A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model

Victoria C. Crawford
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BY VICTORIA C. CRAWFORD*

Introduction

Alternative Dispute Resolution ("ADR") has traditionally operated on the outskirts of the law as an alternative or supplement to traditional court constructs. ADR is typically described as operating in the shadow of the law and certainly not as the foundation for it. The uniqueness of the Internet has the potential to reverse this traditional relationship. This paper suggests that online ADR techniques could be used as a foundation upon which to build an independently existing global cyberlaw jurisdiction for business to consumer transactions.

I. Setting the Stage: Why Has ADR Entered the International Agenda as Such a High Priority?

On December 18, 2000, after a summit between the European Union ("E.U.") and the United States in Washington D.C., the two entities released a joint statement strongly promoting the development and implementation of ADR in cyberspace.1 Since

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then, businesses, governments, academics, consumer groups, lawyers, ADR professionals and international organizations have been scrambling to work out effective and efficient ways to implement ADR globally on the Internet. There is good reason why so much interest has been generated about the increased use of ADR on the Internet, as it may be the only appropriate tool to deal with such uncharted territory.

A. Use of a New Medium for Commercial Transactions Heightens Suspicion Among E-Consumers

With increased computer and Internet use, online transactions are fast becoming a commonplace activity across the globe. This is especially true in the United States and the E.U. In many ways, shopping in cyberspace resembles shopping in the physical world: merchandise is displayed or advertised, a purchase is made and the consumer receives the product or service. In a "cybershop," however, consumers cannot touch, smell or, in most cases, hear the merchandise (or services) they would purchase. In general, sensory perception is currently limited to a two dimensional representation of the merchandise or the services on a computer screen. Consumers need to be certain that they will receive the goods or services ordered of the quality represented for the agreed upon price in a reasonable time frame. Thus, the need for exchanges or returns with cyberpurchases is likely higher than with real world purchases because the consumer cannot properly inspect the purchase for

Sept. 6, 2002).


3. Id. at 693 ("One estimate indicated . . . a predicted 350 million persons would be online in 2005."); see also Robert C. Bordone, Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal, 3 HARV. NEGOT. L. REV. 175, 175-76 (1998) ("Reports estimate that more than 37 million people have access to and regularly use the Internet.").

4. Puurunen, supra note 2, at 693 ("A 1999 survey predicted that the increasing amount of currency involved in e-commerce would generate 95 billion U.S. dollars in revenue by the end of 1999 and 1.3 trillion U.S. dollars by 2003 . . .").

5. See John R. Aguilar, Over the Rainbow European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution, 4 INT'L J. COMM. & POL'Y 1, 4-7 (1999/2000) ("In both the E.U. and the U.S., e-commerce activity increases steadily at exponential rates. . . . In the E.U., more than 16 million highly interconnected e-consumers buy or sell on the Internet. While minor compared to the U.S., the E.U. e-commerce market may grow . . . to ECU 300 billion by 2002, increasing more than ‘tenfold’ since 1996." (citations omitted)).
satisfaction until after the sale and delivery of the goods or services.\textsuperscript{6}

In the real world, a consumer can investigate if the merchant from whom they would make a purchase is reputable. The consumer can look to the area surrounding the store, to the store's clientele or to his or her own personal interaction with the merchant (or the merchant's representative). In addition, the customer can consult with the local consumer agency, chamber of commerce, or equivalent. In the physical world, a consumer can distinguish between a presentable store and a street vendor selling stolen goods. In cyberspace, this distinction may not be so easy to make.\textsuperscript{7} The level of suspicion among Internet consumers then, is necessarily high, as is the need for protection. The groundwork for resolving inevitable disputes is now laid with regard to the uniqueness of this new transactional medium.

