new*Proposal

Reply

Posted by Mr Lee Yoong

KL Telcom Sdn Bhd

We would offer Lin a 3 year contact working exclusively for us on the same terms as previously and with a fee of \$75,000 a year. We will also pay him 5% of all sales we make of software he develops for us

He must commit , within the years of his engagement with us, to only develop programs jointly with us and under this agreement. No outside work.

1.6 *Mediator*

[Mediator]

*new*Proposal

04 Feb 2009 09:26am GMT

Posted by Mrs Emily Wilde

Lee,

Thank you for your response which gives us more details concerning the proposal.

Lin, what do you think about it. Do you agree?

Emily

1.7 Programmer Party

[Party 1]

*new*Proposal

05 Feb 2009 01:34am GMT

Posted by Mr Lin Dub

Lee & Emily,

Thank you for this proposal, I can accept the salary, plus I would assume I would also be paid upon agreement the \$7,750 for the development work already done.

The percentage share I feel is a bit small and seems not far off the percentage share incentives KLT have offered their long term employees in the past. If the percentage was raised to 9% then I would be able to agree in full to all terms and apply the 9% to the current software to settle the dispute.

Lee, please understand I am not trying to extort benefit here, I truly believe a higher percentage share is appropriate and reflective of the value my exclusive professional services over a three year period can bring to the company.

1.8 Mediator

5 Feb 2009 09:58am GMT

[Mediator]

*new*summing up

Reply

Posted by Mrs Emily Wilde

Lin, Lee,

I would like to sum up our settlements we have made so far:

(i) 3 years contract within the company on employee's basis

(ii) Lin will stop business activity for employment period

(iii) Annual salary within this 3 years will be \$75,000

(iv) full ownership of rights to software Lin develops within employment contract, automatically will be passed to the company, including full ownership of rights to modified software

(v) Lin's commitment to develop programs only with the company, not outside work.

(vi) parties obliged themselves to not raise in future any claims in relation to the subject of the dispute, which is the ownership of rights to modified software

and below issues to be agreed yet:

(i) Lin suggests to raise the percentage of sale from 5% to 9% and

(ii) 9% of sale will apply also to the current software Lin wrote.

Lee, could you give us an answer on issues left. I would appreciate your response asap which could allow me to prepare a draft of our settlement agreement.

many thanks

Emily

1.9 *Company-Representative Party*

[Party 2]

*new*summing up

05 Feb 2009 01:52pm GMT

Posted by Mr Lee Yoong

KL Telcom Sdn Bhd

I'm happy, Lin, to confirm that I will also, of course, pay the \$7,750.

9% is too high but I recognise the point that you deserve to be treated better than other long term employees. The very best I can do ,and I will not negotiate further , is 7.5%. I also agree that such will apply to the software the subject of this dispute.

1.10 *Programmer Party*

[Party 1]

*new*summing up

05 Feb 2009 11:17pm GMT

Posted by Mr Lin Dub

Lee,

Thank you for your comments and I confirm that I am happy to accept your offer of 7.5 percent and all other terms as previously agreed.

It looks like we have reached an amicable solution here and I am very happy we can now put this behind us and focus on a productive and lucrative future.

Many thanks for all your help Emily

1.11 *Company-Representative Party*

[Party 2]

*new*summing up

06 Feb 2009 08:30am GMT

Posted by Mr Lee Yoong

KL Telecom Sdn Bhd

Excellent,Lin- give me a call and we'll have lunch and go through the detailed agreement. It will be like last time with the new figures.

Emily - thanks for your help and advices. Do we need anything else or will this exchange amount to an agreement?

1.12 *Mediator*

[Mediator]

*new*summing up

06 Feb 2009 10:47am GMT

Posted by Mrs Emily Wilde

Lee, Lin,

I am very happy I could help you in reaching the settlement. It was a pleasure to cooperate with you and I hope your future relationships will bring both parties a lot of benefits. I could assist you, if you want to, in drafting the settlement agreement. Please

let me know.

take care

Emily

E. ODR in ADR

From the above exchanges in a mediation, one can see the classic steps mediation:

- setting ground rules,
- receiving initial statements in caucus,
- caucusing separately with each party to test their positions and explore options, and
- returning to a joint session, when appropriate, to hopefully reach a settlement of the dispute.

