

ADDRESSING DISPUTES IN ELECTRONIC COMMERCE

**Final Report and Recommendations of
The American Bar Association's
Task Force on Electronic Commerce
and Alternative Dispute Resolution**

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The American Bar Association's
Task Force on Electronic Commerce and Alternative Dispute Resolution
in cooperation with the Shidler Center for Law, Commerce and Technology, University of
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The organizations and individuals listed above have not approved or endorsed the Task Force's report or recommendations.

**American Bar Association Task Force on E-Commerce and ADR
Executive Summary of Final Recommendations***

I. Executive Summary of Final Recommendations

The American Bar Association Task Force on E-commerce and Alternative Dispute Resolution (the “Task Force”) was tasked to propose protocols, workable guidelines and standards that can be implemented by parties to online transactions and by online dispute resolution (“ODR”) providers (referred to as “ODR Providers” or “ODR Service Providers”). The Task Force was asked to focus specifically on “the challenges raised by multi-jurisdictional business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions.”¹

ODR is a broad term that encompasses many forms of alternative dispute resolution² (“ADR”) that incorporate the use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online.

Alternatively, ODR may supplement ADR that takes place in the more conventional physical world. Parties may choose to post materials for arbitration on a website or to interview witnesses online as a supplement to a hearing before an arbitral panel.

ODR allows for virtual communications between parties in cyberspace. As such, it provides a new and innovative means of resolving cross border disputes - especially involving consumers. Parties can participate in ODR without having to travel to another jurisdiction to initiate a lawsuit or to participate in ADR involving a face-to-face meeting or hearing.

The Task Force also notes that the provision of ODR through the Internet and other forms of information technology is a new form of e-commerce in and of itself. Disputes generated offline may also be resolved online. An ODR transaction is itself an e-commerce transaction.

At the heart of e-commerce is an online transaction or series of transactions. As part of its focus, the Task Force has examined what types of mechanisms will help instill trust and confidence in e-commerce transactions and in the online marketplace - primarily for consumers but for businesses as well. Each online transaction is premised upon the confidence of the parties that a bargain will be fulfilled. When focusing on e-commerce and ADR, the Task Force took a broad view of its mandate and recognized that dispute and complaint prevention is as important, if not more important, than dispute resolution as a means of promoting the growth of e-commerce.

* The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of the American Bar Association, the Section of Business Law, the Section of Dispute Resolution, the Section of International Law and Practice, the Litigation Section, or the Section of Intellectual Property Law unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases and readers are responsible for obtaining advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

¹ An important motivation for the creation of the Task Force was to ensure that a “neutral entity” would study the issues and make the recommendations. As stated on the Section on Business Law website, “there is a clear need for a neutral non-provider entity to create a task force to study disputes in cyberspace and assist with the development of proposed protocols, guidelines and standards for dispute resolution.”

² ADR encompasses a wide variety of processes including mediation, arbitration, conciliation, and negotiation.

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There are multiple ways to help prevent disputes from arising out of e-commerce transactions and to provide consumer redress in the event that a problem does arise. Preventive measures include consumer education, the use of secure payment methods such as escrow or credit cards, the use of merchant trustmark or web seal programs, and feedback or other evaluative mechanisms which rate merchants or online buyers and sellers.

Mechanisms for resolving consumer problems arising from e-commerce disputes may include insurance programs, merchant guarantees, in-house complaints handling or customer service programs. In the B2B setting, parties may have to agree to arbitration as a prerequisite to trading on a particular web platform or exchange. For B2C transactions, Internet merchants may offer dispute resolution through a third party ODR provider. ODR, however, typically occurs after a consumer has failed to resolve his or her complaint directly with the web merchant.

The Task Force's recommendations take into account multiple ways to assist in preventing and resolving online disputes. At the outset, the Task Force notes that when customers perceive problems arising from Internet transactions, effective complaints handling by a merchant is more important than ADR or ODR. ADR is a backup procedure that is only necessary if a customer is unable to get redress for his or her complaint.

Mindful that there are many ways to help prevent as well as to help resolve disputes or complaints that arise from e-commerce transactions, the Task Force makes the following recommendations and observations:

1. E-commerce businesses should place an enhanced emphasis on all stages of dispute prevention, complaints handling, and effective methods of redress through ADR and ODR.
2. Internet merchants, governmental and nonprofit entities should place a greater emphasis on consumer education and the prevention of e-commerce disputes.
3. Protecting consumers requires adequate standards and codes of conduct for e-commerce businesses.
4. Internet merchants should be encouraged to participate in and subscribe to relevant e-commerce codes of conduct and trustmark programs.
5. Internet merchants should develop or continue to improve on their in-house complaints handling mechanisms, and educate consumers as to how to use these in-house procedures effectively.
6. For consumers, recourse to in-house complaints mechanisms is normally the first and best means to obtain redress from reputable merchants. Accordingly, consumers should be encouraged to utilize the in-house complaints handling mechanisms offered by reputable Internet merchants before resorting to third-party dispute resolution mechanisms.
7. At present, the lack of ODR does not appear to be a material impediment to the growth of B2C e-commerce.
8. At present, ODR is subsidiary to other higher priority consumer protection activities, including consumer education and use of measures that help prevent or decrease the incidence of fraud in Internet transactions.

9. Recognizing that enforcement of outcomes and decisions reached through ODR may be difficult, consumers should be encouraged to consider using other dispute prevention mechanisms such as escrow services and credit card charge back mechanisms when transacting online.
10. Rather than create a code of conduct for ODR Service Providers, the Task Force has drafted Recommended Best Practices by ODR Service Providers.
11. The Task Force recommends the creation of a new informational entity (referred to as the iADR Center) that would provide information about ODR in an effort to educate and familiarize consumers, businesses, lawyers and other professionals with this new type of service.
12. For the advancement of ODR as an effective and efficient means of cross-border dispute resolution for both B2B and B2C transactions, there needs to be an appropriate emphasis on the development of interoperable communication and data-sharing platforms.
13. The Task Force believes that much of the education that will be useful for consumers will also be useful for businesses - especially small to medium sized enterprises and those who are new to the Internet marketplace and to cross-border transactions.

II. Background and Introduction

A. Task Force Mission

Mindful of the dramatic growth and use of the Internet for commercial transactions, and the profound jurisdictional issues raised by such use, the American Bar Association's ("ABA's") Section of Business Law, Committee on the Law of Cyberspace, initiated in [1998] a project - the Global Cyberspace Jurisdiction Project - designed to explore in detail those jurisdictional issues. The Committee's efforts resulted in the drafting and presentation in July 2000 of a report entitled *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*.³

This study examined the questions and issues raised by Internet jurisdiction in a series of important subject areas - consumer protection, privacy, intellectual property, banking, securities, taxes and gaming. The final report identified a menu of possible solutions to various jurisdictional challenges posed by different types of Internet transactions or online content. The recommendations included:

- Establishment of a multinational "Global Online Standards Commission" to develop uniform principles and global protocol standards
- Development of new online forms of dispute resolution
- Usage of programmable electronic agents ("bots") to automate Internet transactions and protect consumers from websites that do not meet their personal standards

³ To download a copy of the study and for related background information, please see <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>.

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As part of its work, the Jurisdiction Project specifically noted the difficulties associated with resolving disputes arising in cyberspace where cyber-transactions are not tied to any particular geographical location, observing that:

Cyberspace may need new forms of dispute resolution - to reduce transaction costs for small value disputes, and to erect structures that work well across national boundaries. Voluntary industry councils and cyber-tribunals should be encouraged by governmental regimes to continue developing private sector mechanisms to resolve electronic commerce disputes. Government-sponsored online cross-border dispute resolution systems may also be useful to complement these private sector approaches.

The Jurisdiction Project's Report specifically foresaw the need for and possibility of “new forms of dispute resolution” and the fact that the nature of dispute resolution itself would have to evolve, just as e-commerce was evolving. With this particular focus in mind, the ABA again acted to address the issue of alternative dispute resolution (“ADR”) in cyberspace. Specifically, in September 2000, five different Sections of the ABA, including Business Law, Dispute Resolution, Litigation, International and Intellectual Property, jointly created a *Task Force and Advisory Committee on E-commerce and ADR* (“Task Force”) to propose protocols, workable guidelines and standards that can be implemented by parties to online transactions and by ODR providers. The Task Force was asked to focus specifically on “the challenges raised by multijurisdictional business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions.”⁴

In addition, in March 2001 the Committee on the Law of Cyberspace (“CLC”) of the ABA’s Section of Business Law established an Online ADR Task Force (“CLC Task Force”) to provide advice and assistance to this joint Task Force. The support that the Task Force has received from the CLC Task Force has been extensive and consistently excellent. It is reflected widely in the reasoning and language of this Report. Further, the Task Force has been separately advised by the Consumer Protection Working Group from the Cyberspace Committee and the perspectives of that Working Group have also helped shape this Report in important ways. We are grateful for the dedication of these ABA colleagues.

After the establishment of its own website⁵ and an extensive period of international public outreach,⁶ fact-finding and preliminary analysis, the Task Force concluded that the issues under consideration, by their very nature, compelled as broad and comprehensive an analysis as possible. Indeed, responsible U.S. and foreign government officials and entities have consistently

⁴ An important motivation for the creation of the Task Force was to ensure that a “neutral entity” would study the issues and make the recommendations. As stated on the Section on Business Law website, “there is a clear need for a neutral non-provider entity to create a task force to study disputes in cyberspace and assist with the development of proposed protocols, guidelines and standards for dispute resolution.”

⁵ The initial act of the Task Force was to partner with the Center for Law, Commerce and Technology at the University of Washington School of Law in Seattle. The Center took on the responsibility of providing research support for the Task Force and creating and maintaining the Task Force website which is accessible at <http://www.law.washington.edu/ABA-eADR/home.html>.

⁶ In addition to the creation of its website, and the development of written surveys in English, French, German, Spanish, Japanese, Chinese and Russian, the Task Force held a series of public meetings in Washington, DC, New York, Chicago, San Diego, London, and Paris at which time public input was received.

stressed the need for globally compatible solutions, including global dispute resolution systems, codes and guidelines.⁷

B. Taxonomy and Statistical Data

1. Dispute Terminology

The words “complaints” and “disputes” are used frequently and interchangeably without providing any definition or context. There are various types of injurious experiences that consumers may have. Commentators often refer to a pyramid of injurious experience or a dispute pyramid.⁸ At the base of the pyramid is unperceived injurious experience, moving up to perceived harms, grievances and complaints. At the very top of the pyramid are disputes with a subset being disputes voiced to third parties and through formal dispute resolution - which would include ADR as well as lawsuits.

The layers of the dispute pyramid have been characterized in the following manner:

Unperceived injurious experience. Consumers may experience a problem with a transaction but never perceive it as injurious per se. For example, a consumer may lack the expertise to recognize a specific problem such as a product defect that makes a product work inefficiently.

Perceived injurious experience. Out of the larger mass of experience, some of it is perceived by individuals as injurious. A consumer or customer, however, may blame him or herself or feel that the injury is too vague or debatable to be susceptible to a remedy. Thus, the experience may never develop into a grievance.

Grievances. A grievance is a sense of violation of a right or entitlement that can be ascribed to a specific person or entity. Grievances are usually not voiced, although they may make customers decide not to return to a particular merchant or type of merchant or medium. For example, a consumer who has a grievance arising out of an Internet transaction may choose never to use the Internet for future purchases. When a grievance is not voiced, the consumer, in essence absorbs the loss.

Complaints or claims (not legal claims or complaints). A complaint is a grievance that is voiced to the perceived offending party. Most frequently, complaints are granted or

⁷ The Task Force notes the following from the Joint U.S. - EU Statement of December 18, 2000:

“We now reaffirm these important goals and objectives, including the agreement to provide ‘active support for the development, preferably on a global basis, of self-regulatory codes of conduct and technologies to gain consumer confidence in electronic commerce.’ We also reaffirm our commitment to the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce issued in December 1999.”
(Emphasis added.)