\section*{B. Internet Parties Exist in Physically Different Jurisdictions}

In the physical world, most business to consumer transactions are conducted by parties subject to the same legal jurisdiction.\textsuperscript{8} In the past, consumers purchased foreign goods from local merchants. In other words, if a consumer wished to purchase international goods, he or she would purchase from a merchant who imported the goods. In a cybertransaction, the middleman is often eliminated. Consequently, in a cybertransaction, the parties are often physically in different countries and are not subject to the same legal jurisdiction(s).\textsuperscript{9}

\section*{C. Business to Consumer Internet Transactions Represent a Shift Away from the Typical Business to Business Transaction Model}

International transactions have typically been between business parties. International law governing such transactions assumes a certain level of business knowledge and sophistication.\textsuperscript{10} The Internet

\begin{itemize}
\item \textsuperscript{6} Although possible with traditional purchases as well, this is much more likely to be the case with cyberpurchases.
\item \textsuperscript{7} \textit{See} Aguilar, \textit{supra} note 5, at 4 (“In this emerging digital marketplace nearly anyone with a good idea and a little software can set up shop and then become a corner store for an entire planet.” (citations omitted)).
\item \textsuperscript{8} \textit{See} Summary of Public Workshop (June 6-7, 2000), Federal Trade Commission, Department of Commerce (Nov. 2000), \textit{available at} http://www.ftc.gov/bcp/altdisresolution/summary.htm (last visited Sept. 6, 2002).
\item \textsuperscript{9} \textit{See} Bruce Leonard Beal, \textit{Online Mediation: Has Its Time Come?}, \textit{15 OHIO ST. J. ON DISP. RESOL.} 735, 735 (2000) (“Internet commerce sets up the probability that its merchants, suppliers, and customers will not exist in the same legal jurisdictions.”).
\item \textsuperscript{10} \textit{See generally} Summary of Public Workshop, \textit{supra} note 8.
\end{itemize}
has modified the nature of the international transaction. Businesses and consumers now transact business directly via the Internet across international jurisdictions in an unprecedented volume. Both the sheer quantity and nature of these business to consumer transactions create new problems for which legal models capable of addressing the nature and magnitude of the challenge are lacking.

1. Merchant Law Is Ill Suited for the Business to Consumer Internet Context

Discussions among e-businesses and other stakeholders have suggested that a choice must be made between applying merchant law or consumer law. Merchant law is ill suited for governing business to consumer transactions. The existing rules governing international business transactions are derived from international law such as the Convention for the International Sale of Goods ("CISG"). In the United States, however, choice of law clauses can designate the Uniform Commercial Code ("UCC") in the alternative. These constructs apply private contract law to business to business transactions. Yet the CISG and the UCC were not intended to apply to consumer transactions because these bodies of law rely on assumptions regarding certain business knowledge among the parties in merchant-only transactions that is often lacking in business to consumer transactions. The Internet is currently used by many average consumers, thus general business acumen cannot be assumed even if Internet acumen with technical knowledge exists.


Internet technology is having a profound effect on the global trade in services. World trade involving computer software, entertainment products [motion pictures, videos, games, sound recordings], information services [databases, online newspapers], technical information, product licenses, financial services, and professional services [businesses and technical consulting, accounting, architectural design, legal advice, travel services, etc.] has grown rapidly in the past decade, now accounting for well over $40 billion of U.S. exports alone.


13. See generally Aguilar, supra note 5.

14. See A Framework for Global Electronic Commerce, supra note 11, at 7 ("In the United States, every state government has adopted the Uniform Commercial Code (UCC), a codification of substantial portions of commercial law.").

15. See generally Aguilar, supra note 5, at 33-37.

16. See id.
In a cybertransaction, the consumer typically accepts the purchase on the merchant's terms. The terms of the contract are boilerplate and there is no bargaining. Thus, for the consumer, the transaction is a "take it or leave it" proposition. Implied in a business to business transaction, however, is the notion that the benefits of the transaction are high enough to subject oneself to the risk of carrying on litigation in a foreign jurisdiction if a dispute should arise. If knowledgeable business parties wish to eliminate this possibility, they can contract around it by placing choice of forum and choice of law clauses in a contract as a condition of doing business. Yet this is not an option in adhesion contracts of the type usually found in business to consumer transactions on the Internet.