What ODR adds to this process is a means for doing all of this asynchronously, as can be seen by the time stamps of the various interventions of the mediator and the party. ODR platforms can provide an organized space where these communications are kept separate from the other streams of exchanges we all have for that discrete dispute.

Of course, if all the participants were available at the same time, all of these exchanges might have happened over the same day in some meeting facility. with the parties and mediator physically present. Getting to agreement on that day would be part of the process of having that meeting. Obviously, seeing someone face-to-face in physical space is sometimes felt to be an important part of dispute resolution.

On the other hand, in certain types of disputes (family law comes to mind), meeting face-to-face is the last thing that should happen because of the risk of physical intimidation of one party of the other. The promise of ODR is not to argue for, or against, face-to-face, but to ask what do we mean by face-to-face. In ODR, we see to what extent some or all of those physical constraints can be left to the side by using a virtual space. And, depending on the comfort level of each protagonist with being in a virtual space, it may assist the resolution of the dispute.

For example, the above exchanges are presented in a manner in which one can imagine the mediator sitting with the two parties in a joint session, then the parties adjourning to separate caucus rooms,

and the mediator going back and forth between the parties in their separate caucus rooms until the possibility of settlement occurs. Figure A gives us that image of the joint session.

Figure A.
Physical Space Joint Session

One can also imagine a caucus room for each party, with the mediator going back and forth between the parties in their respective spaces.



Figure B1
Programmer Party Caucus Space

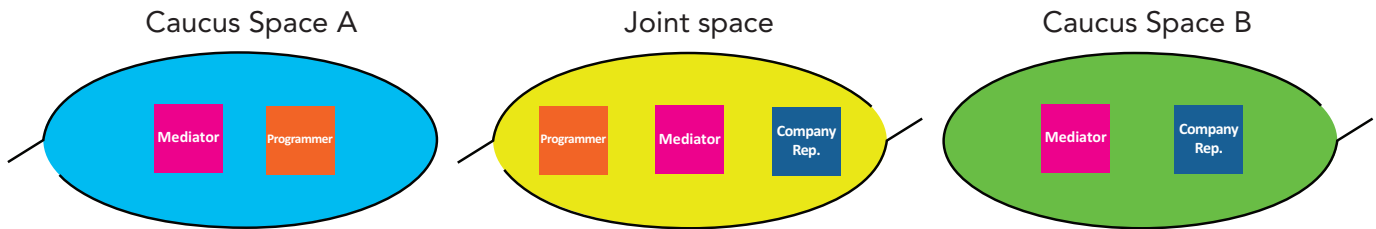


Figure B2
Company Representative Caucus Space

In an ODR setting, all of these joint and caucus spaces are constructed on a platform with certain functionalities appropriate for the type of dispute resolution. Schematically, from the point of view of the Mediator, the constructed space would look like Figure C below.



Figure C

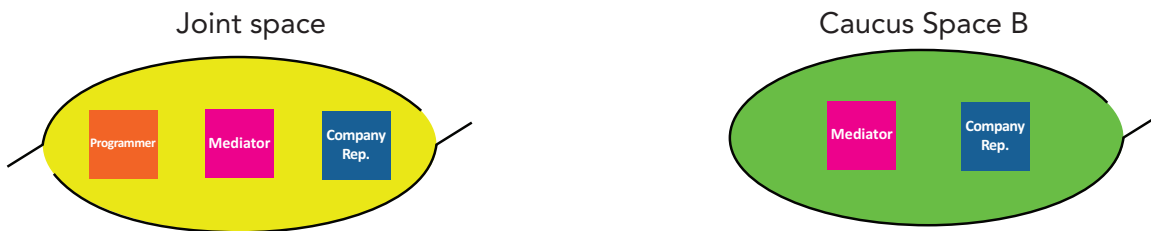


Schematically, from the point of view of one or the other party, the constructed space might look like Figures D1 or D2 below.