⁸ The discussion of the dispute pyramid and its layers was suggested by the Working Group on Consumer Protection of the Electronic Commerce Subcommittee, Cyberspace Law Committee of the ABA business Law Section. For further discussion and explanation of the dispute pyramid See Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 11-17 (1993). See also Barbara Curran, *The Legal Needs of the Public: A Final Report of a National Survey* (1977), and Best and Andreason, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress*, 11 Law & Soc’y Rev. 701 (1977).

redressed. These would be referred to as “resolved” complaints. Reputable merchants, who seek repeat business and value positive reputation among consumers will encourage customers who perceive grievances to complain. A merchant who receives a complaint is in a position to grant relief and to satisfy the customer. Granting relief builds trust and confidence with the customer for future dealings.

Disputes. A dispute, as contrasted with a complaint, is a complaint that has been rejected in whole or in part. Often, customers do nothing after a complaint has been rejected by a merchant. This is another stage at which consumers may choose to absorb or internalize the loss. This is often rational because the cost of pursuing relief may be more expensive than the loss itself. The customer, however, may choose to avoid future dealing with the merchant and can create negative feedback or word of mouth.

Disputes voiced to a third party. A small fraction of customers with disputes choose not to give up but to seek the assistance of some third party. Third parties might include a government agency, a merchant association or a lawyer. Not infrequently, the third party will advise a consumer that it is not worth it to commence a formal proceeding against a merchant.

Formal dispute resolution would include ADR or lawsuits. This is the top of the pyramid and the smallest category on the dispute pyramid.

2. *E-commerce Terminology and Statistics*

The vocabulary of electronic commerce and the Internet is rich and complex.⁹ Thus, it may be appropriate to define at least those few words and expressions that have had particular impacts on our thinking.

The term *electronic commerce*, or *e-commerce* is itself broad and open to many definitions. Broadly defined, e-commerce can be viewed as the aggregate of goods and services sold over computer-mediated networks. For these purposes, sales include licenses. Examples of e-commerce transactions include the sale of a book over the Internet, the sale of parts at an electronic marketplace or trading platform to another business, the sale of component parts from one plant to another within the same company over the Intranet, and a manufacturer selling to a retailer over an EDI network. When we refer to electronic or e-commerce transactions, we refer to the “sale or purchase of goods or services, whether between businesses, households, individuals, governments and other public and private organizations, conducted over computer-mediated networks.”¹⁰

The Task Force categorizes electronic commerce (“e-commerce”) into two principal segments: business-to-business (“B2B”) and business-to-consumer (“B2C”).

The B2C component of e-commerce represents the value of products and/or services that individuals purchase “online” that are intended for personal, family or household use.¹¹ B2C

⁹ A hyper dictionary of electronic commerce law may be found at <http://www.ecom.cmu.edu/resources/elibrary/eclgloss.shtml>. See also <http://www.netlingo.com>.

¹⁰ The OECD coined this definition. See “Defining and Measuring Electronic Commerce: A Provisional Framework and a Follow-up Strategy,” DSTI/ICCP/IE/ID(2000)3/REV1, (August 2000).

¹¹ The phrase “personal, family and household use” appears in Article 2(a) of the *United Nations Convention on*

transactions are carried out daily on a global basis primarily over the Internet. We do not, for our purposes, separately define consumer-to-consumer (“C2C”) or person-to-person (“P2P”) purchases, such as those made through Internet auctions. We include such transactions within the B2C category, because of the involvement of a business service provider interfacing with the consumer parties.

B2B transactions, by contrast, represent the value of products and/or services that are intended for use by a business, an educational institution, a non-profit organization, or a governmental agency. Currently, B2B e-commerce - both buying and selling - is dominated by large enterprises, again on a worldwide basis but typically over closed or private networks. B2B e-commerce is carried out principally in three ways:¹²

- (supplier-driven) eDistribution sites
- (buyer-driven) eProcurement sites
- (independent) eMarketplaces

The first of these methods involves a supplier - which may be a new Internet supplier or a traditional brick-and-mortar company with an expanding e-commerce component to its sales and marketing efforts - which owns and operates an e-commerce site as its own private eDistribution system. Examples of this type of effort would include the online distribution systems of Dell Computers and Cisco Systems.

The second method involves the traditional procurement function carried out on an online basis by a single buyer or on behalf of a number of buyers that agree to use a common eprocurement platform.

The third method is the independent eMarketplace, which is established to facilitate multiple buyers purchasing products and/or services from multiple suppliers. Other terms used to describe the eMarketplace are “trading hub,” “exchange,” “digital marketplace,” “electronic hub,” etc.

Statistics suggest that the numbers of both B2C and B2B e-commerce transactions are increasing. Nevertheless, it must also be observed that both types of transactions are subject to technological limitations as well as advances. B2B online commerce appears in fact to be at a technological crossroads, in that traditional B2B activities have been carried out by the largest companies over private networks that specialize in electronic data interchange (“EDI”).¹³

As discussed below, in order for merchants to engage in B2B transactions they will need interoperable communications and data-sharing platforms. Extensible Markup Language (“XML”) may be the successor to EDI as a means of providing such interoperability for e-commerce and also for ODR as one aspect of e-commerce. Clearly the next generation of B2B

Contracts for the International Sale of Goods (CISG) and sets out a useful, if not authoritative, definition for consumer-type transactions, online or otherwise. For the text of the Convention as well as comprehensive related information, please see <http://www.cisg.law.pace.edu>. A “consumer” can be defined as a natural person acting for purposes, which are outside of his or her trade, business or profession.

¹² Of course, cultural differences do affect the adoption of B2B models in various countries and regions, particularly in Japan and Asia/Pacific.

¹³ For a practitioner's view of EDI, see “EDI and American Law: A Practical Guide,” Benjamin Wright, J.D., published by TDCC: The Electronic Data Interchange Association.

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transactions - which will affect all of the current selling models: eDistribution, eProcurement and eMarketplaces - will involve the scaling of those transactions beyond simple exchanges over private networks between top-tier customers, extending their reach to small and midsize customers communicating and contracting over the Internet.

Internet and e-commerce statistics vary tremendously. Since retail and B2B e-commerce is still relatively new, there is no historical data, which allows for accurate long-term projections about the growth rate of e-commerce for B2C or B2B.¹⁴ Thus, care must be taken when interpreting statistics concerning the Internet and e-commerce.

Internet access and use on a worldwide basis is growing at an exponential rate. On October 1, 2001, the research firm NUA reported that the number of people with Internet access around the world reached 513.41 million ... give or take a few million.¹⁵ Surprisingly, the same firm's November 2000 report indicated that worldwide Internet access then totaled 407.1 million, which suggests that worldwide Internet access and use is currently growing at a rate of substantially more than 100 million individuals a year.

Internet "penetration" - presenting this same data as a percentage of the local population¹⁶ - also varies by region and by country. NUA reports that Internet penetration is high in Western Europe, parts of Asia, and North America, but low in the developing countries.¹⁷ The research firm Taylor Nelson Sofres, which recently published the second of its lengthy and detailed Global E-commerce Reports ("GER"), provides a similar view of Internet penetration.¹⁸

From an e-commerce standpoint, however, the key statistics are not those concerning general Internet use or access, but those concerning use of the Internet for the conduct of B2B or B2C purchase and sale transactions.

¹⁴ For a useful report on Internet and E-commerce data, see "Internet and E-commerce Statistics: What They Mean and Where to Find Them on the Web" Congressional Research Service (October 24, 2000) located at <http://www.cnire.org/NLE/CRSreports/Science/st-36.cfm>; see also Thomas L. Mesenbourg, "Measuring Electronic Business" (U.S. Department of the Census) (August 2001) located at <http://www.census.gov/eos/www/papers/ebusasa.pdf>.

See also "Business-to-consumer E-commerce Statistics" OECD Committee on Consumer Policy, Directorate for Science, Technology and Industry (March 2001) presented as part of OECD Workshop on Consumers in the Online Marketplace. ("Until recently there has been no internationally-agreed definition of what e-commerce is. It is therefore difficult to compare estimates of its size, breakdown and growth. . . . A variety of sources produce estimates, including IT market research firms, investment banks and increasingly national technical offices. Not only are their definitions different, but the methodologies are often not comparable leading to a wide range of estimates and forecasts.") Id at 3.

¹⁵ The authors of the report emphasize that these figures are "guesstimates." NUA currently reports data from 202 out of 227 states and territories, but the local research firms that collect such data do not necessarily use identical methodologies. See <http://www.nua.com>.

¹⁶ The Internet penetration rates would be even more impressive if they were calculated as a percentage of adults or those most likely to use the Internet, say, 15 years or older.

¹⁷ NUA's figures for the top ten countries follow: Country and % of Population: Sweden, 63.55; Iceland, 60.79; United States, 59.75; United Kingdom, 55.32; Hong Kong, 54.50; Netherlands, 54.44; Norway, 54.40; Australia, 52.49; Taiwan, 51.85; Singapore, 49.83; Source: NUA Internet Survey 2001.

¹⁸ See <http://www.tns Sofres.com/ger2001/index.cfm>.

Surveys show that the global volume of B2B e-commerce has increased rapidly over the past three to four years, and estimates are that this volume will continue to increase dramatically over the next several years.¹⁹

These estimates were formulated prior to the slow down in global production that became evident in mid to late 2001 and that was exacerbated by the attack on the United States on September 11, 2001. Hence, future estimates may show less dramatic growth rates for this segment. ODR is not used to any meaningful degree in the B2B market segment since the parties have made other arrangements for the settlement of disputes between them and disputes among them are rare in any case.

In contrast, surveys also show that the volume of B2C e-commerce has increased relatively slowly over the past three to four years.²⁰ The United States Department of Commerce, for example, estimates that B2C transactions accounted for less than ten percent of all e-commerce transactions in the United States during 1999.²¹ In 2000, B2C e-commerce was estimated to be only 6 percent of all e-commerce transactions in the United States.²² Furthermore, even aggressive estimates predict that this volume will continue to grow at a relatively slow rate in the future.²³

B2C transactions also appear to represent a small sector of the retail marketplace. In 2000, the Department of the Census reported that e-commerce transactions accounted for an estimated 0.9 percent of all retail sales. The United States Department of Commerce reported that retail e-commerce sales during the fourth quarter of 2001 were \$10 billion - up 13.1 percent from the fourth quarter of 2000. E-commerce sales made up 1.1 percent of the total retail sales during this

¹⁹ The Boston Consulting Group ("BCG") reports that the transaction value of B2B e-commerce is expected to reach 2 trillion by 2003 with an additional \$780 billion in purchases made over private networks using EDI. Moreover BCG estimates that B2B e-commerce will account for nearly 24 percent of total business-to-business commerce by 2003. Boston Consulting Group, "New BCG Study Re-evaluates Size, Growth and Importance of Business-to-Business E-commerce" http://www.bcg.com/nea_ideas/new_ideas; IDC reports that the total worldwide value of B2B commerce will increase from \$282 billion in 2000 to \$4.3 trillion by 2005. "B2B E-Commerce Heads for Trillions" Cyberatlas (March 6, 2002) located at http://www.cyberatlas.internet.com/markets/b2b/article/o..10091_98661,00.html.

²⁰ OECD, Directorate for Science, Technology and Industry, Committee on Consumer Policy, "Business-to-Consumer E-Commerce Statistics" (March 2001) at 14 ("With B2C e-commerce still accounting for a very small share of all retail trade in OECD countries, usually less than 1%, it is understandable that some public attention has shifted to the B2B e-commerce sphere which accounts for more than four-fifths of all transactions." Id. At 14. United States Small Business Administration, "Small Business Expansions in Electronic Commerce a look at how small firms are helping shape the fastest growing segments of e-commerce" at 13 (June 2000).