Figure D1—Constructed Space from the Point of View of the Programmer Party



Figure D2—Constructed Space from the Point of View of the Company-Representative Party



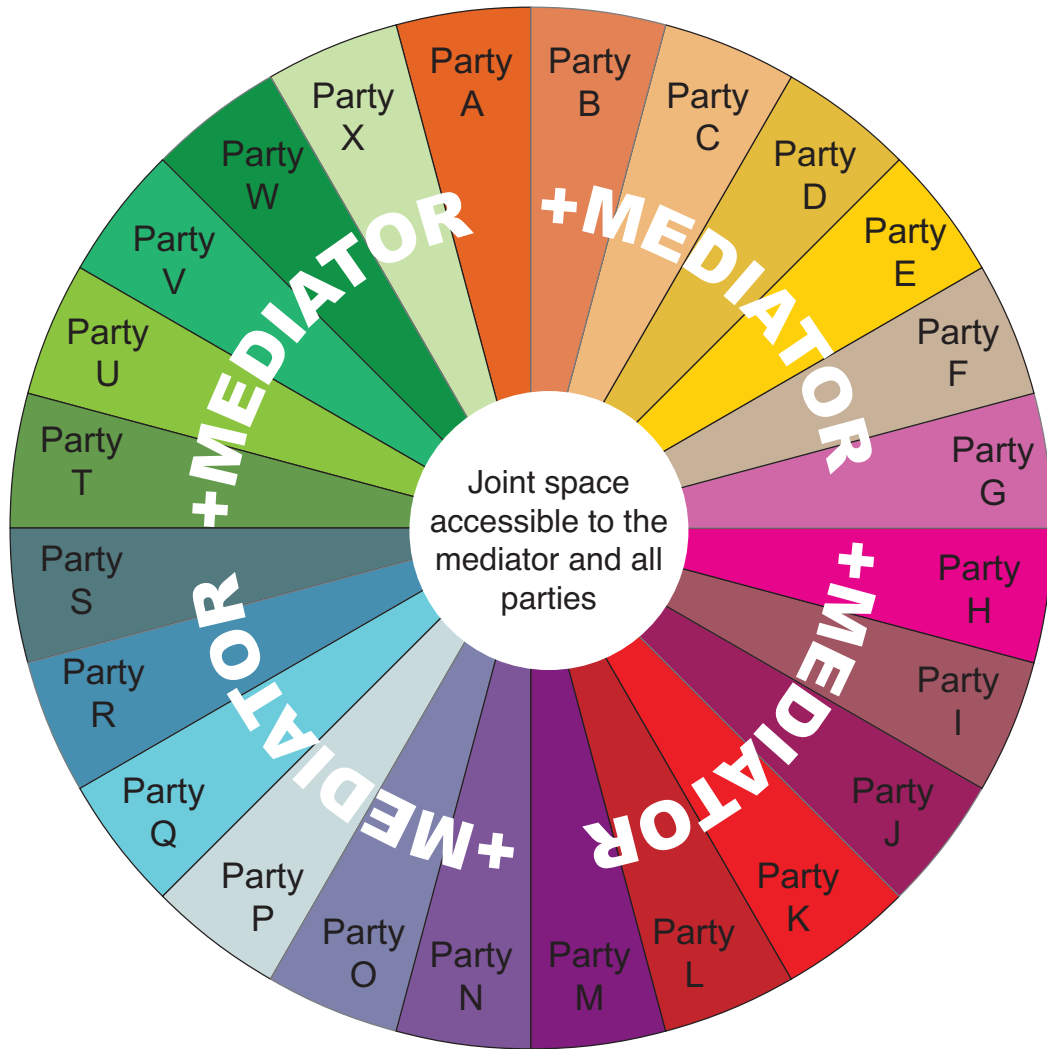
Different ODR platforms allow different kinds of functionalities. Most of them allow:

- document uploading
- picture and/or video uploading, and
- message posting.