²¹ United States Department of Commerce (2002), E-Stats, March located at <http://www.census.gov/estates>. Manufacturing and merchant wholesalers had the highest volume of e-commerce transactions during 1999. See E-States E-commerce 1999 (March 7, 2001) located at <http://www.census.gov/estts>.

²² United States Department of Commerce, "E-commerce 2000" (March 18, 2002) located at <http://www.census.gov/estates>.

²³ A recent (2001) OECD report which compiles and analyzes government and private sector data on B2C e-commerce reports that B2C e-commerce is expected to account for 3 to 6 percent of all retail sales within the next few years. See OECD, Business-to Consumer E-Commerce Statistics (March 2001) at 14.

period.²⁴ It is in this “retail” segment that ODR has been most used and has its greatest potential application.

It should be noted that the various estimates with respect to both B2B and B2C commerce are averages over the entire globe or over very large geographic regions. Hence, depending on many local factors, either segment may show sharp increases or decreases more locally. In general, the factors that seem to be most conducive to growth of B2C commerce in particular sub-regions and countries are the availability of technological infrastructure and the maturity of social structures based on strong and reliable commercial law and related financial and accounting systems.

C. Understanding Consumer Concerns related to E-commerce

Many organizations have studied and detailed the concerns of consumers in online transactions.²⁵ A representative list includes:

- Lack of confidence in online financial transactions (possible misuse of debit and credit cards)
- Nondelivery or late delivery of goods
- Internet fraud
- Hidden costs, such as VAT, duties, delivery charges, postage and packing
- No clear guide to the seller's rules and procedures
- Lack of independent certification of website policies and practices
- Concerns about the unrestricted or hidden collection of personal data; a general failure to protect the consumer's privacy
- Lack of available, plain language information

Of this array of concerns, however, which are the most prevalent among consumers? The most recent statistics concerning consumer complaints, released by the Federal Trade Commission (“FTC”) suggest that identity theft generates the highest incident of consumer fraud complaints in the U.S.

In 2001, 42 percent of the 204,000 consumer fraud complaints compiled by the FTC related to identity theft. This data was compiled by a government database that collects consumer complaints from more than 50 law enforcement and consumer organizations. The second most frequent complaint related to Internet auctions (10 percent). Late delivery or non-delivery of goods, goods less valuable than those advertised, deceptive trial offers from Internet, and

²⁴ United States Department of Commerce News, “Retail E-Commerce Sales in Fourth Quarter” (February 20, 2002) located at <http://www.census.gov/mrts/www/current.html>.

²⁵ The Consumers International study entitled *Consumers@shopping* identified problems with consumers being billed more than expected (often due to non-disclosed delivery charges), non-arrival of ordered goods, delays in delivery, goods damaged on arrival, wrong products being sent, electrical appliances being delivered in a country where they could not be used because of differences in the power supply, high costs involved in returning defective goods, and non-arrival or delays in refund payments. See <http://www.consumersinternational.org/campaigns/index.html>. See also <http://www.consumersinternational.org/campaigns/electronic/sumadr-final.html>.

computer services generated collectively 7 percent of the complaints. Shop-at-home and catalogue offers that failed to deliver or honor guarantees constituted another 6 percent.

These statistics indicate that the complaints arising from e-commerce transactions represent a significant but not primary cause of consumer complaints.

Other statistics also indicate a similar picture - that consumers are most concerned about identity theft, misuse of their personal information and also Internet fraud (i.e., situations where a website operator intentionally deceives consumers. Situations involving fraudulent investment schemes are an example of Internet fraud. Another might be a merchant who takes a consumer's money and has no intention of providing a product or service).

In a poll taken by Harris Interactive in August 2000,²⁶ consumers were asked the following questions:

Q3. Why haven't you bought anything online in the last 12 months?

57%	Afraid my credit card number will be stolen if given online
57%	Concerned that my personal information may be abused
38%	Worried that sellers may be fraudulent
26%	Want to be able to talk to someone when I place an order
37%	Don't know if sellers will be reliable
47%	Want to see a product in person
25%	Other

After reviewing recent literature concerning consumer concerns relating to the Internet and studies concerning how Internet merchants are conducting their business, the Task Force notes that consumers are concerned primarily about their ability to transact safely online - that is to do so without fear of the loss or theft of their personally identifiable information, without fear of identity theft, or of becoming a victim of Internet fraud.

These types of concerns are unlikely to be addressed through the use of ODR. ODR presupposes that a merchant or other party and a consumer are willing to engage in a process to resolve a dispute and possibly to achieve an agreed outcome. Internet fraudsters, whether they are stealing someone's credit card number or refusing to deliver goods and services, are unlikely to participate in ODR.

Rather, consumer education, which focuses on the means by which consumers can transact safely and securely, would be one means of addressing such consumer concerns. The Task Force's recommendations, outlined in the Executive Summary and in Part IV below, therefore have a strong educational component.

Problems with e-commerce transactions that would give rise to a complaint to the merchant are of secondary concern. Such problems might include late delivery of goods, non-conforming

²⁶ "E-Consumer Confidence Study," commissioned by the National Consumers League with the support of Dell Computers. The poll was conducted among 2,810 adults, aged 18 or over. See <http://www.nclnet.org/downloads/results.pdf>.

goods, or problems with the quality of customer service provided. The Task Force notes that a greater emphasis on in-house complaints handling, coupled with the provision of ODR (as the industry develops) will help to address this secondary set of consumer concerns. Privacy disputes relating to the use or misuse of a consumer's personal data by an Internet merchant may be amenable to alternative dispute resolution. Alternatively, it may be the subject of litigation or regulatory action by government agencies.

D. The Need for Increased Consumer Education and Disclosure by Internet Merchants and Other Stakeholders

Consumer concerns point to the need for additional consumer education about how to transact online safely and securely. At the same time, reports and data concerning best practices among Internet merchants suggest that there is great room for improvement in the manner in which merchants provide information to consumers. A recent study of international B2C e-commerce transactions, conducted by Consumers International, also points to the need for enhanced disclosure by merchants on their websites as well as heightened compliance with relevant consumer protection law.²⁷

It is important to stress that many online vendors are committed to the highest best practices standards and their websites fully reflect that commitment. Indeed, as experience is gained, one can only anticipate that the market for these early entrants will improve dramatically. Nevertheless, the Task Force must be cognizant of the fact that the rate of entrance to the world of online selling is almost certainly growing faster than the rate that the existing vendors improve their online practices and procedures. This suggests that all relevant communities - business, government and legal - have considerable work yet to do to inform and protect consumers, as well as ensure the scope and availability of appropriate ADR and ODR mechanisms.

From the standpoint of the typical vendor's website, these concerns appear to be well documented. A New Zealand study²⁸ of 700 websites released in October 1999 revealed that:

- More than 50% of the vendors failed to outline their payment security mechanisms
- 62% provided no refund or exchange policies
- 75% had no privacy policy
- 78% failed to explain how to lodge a complaint
- 90% failed to advise customers what laws applied
- 25% showed no physical address

In September, 2000, the United Kingdom company Clicksure examined business websites in Europe and the United States - focusing on privacy, security, website information, transaction management, quality and monitoring - and concluded that there was a clear failure to measure up to "internationally recognized best practice[s]".²⁹ Thereafter, in January 2001, the leading

²⁷ Consumers International,, "Should I Buy? Shopping Online 2001: An International Comparative Study of Electronic Commerce" at 810.

²⁸ Electronic Commerce and the New Zealand Consumer, March 2000.

²⁹ Clicksure Best Practice Report; see <http://clicksure.com>.

international consumer organization, Consumers International, released its Privacy@net study³⁰ in which it concluded:

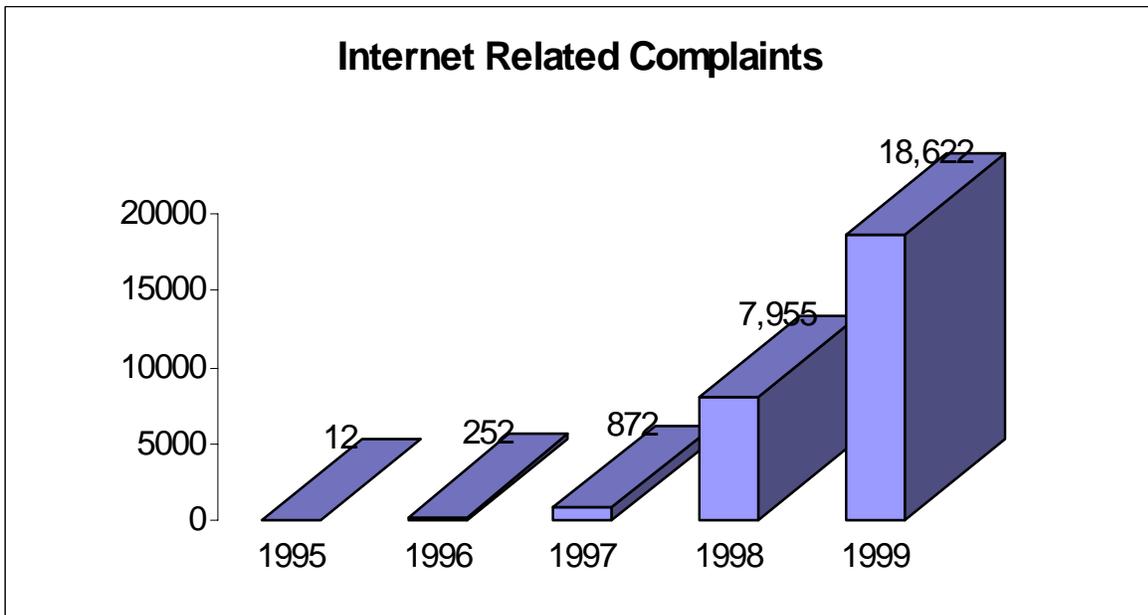
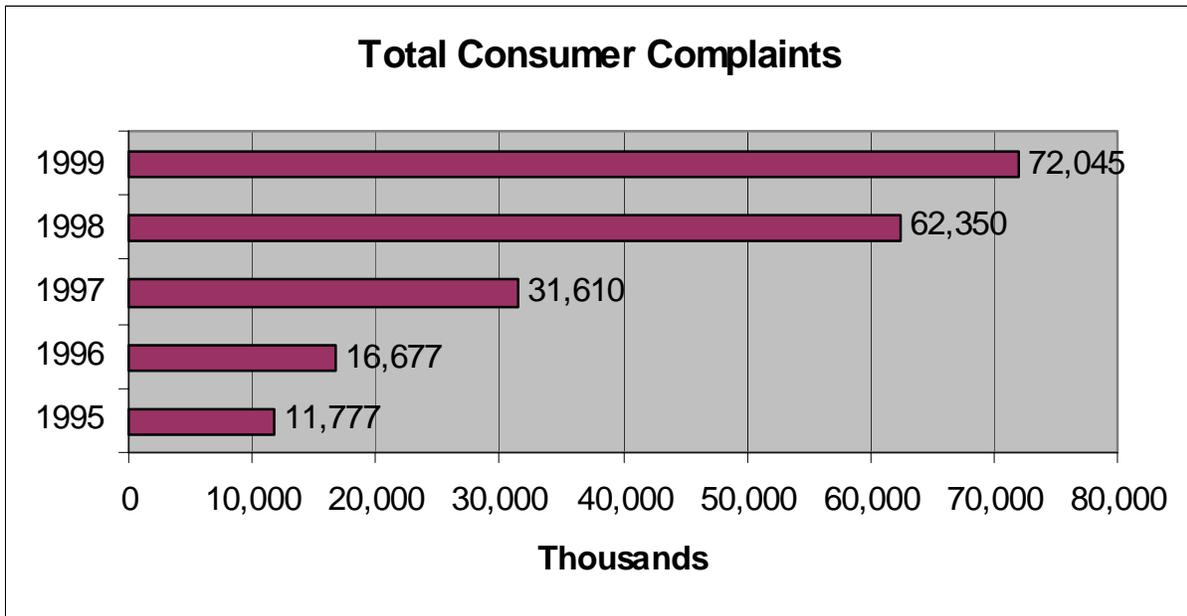
Despite the fact that the majority of the sites collected personal information from the user, only a tiny minority provided a privacy policy that gave users meaningful information about how that data would be used. Sites both in the U.S. and EU fall woefully short of the standards set by international guidelines on data protection. The majority of sites ignore even the most basic principles of fair information use, such as telling consumers how their data will be used; how it can be accessed; what choices the consumer has about its use; and how security of that data is maintained.... Despite tight EU legislation in this area, researchers did not find that sites based in the EU gave better information or a higher degree of choice to their users than sites based in the US. Indeed, US-based sites tended to set the standard for decent privacy policies.... EU consumers are not only protected by legislation, but also have a data protection commissioner in each country looking out for their rights, and have a right to redress if the law is breached. However, in practice, EU sites do no better than US ones at keeping their users informed.

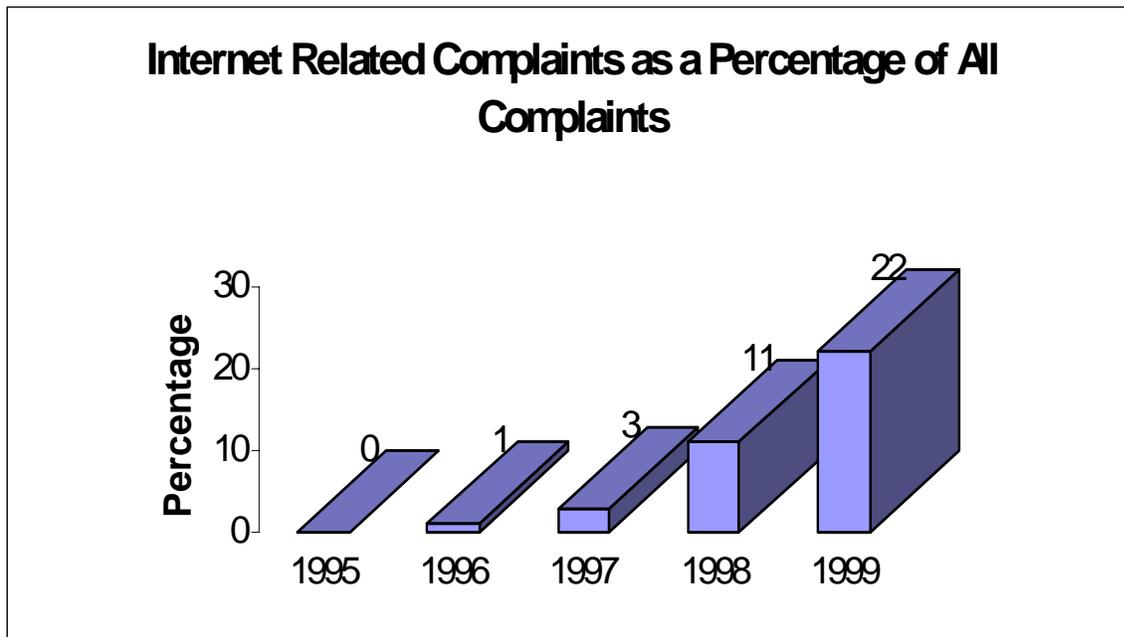
More recently, on August 16, 2001, Arthur Andersen released a study of 75 Fortune 500 and medium-sized, well-known U.S. companies - in five different industries, including financial services, retail, technology, telecommunications/media/entertainment, and travel/leisure - as to how the U.S.-EU "Safe Harbor" principles had been implemented. Its conclusion was starkly clear: "[M]ost U.S. multinationals doing business internationally have made little progress in adopting and implementing minimum worldwide standards for ensuring the privacy of individuals' personal data."

Not only are consumers beset by inadequate vendor policies and practices in the area of e-commerce transactions,³¹ enforcement records of key government agencies suggest that the problems for consumers in the online world go well beyond mere "inadequacy." The U.S. Federal Trade Commission (2001) has provided the Task Force with the following data:

³⁰ See <http://www.consumersinternational.org>.

³¹ Of course, not all websites fail to meet recognized best practice standards, and the expectation is that a great many websites will improve substantially over time. However, considering the infancy of B2C e-commerce, the most realistic short-term view is that the rate of improvement of existing websites will be slower than the rate of increase of (inadequate) new websites to the World Wide Web.





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ry, the Office of Fair Trading in the U.K. issued a report in March 2001, which indicated that more than half of the Internet sites in Britain might be breaching EU and UK consumer law. The Office of Fair Trading conducted a “mystery surf” of 637 web sites. The report noted that, while most of the sites provided basic contact details, 52 percent failed to provide easily accessible information on refund or exchange policies.³²

III. Market Responses to Consumer Concerns about E-Commerce

A. The Development of ODR as a Response to the Need for Redress in the E-commerce Marketplace

For B2B e-commerce, The Task Force believes that technological innovation and the development of interoperable standards will help to facilitate the use of ODR as a means of cross-border dispute resolution. The Task Force is not nearly as comforted with the current and prospective realities of B2C e-commerce as we are in the case of B2B e-commerce. Nevertheless, as will be seen below, one very positive way is the growth of ODR providers to fill the potential “market” niche for ODR services, particularly in B2C e-commerce.

The term ODR is a relatively new phrase and may convey different things to different people. For this report, the term ODR is used loosely to include the use of the Internet and other web- and computer-based technologies for facilitating alternative dispute resolution. For example, parties to a dispute may use the Internet in order to communicate with one another as part of a conciliation process. Alternatively, a neutral might communicate with both parties via the Internet as part of a mediation or arbitration. Additionally, the Internet may facilitate the collection, transmission and storage of information pertaining to the dispute. In certain circumstances, ODR involves dispute resolution where the parties may never meet in person but may interact solely online.

³² Office of Fair Trading “Online Retailers May be Breaking law” (March 13, 2001)
<http://www.of.t.gov.uk/html/rsearch/press-no/pn11-01.htm>.

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ODR may be used, of course, to resolve disputes generated online as well as offline. ODR, as a process, may involve various types of dispute resolution including:

- dispute prevention (education, outreach, rating and feedback programs);
- ombudsman programs;
- conflict management;
- assisted negotiation;
- early neutral evaluation and assessment;
- mediation/conciliation;
- mediation-arbitration (binding and/or non-binding);
- arbitration;
- expert determination;
- executive tribunals; and
- consumer programs (private, trade groups, quasi-governmental, and governmental).

Governments must be given substantial credit for the development of ODR. As evidenced by the third annual progress report of the U.S. Government Working Group on Electronic Commerce, released January 16, 2001, governments have shown considerable restraint in this area, acting primarily to promote “collaborative efforts among the private sector and consumer groups to develop and implement fair and effective ADR mechanisms for online transactions as one means of promoting consumer confidence and participation in electronic transactions.”³³ In an important statement issued by the European Union and the U.S. Governments on December 18, 2000, the two governments committed themselves jointly to the use of ADR and ODR in the e-commerce arena:

“Easy access to fair and effective ADR, especially if provided online, has the potential to increase consumer confidence in cross-border electronic commerce and may reduce the need for legal action. We, accordingly, agree on the importance of promoting its development and implementation.”

In this statement, the two governments went on to acknowledge that the issues of applicable law and jurisdiction will be “difficult to resolve in the near term,” emphasized the importance of global “self-regulatory programmes such as codes of conduct and trustmarks,” and recommitted themselves to the Organization for Economic Cooperation and Development (“OECD”) *Guidelines on Consumer Protection in the Context of Electronic Commerce* issued in December 1999.

³³ This Report adds that “alternative dispute resolution can be a practical way to provide consumers with fast, inexpensive, and effective remedies, and can reduce businesses' exposure to foreign litigation.”

The Federal Trade Commission also deserves substantial credit for its initiatives aimed at creating effective and trustworthy ODR mechanisms for B2C Internet transactions. The FTC, in partnership with the U.S. Department of Commerce convened a major workshop on ODR in June 2000 and has been an active participant in international and U.S. based dialogue on the topic.³⁴ The FTC is also the major impetus behind [econsumer.gov](http://www.consumer.gov), an intergovernmental website meant to assist consumers in filing complaints related to global ecommerce transactions with the appropriate government consumer protection agency.

To some in the ADR community, the potential to resolve disputes in the e-commerce world, particularly B2C transactions, has provided a rare opportunity to design a conflict resolution model where none yet existed; for others, it has provided an opportunity simply to extend their existing tools and structures to a broader potential audience and customer base. Whichever is the case, the continued growth, development and maturity of the ODR community is both a goal and precondition to the successful resolution and avoidance of disputes in cyberspace. Creative new dispute resolution tools such as “blind bidding”³⁵ have been developed to serve particular niches within cyberspace, but there is also ample room within the unique environment of the Internet for the practice of traditional forms of ADR, such as negotiation, mediation, arbitration, conciliation, early neutral evaluation, expert determination, and the like.

In early 2000, the number of ODR providers grew apace alongside the growth of e-commerce generally.³⁶ Such companies provide a large palette of tools for the resolution of e-commerce disputes. However, the ODR community is, in large part, still in its infancy. In 2002, the number of ODR providers has contracted, with some companies ceasing to do business, and others offering their domain names for sale, or their websites appear inactive. The establishment of a robust ODR industry clearly requires even greater growth and a more effective global reach, and just as clearly awaits greater financial, business, technological and legal maturity.

The opportunity to create, invent and put into practice new as well as traditional ideas of dispute resolution must be allowed to continue; the ODR community must be allowed to respond, without significant constraint, to the demands of the market that it now serves. The Task Force

³⁴ See FTC and U.S. Department of Commerce, Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions located at <<http://www.ftc.gov/bcp/altdisresolution/comments/>>.

³⁵ So-called blind bidding is a dispute resolution process pursuant to which the parties to a commercial dispute submit their monetary offers and demands to an automatic system. Each party's offer or demand is not disclosed to the opposing side; rather, the computer software in various “rounds” compares each offer and demand. If one party's offer matches the opposing party's demand or is within a specified range, then the case is settled for the amount that is a match or for the average of the offer and demand where it falls within the specified range. Blind bidding is a highly efficient and beneficial method of ODR where interests of the parties involved are purely numerical. In the case where the parties' interests cannot be put into numerical terms, then a more “neutral-managed” ODR mechanism -- arbitration or mediation -- must be used.

³⁶ Various reports provide lists of ODR providers. See, for example, “Online Dispute Resolution: the State of the Art and the Issues (December 2001), University of Geneva Faculty of Law and Centre Universitaire Informatique”; Center for Law, Commerce and Technology, University of Washington, (2000) Online Alternative Dispute Resolution: An Issues Primer, Report for the National Association of Attorneys General, http://www.law.washington.edu/lct/files/2000_ADR_Online_draft.doc; Consumers International, Update to Disputes in Cyberspace (2001) Consumers Intl 2001 Update to Disputes in Cyberspace Report (includes table and list of providers) http://www.consumersinternational.org/campaigns/electronic/update_disputes_in_cyberspace_2001.pdf.

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agrees with the current government view that ODR must be allowed to develop, collaboratively to be sure, at its own pace. Nevertheless, from the viewpoint of the *users* of the systems - consumers, businesses, attorneys, and lay advisors - it cannot be said that the current situation is optimal. Indeed, some fundamental observations or assumptions about ODR services must be noted:

- The ODR community is, in most respects, still in its infancy, without a meaningful database of experience, information or analysis.
- No strong or significant business or “trade” association has emerged, around which the ODR community can coalesce, particularly on a worldwide basis.
- To date, consumers worldwide do not have great awareness of the existence of ODR as a means of resolving disputes generated online or offline. They are not, therefore, making decisions whether or where to transact online based on the availability of ODR.
- Existing ODR providers range from the old, respected and financially stable to the new, unproven and less capitalized. The ODR industry is currently in a state of flux and some providers will ultimately fail, as is natural in any new marketplace.
- Whether styled as a for-profit or as a non-profit entity, each member of the ODR community is subject to all forms of market pressures and business and financial realities and can be expected to respond to those pressures and realities as any other business entity might respond.
- ODR for B2C transactions is intrinsically multi-jurisdictional and exceedingly complex, yet subject to severe financial limitations. Since many B2C disputes involve dollar values that are relatively low, it has been challenging for ODR Providers to provide such services and to generate a profit.
- No guidelines or standards for ODR have emerged as a dominant code of practice within the ODR community.