One can imagine Skype- or Facetime-type applications being available so that the participants can see each other when they have a meeting at the same time (synchronous). Or, they could post a video of their response (rather than typing one) that can be viewed later (asynchronous). The type of dispute resolution dictates the needs for the structure of the virtual space, and thus the features of the ODR platforms.

One should keep in mind, however, that there are many things that could be imagined for the structure of a given dispute that become possible without the physical constraint of having to be in physical meeting rooms. For example, Figure E could be a complex multiparty mediation.

Figure E – Complex Multiparty Mediation



In the above setting, there could even be subcategories of joint meeting rooms in which all the parties implicated in one dispute that is related to the multiple disputes (e.g., construction-contract disputes) could meet with the mediator, while the other parties to other disputes that are related to the multiple disputes might meet in another joint meeting room open to them.

Yet, even in these images of the meeting space approaches, there is an implicit attempt to mimic the physical-world vision of how disputes are mediated. Another complementary approach might be allowing users the ability to specify the characteristics of the disputes they have (for example, describing the specific characteristics of disputes in eBay). A thoughtfully constructed database could search similar disputes, to see the kinds of outcomes that resulted. From that information, the parties to the live dispute might access the resolutions from these anonymized cases to generate options for their case—a kind of expert system.

Such a tool might be available in the joint meeting or caucus space to assist the process of trying to find a solution. Such approaches could be part of the ODR platform, or they could be separate functionalities that one could access like an application on a smartphone. Or alternatively, the ODR platform could be an application on a smartphone that users could access for their disputes. There could even be an app for disputes regarding any problems with the phone plan, the phone manufacturer, any applications on the phone, or as a tool to be used for any other disputes in physical space and so on.

Moreover, so far our discussion has only focused on ODR for mediation. Obviously, the concepts described above can also be applied in arbitration and negotiation or other ADR processes if the creativity of the ODR platform and functionalities can support such an approach.

But, we should not be limited to just ADR. Imagine if these technologies were introduced in Court and Administrative procedures as some are doing now, as described above.²³ A brave-new-world vision might be one we have imagined, in which there is a joint space where two court cases between the same parties on the same dispute in two different countries go on before two different judges. The procedure is crafted to comply with the procedure and due-process rules of the respective jurisdictions, and each of the judges renders their ruling with their judgment being a local decision in each jurisdiction. With judges from different countries, there would not necessarily be any need for the recognition of the judgments in each locality, since each case would be adjudicated locally. But, that might be too much of a brave-new-world vision for us all to imagine.

On a more modest scale, consider consumer protection laws and policies that vary from country to country, and the problem of cross-border, low monetary value disputes. One solution might be to make sure—through treaty or otherwise—that consumers across a diverse series of national legal spaces are subject to a common set of stringent consumer-protection standards that compensate for the potential cross-jurisdiction inconsistencies. In such a setting, ODR might be put in place to

²³ See, for example, the text accompanying footnotes 7 and 13 above on the Property Tax and British Columbia experiences.

address that common transnational vision of consumer protection. ODR then becomes an instrument of transnational or trans-jurisdictional legal harmonization—a task possibly only modestly perceived by the technologists but of central importance to states as well as lawyers or clients acting in cross-jurisdictional settings.

V. Looking Forward

Our goal here is not to present our vision of some brave new world, but rather to highlight the manner in which the ODR development might take dispute-systems design. Whether incrementally or disruptively, one senses that ODR carries with it a number of opportunities that may force a deeper reflection by all involved about the manner to conduct ADR and court/administrative proceedings. The ultimate goal is to provide justice in a manner that is meaningful and respectful of judicial norms and forms, while making use of technology's potentialities.