These observations suggest two courses of action for the Task Force. First, the Task Force, and the organized bar generally, should encourage greater education and awareness of ODR along with other mechanisms for dispute prevention and resolution in cyberspace. Consumers should be made aware of ODR as one of an array of options that will instill increased confidence in the online marketplace. Business should also be apprised of the possible benefits of ODR as part of a comprehensive complaints handling and customer service program.

Secondly, the Task Force should help ODR Providers to develop effective codes of practice. To this end, the Task Force has developed a set of Recommended Best Practices by ODR Service Providers. These guidelines are not a code of practice, but, rather, recommend a set of best practices that may be incorporated into a code of conduct. As such, they represent the Task Force’s view that certain types of disclosures should be made by ODR Providers as a means of ensuring that consumers are (a) informed and (b) are given a fair opportunity to understand the nature of an ODR Provider’s service before agreeing to participate in an ODR proceeding with

the provider. It is our hope that such Recommended Best Practices will provide a useful tool for ODR Providers and for consumers and merchants when assessing codes of practice that are developed.

Beyond the mere proliferation of ODR providers and supportive government attitudes, however, the Task Force is compelled to conclude that other tools necessary to assist the online consumer are still not in place, and that there are in fact existing structural failures in addressing the reasonable concerns of consumers on a worldwide basis.

B. Use of Trustmarks and Codes of Conduct by Internet Merchants

It is considered axiomatic that the creation of trust and confidence is the most critical factor for an online business to build and maintain satisfactory customer relationships. One approach to encourage consumer confidence has been for online sellers to commit to codes of conduct or “best practices” guidelines that have been developed by various “trustmark” organizations.³⁷ These institutions can validate the trustworthiness of an online business and thus reduce consumer uncertainty involved in a particular transaction.³⁸

In the case of a code of conduct dealing with privacy issues, for example, if a consumer visits a website and sees a trustmark, she can be assured that the website will disclose:

- the personal information that is gathered
- how this information will be used
- with whom the information will be shared
- the choices available to him or her regarding how the collected information will be used
- the safeguards in place to protect this information from loss, misuse or alteration

From the merchant's perspective, trustmarks provide an instant graphic display that this website is committed to a series of “best practices,” distinguishable from its online competitors who may not have made such a commitment. Trustmarks, along with their related code of conduct, typically ensure that the merchant will observe best practices in the following areas:

³⁷ A “trustmark”, sometimes called a “webseal”, is a label on a website indicating that a merchant commits to complying with a number of best business practices, including redress mechanisms. Consumer organizations, major accountancy organizations, trade or professional organizations such as Chambers of Commerce, and companies have developed Trustmark programs privately. They attempt to respond to various consumers' concerns such as privacy, children's advertising, security, consumer protection, and more. For purposes of trustmark schemes, the merchant would use the trustmark on its website and commit to complying with the trustmark specifications. For analysis of trustmark programs, see <http://econfidence.jrc.it>.

³⁸ It has been suggested that the concept of a trustmark or webseal first originated from a lecture on trust at Esther Dyson's PC Forum in March 1996, the notion being to bring to the Internet branded systems of trust such as the Underwriter Laboratories or Good Housekeeping “seals of approval”. The two of the earliest online seals include TRUSTe, which began in June 1997 and the Better Business Bureau Online Reliability Seal. See Raphael France, The Internet Law Journal, published February 5, 2001 at <http://www.tilj.com/content/ecomarticle02050103.htm>.; Comments by the Council of Better Business Bureaus and BBBOnline on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution's Draft Recommendations and Report (June 4, 2002) at 3 located online at <http://www.law.Washington.edu/aba-eadr>, <http://www.law.washington.edu/ABA-eADR/drafts/2002.04.05draft.html>.

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- Accuracy and accessibility of information
- Marketing practices
- Information about the merchant
- Information about the goods and services
- Information about the transaction
- Cancellation/return/refund policies
- Security
- Customer service and/or support
- Warranty
- Privacy
- Unsolicited e-mail
- Complaints handling, redress or dispute resolution

It must be said that there is a wide range of codes³⁹ and that the proliferation and diversity of such codes⁴⁰ may have disadvantages as well as advantages. A healthy diversity and competition among the developers of trustmark/code programs might result in “a race to the top”, which would increase consumer choice and improve the overall standards of online selling. On the other hand, the lack of a clear set of minimums or overall benchmarking, coupled with the potential absence of monitoring and enforcement, may lead the consumer to doubt the value of all trustmarks and codes, or at least make him lack the essential knowledge as to which codes can in fact be trusted.

Governments (and international organizations) deserve praise for their work in this area. Of particular note are the following:

Australian Best Practice Model for Business

<http://www.e-commerce.treasury.gov.au/html/e-commerce.htm>

Canadian Framework for Consumer Protection for Electronic Commerce

<http://strategis.ic.gc.ca/SSG/ca01182e.html>

Dutch Model Code of Conduct

³⁹ Trustmark/code of conduct programs vary considerably in their terms and operation. Some certify only particular aspects of online business, such as privacy, while others certify a broad range of issues including advertising, disclosures, contract terms and performance, and security. Most include provisions concerning internal and/or third party dispute resolution, and some trustmark organizations provide or monitor dispute resolution services involving their subscribers. Some programs certify only that the subscribers have accurately disclosed their own policies, while others certify that subscribers follow the trustmark organization's standards.

⁴⁰ Codes may be international or national in scope; government or privately sponsored; based on for-profit and non-profit models; applicable to specific industries or to all e-commerce; applicable to specific issues or a broad range of issues; and developed and operated by a single stakeholder or multiple stakeholders: consumer organizations, trade associations, or individual companies.

<http://www.ecp.nl/ENGLISH/index.html>

New Zealand Model Code and Report on Consumer Protection in E-commerce

http://www.consumer-ministry.govt.nz/dp_e-commerce_statusreport.htm

OECD Guidelines for Consumer Protection in the Context of Electronic Commerce

<http://www1.oecd.org/dsti/sti/it>

European Code of Conduct for On-Line Commercial Relations

http://www.eurocommerce.be/publications/position_papers/CODEEngIFINAL02.PDF

Numerous private sector trustmark organizations have developed codes of conduct and webseals and currently offer their services to potential subscribers.⁴¹ Trustmark companies have been organized in North America, Europe and Asia targeting either a local or a truly international subscriber-base. These organizations have been inventoried at various sites.⁴²

Potential subscribers to the selected trustmark program submit an online application, review and sign a license and related agreements, compare and conform their policies with those of the trustmark provider, and then receive a seal graphic with confidential instructions for electronically displaying the trustmark on the subscriber's website.

To be effective and credible, trustmark organizations must put into place mechanisms to establish and monitor the merchant's compliance with the trustmark program specifications. These might include random checks by the certifier, independent auditing or verification, self-certification by the merchant, and of course regular reporting by the merchant of relevant information. The consequences of a failure to comply with program requirements must also be specified.⁴³

The use of trustmark and webseal programs appears to be a natural development in the world of online commerce. They are clearly a helpful mechanism for boosting consumer confidence in e-commerce and the Task Force stands behind their use. Indeed, as will be discussed below, we recommend their future use in connection with the provision of ODR services by the ODR community.

⁴¹ It appears that some organizations have developed codes of conduct, but offer these without any accompanying trustmark or webseal. See, for example, the ICX Code of Conduct at <http://www.icx.org.uk>.

⁴² See, for example, GBDe < http://consumerconfidence.gbde.org/t_inventory.html >, Advertising Standards Authority < <http://www.asa.co.nz/trustmarks.htm> >, and Australian NOIE Consumer Confidence Project <http://www.noie.gov.au/projects/consumer/roundtable/webseals_comparative_table.htm >.

⁴³ For a useful assessment of the certification process see European Commission Joint Research Centre, Institute for the Protection and Security of the Citizen Cyber security Sector, "E-commerce and Consumer Protection: A Survey of Codes of Practice and Certification Processes" (2001) EUR 19932 EN. This report concluded that "[T]he aspects in which the codes of practice seem particularly exhaustive are identity of the offeror, order procedure, advertising and security. The aspects in which the codes seem to be mainly incomplete are related to server/host identity, code of practice properties and general trustmark properties." The report also notes that in a survey of certifiers, out of 26 respondents "for a total of 6380 applications received, 73% of the webshops were granted the trustmark, 18% were rejected and the remaining 9% were under assessment". Id. at iii.

The Task Force does not, however, believe that such merchant trustmark programs represent a magic solution to the consumer protection problem. As the previous statistics have noted, Internet users are measured in the hundreds of millions; Internet sellers are measured in the millions; while trustmarked sellers are measured in the thousands. As Brick-and-Mortar companies turn to “Brick-and-Click”, and as new online sellers come to market, one can expect their rate of growth to be substantially greater than the rate of growth at which trustmark companies increase their subscriber base. The consumer clearly benefits from trustmark programs but, just as clearly, other efforts are needed, particularly in the educational and informational arenas. The recommendations of the Task Force also focus on these “other efforts.”

IV. Discussion and Recommendations

Some of the major questions that the Task Force has attempted to address include the following:

How to assure independence, neutrality and impartiality in the ODR Process?

The Task Force believes that ODR as an industry is still in the early stages of its development. Greater consumer education and information will help consumers and businesses to learn about ODR and to understand what sort of features will provide for an independent, neutral and impartial ODR Process. The Task Force believes that the Recommended Best Practices by ODR Service Providers is one possible tool that will contribute to this process. The Recommended Best Practices provide guidance on what types of information should be disclosed by ODR Providers to ensure that parties are properly informed about the independence, neutrality and impartiality of an ODR process. An emphasis on greater and more uniform disclosure mechanisms will help to educate and inform all stakeholders.

How to assure the financial viability of ODR Providers?

The Task Force believes that at present, B2C ODR has not flourished due to lack of distinctly viable business models for the majority of ODR providers. A core reason for this situation is that, even with the cost efficiencies of ODR, the value of the goods or services purchased may be less than the cost of the ODR process to the consumer, and the merchant may be unwilling to subsidize the cost of the ODR process to any substantial degree because of the adverse incentive such a subsidy creates from the merchant’s point of view. Thus, many of our recommendations emphasize the need for reinforcement of dispute prevention mechanisms as well as merchant complaints handling procedures. The ODR industry needs to develop and further research is needed to determine whether there are certain business models that will allow for the growth and success of the industry. As Internet businesses become more aware of ODR through increased education, they may begin to use ODR as part of their complaints handling program as well. There are some experiments underway by governmental entities in the US and the EU to provide government-sponsored ODR. These efforts are worthy experiments.

How to assure the ODR Provider has the ability (jurisdictional and otherwise) to handle cross-border transactions?

The Task Force believes that greater education for Internet merchants, consumers, lawyers and other stakeholders is one of the first and most necessary steps to facilitate cross-border e-commerce as well as cross-border dispute resolution. To this end, the Task Force has recommended the creation of an informational entity, the iADR center, that will provide a broad

audience with information about applicable laws and regulations concerning e-commerce in different parts of the world as well as information about mechanisms (including ODR) for resolving disputes between parties that reside in different jurisdictions.

The Task Force believes that ODR providers, Internet merchants and government-sponsored complaints handling or clearinghouses websites should, whenever possible take into account the cross-border nature of e-commerce transactions. To this end, Internet merchants and ODR providers are encouraged to state clearly in which countries or locations they are willing to do business. In addition, the use of multilingual websites, complaints handling decoders and ODR processes that account for language and cultural differences are to be encouraged. At the same time, the Task Force is cognizant that ODR Providers are still trying to establish viable business plans and therefore the development of robust cross-border capability may not be feasible for all ODR Providers.

How to draft a set of procedural rules for effective ODR?

The Task Force has not drafted a new set of procedural rules for effective ODR. Rather, the Task Force has drafted a set of Recommended Best Practices by ODR Providers that focuses on the nature and method by which information concerning an ODR Provider can be disseminated and disclosed to parties. This set of best practices is meant to be used by consumers, merchants and ODR providers as a means of assessing the various ODR codes of practice that are being developed as well as to assess whether a particular ODR Provider's website provides enough information for parties to make informed choices about whether to use ODR to resolve their disputes.

A. The Role of Internet Merchants in Preventing and Resolving Complaints Arising from E-commerce Transactions

During the Task Force's outreach and research, it has become clear that there is currently no clear viable business model for the conduct of sustained and successful ODR operations, especially in the cross-border context. There is little publicly available data concerning the financial viability or success of ODR. Anecdotal evidence, suggests that the ODR community, taken as a whole, is marginally profitable at best.

Ideally, customers would like to transact with reliable merchants and to have satisfactory customer experiences. Problems with transactions, including Internet transactions, however, are inevitable, even with reputable merchants. When customers perceive problems, effective complaints handling by the merchant is more important than effective third party dispute resolution. ADR and ODR may be good substitutes for litigation but are not substitutes for effective complaint management at the merchant level. Effective complaint handling also involves advance disclosure of information that facilitates customer complaints.

To this end, the Task Force recommends an increased focus by Internet merchants on more consumer education, coupled with a greater emphasis on disclosure of policies and practices on merchant websites. Some of the statistics and data outlined in Section II, above, indicate that (a) consumers still have concerns about whether or not to transact online and (b) that Internet merchants can improve the ways in which they are communicating with consumers. To this end, the Task Force's recommendations for Internet merchants focus on greater education, disclosure, and participation in trustmark or web seal programs.

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1. E-commerce businesses should place an enhanced emphasis on all stages of the B2C relationship, including dispute prevention, complaints handling, and effective methods of redress through ADR and ODR.
2. Internet merchants, governmental and nonprofit entities should place a greater emphasis on consumer education and the prevention of e-commerce disputes.

The Task Force believes that it is better to reduce the number of consumer grievances that may arise from an e-commerce transaction rather than to focus solely on providing better complaints handling mechanisms for resolving grievances when they do arise.

3. Protecting consumers requires adequate standards and codes of conduct for e-commerce businesses. These may take the form of voluntary codes of conduct, government created codes or co-regulatory codes.

Internet merchants should be encouraged to participate in and subscribe to relevant codes of conduct. Often, this may involve participating in an e-commerce trustmark or merchant seal program. Such programs should ideally include a provision for third party ODR services for unresolved complaints between consumers and the merchant.

4. Internet merchants should be encouraged to participate in and subscribe to relevant e-commerce codes of conduct and trustmark programs.
5. Internet merchants should develop or continue to improve on their in-house complaints handling mechanisms, and educate consumers as to how to use these in-house procedures effectively.
6. For consumers, recourse to in-house complaints handling mechanisms is normally the first and best means to obtain redress from reputable merchants. Accordingly, consumers should be encouraged to utilize the in-house complaints handling mechanisms offered by reputable Internet merchants before resorting to third-party dispute resolution mechanisms

Internet merchants are on the front line of dealing with consumer e-commerce complaints. Realistically, consumers often turn to a merchant and its in-house customer service department or complaints handling process first if a problem arises from an e-commerce transaction. The Internet merchant will have a familiarity, data and expertise that will allow it to provide effective complaints resolution processes for the consumer.

As for cost, a strong and professionally conducted in-house complaint resolution program is inherently less costly than the use of a third party ODR or ADR service as a means of resolving consumer complaints. Trustmark programs (which may offer their own ODR or ADR services) or ODR providers should be available as an alternative if in-house complaints resolution does not resolve the dispute.

The Task Force conducted a survey of websites of major e-commerce retailers. The survey assessed whether the websites conformed to many of the best practices for complaints handling developed by various organizations. These results, discussed in Annex 2, indicate that there is room for improvement in the ways in which Internet merchants currently inform consumers about in-house complaints handling procedures and policies. Interestingly, none of the 50 Internet merchants posted their formal, written complaints handling procedures on their websites.

B. Recommendations relating to ODR

With respect to ODR, the Task Force makes two principal recommendations, *first*, the adoption of a set of Recommended Best Practices by ODR Service Providers (“Recommended Best Practices”). These Recommended Best Practices are meant to provide guidance to ODR Providers, Internet merchants and consumers when assessing whether a particular code of practice is effective. The best practices focus on the use of disclosure as a means of consumer education and empowerment. In this regard, the best practices focus on the types of information that should be provided to consumers by ODR providers. The *second* recommendation is the creation of a structure or entity that acts to inform and educate lawyers, businesspersons and consumers on relevant issues including ODR.

The first recommendation, developing a set of Recommended Best Practices, complies with our original mandate but reflects our conviction that an independently derived set of best practices will set an important benchmark against which emerging ODR codes of practice may be assessed. The primary goal is to ensure that the ODR Provider’s service is clearly and comprehensively presented to the consumer in a manner that is consistent with the Recommended Best Practices and in fact operates in the manner presented.

The second recommendation - pertaining to the establishment of a new entity that will educate and inform lawyers, businesspersons and consumers - flows from our independent conviction that there are currently systemic problems that must be addressed before the consumer can be adequately protected in the online world.

1. Recommended Best Practices by Online Dispute Resolution Service Providers

Note: The Task Force’s Recommended Best Practices are included in Annex A to this Report.

The Task Force’s Recommended Best Practices are intended to assist:

- Organizations that provide online dispute resolution (ODR) services (ODR providers), concerning disputes that occur online or disputes that lend themselves to being resolved online;
- Individuals who serve as neutrals for ODR Providers;
- Customers of those services, whether personal consumers or businesses; and
- Online merchants or marketplaces.

Actions that are taken by ODR Providers consistent with these Recommended Best Practices may (a) take the form of codes of conduct, codes of practice, best practices statements, protocols and similar statements; (b) be reflected in the operation of their websites and in material posted on their websites; or both. The exact form is secondary. The primary points are that the ODR Provider’s service is clearly and comprehensively presented to the consumer in a manner that is consistent with the Recommended Best Practices and in fact operates in the manner presented.

These Recommended Best Practices contain many principles that are applicable in both B2B and B2C disputes. However, they particularly are intended to enable consumers to make intelligent choices concerning ODR providers, to help give them confidence in the efficacy of ODR and therefore in B2C commerce generally, and to encourage consumers to use ODR as a means of obtaining resolution of their complaints.

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These Recommended Best Practices are also not primarily directed to the codes of conduct, best practices statements, and similar protocols of online merchants or marketplaces (although they may find the Recommended Best Practices useful). Other private and governmental entities have proposed merchant guidelines and best practices for consumer protection in the context of electronic commerce, and this Task Force does not purport to duplicate their efforts.

It is not the primary goal of these Recommended Best Practices to set minimum substantive standards of best practice. The approach taken by these Recommended Best Practices is based mainly on the use of disclosure and addresses both the adequacy of the means whereby the disclosure is given and the subject matter of the disclosures.

The Task Force believes that the types of disclosures outlined in the recommendations will help to instill confidence and trust in the new ODR industry and marketplace. As the commentary indicates, ODR Providers will need to take into account the size of their own business operations.

It is recognized, however, that the fact of comprehensively listing and organizing the topics for disclosure has the effect of setting substantive standards. It is also acknowledged that, when individual ODR Providers come to the act of formulating disclosures that are readily available publicly and easily compared with those of other ODR Providers, a natural effect of a disclosure-based system is to press ODR Providers in the direction of setting strong substantive standards. These effects are intended. In addition, a “Commentary” area follows each of the Sections of these Recommended Best Practices and those Commentaries indicate, among other things, substantive standards that are encouraged. Hence, as a practical matter, the approach in these Recommended Best Practices is unavoidably a mixed system of recommended disclosures and substantive practice standards.

Nevertheless, the intention is to rely mainly on disclosure. There are several reasons for this disclosure-based approach:

- The ODR community as a whole is quite new and has not generated a sufficient database of information on which to base confidently extensive substantive standards particularly applicable to ODR.
- Different ODR Providers focus on different markets (service, product, merchant type, geography, etc.) and a single set of substantive standards may not be appropriate in all cases.
- The ODR community lacks a clear business model or models for sustained profitable operations and appears to be evolving so as to develop such models. Premature standard setting may retard that evolution.
- From the point of view of the Bar, a consumer’s decision to use an ODR Provider (or to make an online purchase taking into account availability of an ODR mechanism) is a contract decision. A central issue in any contract decision between a vendor (the merchant or the ODR Provider or both) and a vendee (the consumer) is whether the vendee has sufficient information on which to make an informed and intelligent choice. The Bar is not a consumer protection regulatory agency. Its proper concern is more with the fairness of the various processes involved than with the appropriateness of the substance, as might be more the proper concern of a regulatory agency.

- Disclosure has an important enforcement consequence in that, under US law, if a business fails to adhere to the public disclosures that it makes concerning its services, it may, under many circumstances, be engaged in an unfair or deceptive act or practice in or affecting commerce under Section 5 of the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended). This is also the case under the consumer protection laws of many states and non-U.S. jurisdictions.

The Recommended Best Practices are not designed to be a one-size fits all set of recommendations. The appropriateness of the recommendations and the manner in which they are implemented must be balanced against the individual nature of the services and business model of the ODR Service Provider. The Task Force is also mindful that there will be cost and resource implications linked to implementation of various best practices - including, for example, increased time and resource allocations to collect and disseminate certain types of data. On balance, however, the Task Force views disclosure of certain data and material affiliations of the ODR provider as an important means to instill consumer confidence in ODR.

Individual ODR service providers will have to factor in the nature of the ODR services they provide when considering how to implement a regime of best practices. Similarly, it may be difficult to implement certain best practices retrospectively with respect to data or information about an ODR service provider's previous business activities, affiliations or caseloads. The Task Force acknowledges that retrospective application presents certain concerns. The Recommended Best Practices are focused mainly on prospective application and implementation. The document is forward looking rather than backward looking.

2. Creation of iADR Center

The Task Force has expressed above its conviction that there are systemic failures in the B2C arena. In our view, one of the largest problems is the absence of many structures pursuant to which consumers and businesspersons can obtain the information necessary to make informed choices about e-commerce and ODR.

To a considerable degree, these problems relate to the fact that e-commerce is global in nature, while law and language are territorial in nature. Moreover, B2C transactions are inherently small in nature and the issues of redress and dispute resolution must necessarily be dealt with in a fashion that addresses this constraint.

To this end, the Task Force has spent a considerable amount of time assessing what sort of entity or institutional structure might provide for greater consumer education on a worldwide basis as well as what sort of an entity might assist consumers in gaining redress or access to redress mechanisms in the online marketplace.

a. Options Considered

The Task Force has considered six different entities that might serve to facilitate and promote the use of ODR by consumers, as well as to enhance consumer trust in e-commerce. The range of entities included:

- Global Online Standards Commission (GSOC);
- Newly Funded ODR Trustmark Issuing and Administering Entity;

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- ODR Trade Association;
- Dispute Clearinghouse;
- Use of Third-Party Auditors; and
- Newly Funded Informational Entity (“iADR Center”).

In considering the range of entities, that Task Force considered a variety of factors including:

- whether the entity should be high profile (may attract controversy) *versus* low profile (may avoid controversy);
- whether the entity should have government funding and involvement *versus* no government funding or involvement;
- whether the entity should have a certification or regulatory structure (may attract controversy and be difficult to implement on multijurisdictional basis) *versus* purely informational structure (non-controversial and easy to implement)
- whether the entity should piggyback on existing structures (may suffer from existing prejudices or perceived biases) *versus* creation of new entity (potentially free of bias)

i. Option One Global Online Standards Commission (GOSC)

The ABA Jurisdiction in Cyberspace Report recommended the creation of a Global Online Standards Commission. The GOSC would be a high profile, intergovernmental entity. It would operate on a worldwide basis and issue binding ODR standards. The enforcement of binding standards might involve a trustmark program.

Global Online Standards Commission

Pros	Cons
Clear, unambiguous, independently derived and binding ODR standards	Negotiation of intergovernmental agreements would be inherently difficult and time-consuming
Potentially strongest possible enforcement mechanisms	Controversial to some because of perceived “loss of sovereignty”
Presumably would include broad input from consumer, business, legal and government communities	Runs counter to public statements of U.S. and EU governments advocating “self-regulatory” structures

ii. Option Two: ODR Trustmark Entity

The ODR Trustmark Entity would be a high profile, purely independent entity operating on a worldwide basis. The Trustmark Entity would establish ODR Guidelines and issue and administer an ODR trustmark program for ODR Providers. The entity would have the authority to “pull” the trustmark in appropriate cases and would thus have a certification, auditing and enforcement role over ODR Providers.⁴⁴

⁴⁴ The ODR Trustmark and Trustmark Entity were first discussed in the Task Force’s preliminary concept paper circulated in May 2001. See ABA Task Force on E-Commerce & ADR Draft Preliminary Report available at

ODR Trustmark Entity

Pros	Cons
Clear, unambiguous and independently derived ODR standards	Uncertain funding, particularly for the broad purposes intended
Reasonably effective enforcement mechanisms	May be perceived as “too much, too early” in the life of the industry
System could build on experience of merchant trustmark system, which is already widely accepted in e-commerce	May be perceived by some ODR Providers as interference (goes beyond creation of inspirational principles)
System would easily tolerate broad input from consumer, business, legal and government communities	

iii. Option Three: ODR Trade Association

An ODR Trade Association would be established by the industry itself. Administrators of an ODR Trade Association would establish industry-approved ODR guidelines and administer the ODR trustmark to member companies. The Trade Association would be free to decide the level of enforcement but would presumably have the authority to “pull” the trustmark in appropriate cases.

Pros	Cons
ODR Standards potentially clear and unambiguous, but not independently derived and not necessarily adequate	Uncertain potential for establishment and funding since industry as to date failed to create an effective, independent trade association
Reasonably effective enforcement mechanism	System may be perceived as unlikely to encourage or accept input from consumer groups and other stakeholders
System is consistent with merchant trustmark system, which is already widely accepted in e-commerce	Standards may be perceived as inadequate because they are “industry generated”
	Strong potential to tolerate violations of standards by dues-paying member organizations; no coverage of non-members

iv. Option Four: Dispute Clearinghouse

New or existing high-profile entities would act to receive consumer complaints from around the world and to refer these disputes to internally “certified” ADR/ODR Providers.

<http://www.law.washington.edu/ABA-eADR/drafts/2001.05.21draft.html>.

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Pros	Cons
Dispute clearinghouses would give consumers a practical and accessible opening venue for resolution of disputes.	ODR standards or criteria for certification would not necessarily be made public and may not be adequate
Potential for reasonable effective enforcement mechanisms	System may be perceived as unlikely to encourage or accept input from consumer groups or other stakeholders
Potential for adequate ODR standards	Standards may be perceived as inadequate because they are industry-generated or generated by some sort of trade association
	Strong potential for multiplication of clearinghouses and some potential for degradation of standards and toleration of violations

v. Option Five: Third Party Auditors

No new entity is created; instead, professional independent auditors would audit ODR providers to ensure compliance with “*Generally Accepted ODR Standards.*”

Third Party Auditors

Pros	Cons
Avoids controversies related to creation of a new entity	Who’s the client? Who pays? Who will be the auditors?
Allows fully independent, professional auditors to render professional opinion on compliance with standards	Are the standards of a type that can actually be audited? Who sets the standards? Can the auditors carry out their function under a multiplicity of standards?
Separates entirely the standards-creation process from the standards-enforcement process	Who reads the opinion? Who acts to enforce violations?
	May be strong perception that this system lacks all enforceability and accountability

vi. Option Six: Informational Entity (iADR Center)

Low profile, purely independent entity operating on a worldwide basis which establishes ODR guidelines and either (a) simply lists for consumers ODR providers that self-certify that they meet those standards, or (b) issues and administers a formal ODR trustmark system with auditing and enforcement powers. Would give greater weight to consumer and ODR education efforts, at least initially, than to certification and enforcement.

Pros	Cons
Clear, unambiguous and independently derived ODR standards	Uncertain funding
Because of concentration on education and	Lesser attention to enforcement may be of

information, may avoid controversy	concern
Limited enforcement mechanisms (in case of (a) or reasonably effective enforcement mechanism in case of (b))	In case (a), question is whether self-certification (without auditing) is a credible means of compliance with standards
Consistent with U.S. and EU public statements on ADR, consumer protection and use of technology	

b. Recommendation: Creation of the *iADR Center*

After considering a number of alternative structures, the Task Force recommends the creation of an educational and informational entity - referred to as the *iADR Center*. The Task Force concluded that the *iADR Center* is most likely to gain traction with various stakeholders including government entities, Internet merchants, ODR Service providers and consumers at this juncture.

Given the divergence of legal rules concerning consumer protection, jurisdiction and choice of law in the United States and other countries, it would be difficult at present to envision creating an entity such as a Global Online Standards Commission that would have prescriptive, regulatory or enforcement jurisdiction. Jurisdictional complexity is thus a barrier to creating an international treaty based entity to regulate ODR providers.

By recommending the creation of an informational entity, the Task Force is not stating that the other options are without merit. To the contrary, there is certainly room for entities such as a dispute resolution clearinghouse as well as an ODR Trade association and Trustmark entity. The Task Force believes, however, that the most timely and useful entity at this stage, given the nascent stage of ODR, is an informational entity. As the ODR industry grows, these other entities may emerge to help provide further oversight and accountability when there is a robust ODR marketplace.

At present, the Task Force recommends the creation of a web-based entity that would perform the following tasks:

- Disseminate information concerning the Recommended Best Practices by ODR Service Providers along with information concerning existing ODR codes of practice;
- List and provide information concerning the available ODR/ADR service providers available for the resolution of e-commerce disputes;
- Develop and/or disseminate sample complaints handling, privacy and best practices forms, codes, standards and guidelines; and
- Provide all information on a multilingual basis via the World Wide Web.

This entity should effectively address our one major factual conclusion:

- There is no organized nonprofit educational/informational effort to assist consumers, businesspersons or attorneys on a worldwide basis at this time⁴⁵

⁴⁵ We distinguish our recommendation from the *Euroguichets*, which provide information and advice only to EU

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Indeed, we believe that a well-organized, multilingual, worldwide, educational and informational effort will:

- perform a function that is not now being performed
- (because it would be web-based) require relatively little in the way of funding
- be consistent with official statements of the U.S. and EU governments
- advance the interests of businesspersons and attorneys, as well as consumers
- be commensurate with low-value B2C-type transactions
- encourage participation by the legal community on a worldwide basis in B2C transactions

At this stage, the Task Force's recommendation is conceptual. Additional work and assessment will need to be done to create an iADR Center. The Task Force has given preliminary thought to some of the basic structural and organizational issues relating to the creation of the entity. It recognizes, however, that a next step would be a feasibility study to examine in greater detail how one would create an iADR center and the tasks necessary to achieve such an objective.

Type of entity

The Task Force recommends that the iADR Center be created as a private nonprofit organization as opposed to a governmental or a quasi-governmental organization. Given the informational nature of the Center's core mission, it seemed more appropriate and feasible to create a non-governmental entity that had no regulatory authority. A nonprofit entity (as opposed to a private for profit entity) would also avoid tax issues with respect to any funds received or administered by the organization.

An alternative model was discussed of creating an association involving regional or national centers feeding into a parent organization. The International Chamber of Commerce is a nonprofit organization that operates along the associational model. This would involve creating or organizing a larger number of entities and thus would be more expensive to create. There is, however, no reason why the iADR Center could not evolve toward the associational model if that were an appropriate response to external conditions.

Staffing and Oversight of an iADR Center

The Task Force recommends the creation of a board of directors with an international composition. It also suggests that a certain portion of seats on the board might be reserved for specific categories of representatives such as consumer groups, ODR Service Providers, traditional ADR providers that have branched into ODR, etc. In addition to a board of directors, the iADR Center should have an advisory board comprised of experts in areas relevant to the work of the Center including consumer protection, ODR, and technology, for instance. As for staffing, the Task Force believes that there needs to be several attorneys who would work to create the material and information disseminated by the iADR center as well as administrative support staff to help with outreach activities.

Funding of iADR Center

consumers (not worldwide and not to attorneys) and from *econsumer.gov*, which dispenses some advice but is primarily an enforcement tool.

There are multiple sources for funding the initial startup phase for an iADR Center. Governments might consider funding such a project. Business organizations that represent Internet merchants and that engage in a large amount of B2C e-commerce transactions will also benefit from the iADR Center and thus have an incentive to help create such an entity. Additionally, there are private foundations and philanthropic organizations that might have an interest in further planning and development towards an iADR Center. The Task Force recognizes, however, that the iADR Center needs to be independent from any outside interests or constituencies and should avoid any perceived conflicts of interest. Thus, funding from multiple sources may be desirable to create a sense of independence and impartiality. Merchants, consumers and ODR Service Providers need to feel that the iADR Center is trustworthy in order to benefit from the existence of an informational website and center.

In the future, however, the iADR Center would have to consider a revenue model of some sort in order to be self-sustaining on an ongoing basis. Fees might be charged for more in-depth information or research, for example, provided to merchants. Ultimately, the creation of a trustmark program or certification process might be one way of ensuring the continuity of the iADR Center.

Service to be provided by the iADR Center

What Materials would the iADR Center provide?

The Task Force examined a range of information gathering and publication services that the iADR Center might provide. The Task Force’s analysis was guided by the following four attributes: whether the service was essential or optional and inexpensive or expensive to provide/create.

	Essential	Optional
Inexpensive	1	3
Expensive	2	4

The most essential and least costly services that the iADR Center could provide include:

- Updating of governmental recommendations, codes, reports relating to best practices for ODR Service Providers and Internet merchants.
- Recommended Best Practices by ODR Service Providers and related commentary (to be updated as revised by the Board of Directors, Advisory Board or other related group of experts)
- Brochures or other educational material relating to topics such as:
 - Description of basic information regarding ADR/ODR mechanisms and options;
 - Dispute avoidance techniques; and
 - Other alternatives for dispute resolution (e.g. small claims court, ombudsman)

A second category of information that was perceived as essential but perhaps more expensive to collect and update includes:

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- Links to relevant resources on the web for consumers, including governmental entities, consumer organizations, etc; and
- List of ADR/ODR Providers and pertinent contact information

A third category of information that is optional and inexpensive includes:

- Glossary or relevant Internet and e-commerce terms and a list of definitions; and
- Standard forms developed for filing complaints online and for other consumer relating transactions

Finally information that is optional and potentially expensive to collect and publish includes:

- Metrics or statistics relating to e-commerce and consumer protection;
- Links to relevant resources on the web for consumers, including governmental entities, consumer organizations; and
- Summaries of relevant consumer protection legislation from around the world that is updated regularly and summarizes for consumers, lawyers.

The Task Force is mindful that a listing of ADR and ODR Providers may create a perception that the iADR center endorses certain providers. Thus, more careful consideration needs to be given to whether any sort of listing is practical and if so what sort of disclaimers and information would need to be posted on a website to ensure that no endorsement was implied.

Another possible function that the iADR Center could serve is to provide feedback to the public on the quality of service offered by various ODR Service Providers. This could be done through providing a mechanism for filing a complaint with the relevant provider. Alternatively, a chatroom or bulletin board could be created where users could post their feedback. This has potential drawbacks, however, as persons might post messages containing negative feedback as a way of harming another business. The iADR Center might also be exposed to the added costs of some level of monitoring of the chatroom or bulletin board or to liability for failure to do so adequately.

Addressing further the issue of the ODR trustmark/code of practice scheme that was first raised in our May 2001 concept paper, the Task Force believes that the iADR Center may be able, at a future date, to administer a code of practice and trustmark scheme. At the outset, and depending on funding, the iADR Center would rely largely on self-enforcement tools such as self-certification and reporting from ODR providers as a means of providing information.

The Task Force accepts that not all members of the ODR community would necessarily adopt the iADR Center's trustmark. The large, early entrants to the practice of ODR may already be committed to particular codes of practice that are otherwise quite acceptable. Nevertheless, the newer, smaller ODR providers may find that it would be useful to adopt and accept an iADR Center trustmark scheme, since it would provide them with an important measure of credibility in terms of their prospective user-base.

At this stage in the life of the ODR community, there is little overall data and little, if any, indication that ODR providers are not comporting themselves with anything other than “best practices” as they see them. It would always be possible, of course, if a body of complaints and

adverse information should emerge, that the aspect of enforcement could and should be strengthened with the use of a trustmark and code of practice.

The iADR Center might also assist with the development of new standards for computer system interoperability to facilitate the growth of ODR. The European Union undertook an initiative to develop technical standards for ODR platforms, known as odrXML (ODR Extensible Markup Language).⁴⁶ OdrXML draft is a 0.1 proposed standard for interchange of ODR cases between different ODR systems. The need for cross-border dispute resolution in Europe necessarily involves the issue of interoperability between national based ODR systems. The scope of the EU standardization effort was to define a lowest common denominator for effective exchange of disputes between different ODR systems. It was not intended to develop a single system but rather to define how new emerging ODR systems can communicate with each other. At a later point more extensive interoperability may be desirable, such as the interchange of data among different entities including merchants, ODR Providers, and government entities.

Currently, the further development of odrXML has been referred to a technical committee under the LegalXML Member Section of OASIS⁴⁷. The committee would develop standard syntax odrXML. The standard would include a tool to validate the syntax of XML documents and would enable information interchange between different ODR systems supporting a core data model intended to provide a basic yet complete description of individual cases. The standard would provide for the markup of final decisions, settlements or other final agreements as well.

3. Execution and Enforcement of ODR Outcomes: Importance of Dispute Prevention Mechanisms as an Alternative

a) Execution and Enforcement in ODR

During the consultation period, the Task Force received numerous comments concerning the problem of enforcement of outcomes or decisions reached through an ODR process. If an ODR Provider has no means to obtain compliance from a merchant or party that has agreed to participate in dispute resolution, a consumer will have to seek a judicial remedy in order to enforce an agreement. One exception to this is where a trustmark or web seal provider also provides ODR services for a merchant. The seal or trustmark provider will be in a position to revoke the seal or trustmark in the event that a merchant does not comply with a specific agreement reached with a consumer. Alternatively, it may be able to invoke other types of remedial sanctions for merchant non-compliance.

As the Best Practices for ODR Service Providers indicate, some ODR Providers will implement mechanism to provide effective enforcement of outcomes, while others will have business

⁴⁶ OdrXML is a variant of XML (Extensible Markup Language.) The first draft of OdrXML was developed by the Institute for the Protection and Security of the Citizen (IPSC) of the European Commission. The draft specifications are located online at the website of the eConfidence forum at <http://econfidence.jrc.it>.

⁴⁷ See www.oasis-open.org. OASIS is a not-for-profit, global consortium that focuses on the development, convergence and adoption of e-business standards. OASIS produces worldwide standards for security, Web services, XML conformance, business transactions, electronic publishing, topic maps and interoperability within and between marketplaces. OASIS and the United Nations jointly sponsor ebXML, a global framework for e-business data exchange. OASIS also operates XML.org, a community clearinghouse for XML application schemas, vocabularies and related documents.

models that do not contemplate involvement in enforcement of outcomes. As the Best Practices indicate, ODR Providers need to disclose what, if any, involvement they will have in enforcement up front so that parties are aware at the outset of the ODR Providers role (or lack of role) in enforcement.

The economics of dispute resolution are typically different for B2B and B2C disputes. That is to say, the two classes of relationships are a rough proxy for large-dollar versus small-dollar transactions (although there are certainly exceptions), and for repeat-player versus one-off relationships, and between sophisticated versus unsophisticated parties.

The business community has long been involved in traditional ADR processes in resolving B2B disputes, and for these parties ODR is essentially a change in venue rather than in approach. B2B ODR would thus not represent a major shift, and the choice for the parties between ODR and traditional ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction. Ordinarily, B2B actors would not participate in any dispute resolution process (including litigation) if the economics or other importance of the controversy did not justify the expense.

Most of these attributes of B2B dispute resolution are different in the B2C context. B2C disputes are not traditionally resolved by ADR,⁴⁸ although there has been a recent trend for business parties to attempt to provide for mandatory arbitration. Because many B2C disputes are often over transactions of small dollar value, the economics of dispute resolution mitigate against any external dispute resolution process at all. Although ODR may reduce the costs of conducting ADR, the cost even of online mediation is likely to exceed the amount in controversy.⁴⁹ Online arbitration is ordinarily far more expensive, and therefore even less likely to be a cost-effective solution in relation to the amount in controversy.⁵⁰

b) Enforcement

The end product of a successfully concluded ADR process (*i.e.*, one that resolves the dispute) is either (A) an agreement, in the case of a non-binding process, or (B) an arbitral award. This stage is, unfortunately, a far cry from a complete resolution, as a dissatisfied party can breach the contract or decline to comply with the arbitral award. Such non-compliance may put the prevailing party in a similar position to its starting point if the cost of vindicating its post-ADR rights would exceed the amount originally in controversy. This is possible even when the parties are not geographically remote; the probability increases with distance, and grows the more when national boundaries are crossed. In this latter respect, a breach of the agreement arising out of a consensual ADR resolution (in A) calls for its own legal action for breach of contract, often without the prospect of recouping attorneys' fees and costs; likewise, following a party's refusal

⁴⁸ The notable exception being Magnuson-Moss warranty disputes.

⁴⁹ For example, the largest-scale ODR program is on eBay, but the cost of the ODR process is underwritten by eBay rather than the disputant parties; absent this subsidy, few auction disputes would warrant even the relatively modest costs charged by the ODR provider.

⁵⁰ Where the dispute is not self-contained but rather subject to aggregation by private (*i.e.*, class action) or governmental action, the business party would naturally view the amount in controversy differently from the consumer, and be concomitantly willing to bear all or virtually all of the expense of the ADR process. It is on this foundation that the AAA Due Process Protocols are based, and the courts have generally required such cost allocation as a condition of enforcing mandatory arbitration clauses in the b2c context.

to comply with an arbitral award (in B), the process for recognition and enforcement is hardly the quick and inexpensive process that one might want. And, even after pursuing judicial remedies in either case, execution of a resulting court judgment is by no means automatic. Moreover, there are abundant traps for the unwary, a few of which warrant specific mention in the international context: (i) failure to use the Hague Convention on Service of Judicial and Extra-judicial Documents Abroad; (ii) failing to take account of provisions of law in the jurisdiction of the losing party (particularly if that party is a consumer) that the local courts may deem to be mandatory law;⁵¹ (iii) disregard of local laws that make the subject matter of the dispute inarbitrable⁵² or provide for mandatory jurisdiction of local courts.⁵³ Thus, successful enforcement of an ADR result incorporates the concerns described in the section of this Report regarding jurisdiction and applicable law.

All of the foregoing highlights the desirability that ADR providers make enforcement easier and more harmonized. One procedural mechanism that has been put into force in at least one foreign jurisdiction (Buenos Aires, Argentina), and which was discussed in the drafting process of the recently-completed Uniform Mediation Act (but rejected), is that the parties to a mediation conditionally vest the mediator with the additional mantle of arbitrator, so that, if an agreement is reached, the mediator can render an arbitral award embodying the parties' agreement. This metamorphosis eliminates at least the need to prosecute from the beginning an action for breach of the agreement reached in mediation, and allows the party seeking enforcement to proceed directly to the procedure for recognizing and enforcing an arbitral award. Such an approach is particularly useful in an international dispute, since recognition and enforcement of arbitral awards is available under a number of international conventions, and harmonizes the enforcement procedure by consolidating the end products of ADR into a common form. Another option, in some instances, is to require the parties to put into escrow each party's consideration in the transaction that is the subject of the dispute, so the escrow agent can distribute the assets in accordance with the ADR result.

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⁵¹ See, e.g., E-commerce Directive 2000/31/EC of June 8, 2000.

⁵² E.g., under Italian law, a dispute involving the validity of a registered intellectual property right requires the participation of the Procurator General, and therefore is probably not arbitrable even *inter partes*.

⁵³ For example, the constitution of Brazil long provided that a Brazilian citizen had the unconditional right to have any legal case against him heard by a Brazilian court; this meant that recognition of an adverse foreign judgment or arbitral award was all but impossible.

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The ADR providers can take additional steps in regard to sellers that have trustmark accreditation, since repeated refusal to comply with settlements or awards would be cause to revoke the seller's right to display the trustmark. Unfortunately, this remedy is asymmetric (no such sanction can be levied against buyers unless they also happen to be trustmarked sellers), and underinclusive (many sellers are unaccredited).

c) Least-Cost Solution

Based upon available data, which suggest that a significant majority of B2C disputes feature the consumer's goal to rescind the transaction and obtain a refund,⁵⁴ the least-cost solution would not be any form of post-dispute resolution at all, but rather preclusion of the dispute *ab initio* through the use of an escrow service provider. This solution is very low-cost (typically, 2% of the transaction), and is designed to effect the very remedy most often sought by the consumer party in a B2C dispute. In transactions within the United States, this solution has been largely eclipsed by the credit card charge-back, which achieves the same result for the consumer without the 2% fee, as sellers commonly accept payment by credit card. Further, in the case of eBay, the dispute resolution regime breaks into separate categories, since eBay provides its own anti-fraud insurance; this means that the escrow option is available to address customer dissatisfaction with a delivered but non-conforming product only, while the ODR option (also subsidized by eBay) provides a mediation forum. And, most recently, the US Postal Service has launched a program called "Pay@Delivery" to facilitate online auctions: this process conditions release of payment to the seller upon delivery of a package to the buyer with a USPS-issued bar code affixed by the seller.⁵⁵

The situation outside the United States is quite different because of the smaller proportion of transactions involving credit card payments. Furthermore, the charge back system currently in use in the United States does not exist in all countries. Therefore, the least-cost preferred vehicle for enhancing consumer confidence, particularly in international B2C commerce, would appear to be fostering greater use (and widespread availability) of the escrow service option.⁵⁶ Within the United States, use of a credit card for payment with the ability to access the credit card charge back mechanism is also desirable for consumers.

⁵⁴ The National Consumers League report on e-commerce fraud indicates that 41% of online auctions disappoint the buyer, where they receive the wrong item or nothing at all. The report also deplors consumers' unfamiliarity with escrow services. See <http://nclnet.org/shoppingonline/onlineauctions.htm>.

⁵⁵ See <http://www.usps.com/paymentservices/pspaymnt.htm>.

⁵⁶ Quite without statistical validity, limited data adduced by one of the Task Force members indicate that even repeat-player business sellers on eBay are unfamiliar with the escrow service available on that site. On inquiry, we learned that eBay does not require its sellers to accept an escrow transaction even if the buyer bears the entire cost of the escrow service.