A typical business to consumer transaction involves goods or services of small monetary value. The Internet's low economic barriers to entry invite participation in commerce by small entities or individuals who cannot afford direct participation in many traditional markets. These low barriers to entry and participation by individuals result in many transactions of small value. The transaction costs of either litigating or utilizing dispute resolution mechanisms "threaten to swamp the value of the underlying transaction." This statement is even more true when applied to the costs of litigation or arbitration across international borders. For this reason, consumers purchasing small value items should have their needs addressed in the event of a conflict with the merchant without being subject to traditional and inapplicable jurisdictional constructs to adjudicate their disputes. If traditional jurisdictional constructs are the only means available for resolving grievances, consumers are really left with little choice at all except to write off the loss and learn

17. Henry H. Perritt, Jr., Dispute Resolution in Cyberspace: Demand for New Forms of ADR, 15 OHIO ST. J. ON DISP. RESOL. 675, 698 (2000) ("The bargained-for-exchange model of contracts is conspicuously absent from a vast majority of consumer transactions.").
18. See id. at 675.
19. See id.
21. Perritt, supra note 17, at 675.
22. Id.
23. Id.
This collective experience will have a chilling effect on e-commerce to the detriment of businesses, consumers and the worldwide economy.  

2. Current Consumer Law Is Inadequate to Address Internet Needs

Having already established "merchant law" as an inadequate construct in the business to consumer context, unfortunately, the application of current international "consumer law" does not fare much better. The E.U. and the United States have invested the most resources in the Internet and in turn have the largest Internet markets relative to other regions. As the "biggest players," the E.U. and the United States have approached Internet consumer protection differently:

[The U.S. has hosted "conferences and events involving governments, the private sector and international organisations," but has failed to actually address e-consumer protection leaving others to fill the void. While the U.S. addresses only cybercrime and fraudulent, deceptive and unfair e-business business practices ["U.S. e-commerce policy"], the E.U. has acted to protect e-consumers from caveat emptor business practices ["E.U. e-commerce policy"]. . . . While the E.U. demands a more "global" Internet regime free from American monopolization, it has refused to water-down highly protective E.U. consumer legislation even with the difficulties associated with these enactments. The U.S. counters by charging E.U. actions as protectionist . . . . More tempers are raised than solutions.]

In the 1998 Organization for Economic Cooperation and Development ("OECD") Ottawa Conference regarding Internet governance, the United States "gutted e-consumer protection from

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24. See Beal, supra note 9, at 742 ("Internet commerce produces merchants, suppliers and customers who may and usually do exist in different jurisdictions. When a dispute arises, [they often] 'write it off' . . . . or just 'sit tight' and await further developments, usually none.").
25. See id.
26. See generally Aguilar, supra note 5, at 11.
27. See id. at 7 ("The E.U. and the U.S. account for a major percentage of world business and the overall majority of e-commerce.").
28. See generally id.
29. Id. at 12-13 (citations omitted); see also id. at 7 ("The net effect is that e-commerce has become a tangled web of policy, regulations and unforeseeably - an area ripe for e-consumer harm.").
the agreement. The United States was concerned that the E.U. approach placed too much responsibility on sellers to figure out consumer protection laws of each separate country. The United States wished to “place more emphasis on self-regulation by encouraging businesses to establish fair, effective and transparent mechanisms rather than developing an international e-consumer protection standard.” The E.U. advocated the use of formalistic codes and regulations adopted to ensure specific e-consumer protections, mirroring its own strong consumer protections. Common ground can be found, but with these two major policy makers so polarized, common e-consumer protection laws do not yet exist. Consequently, current international consumer law is not yet poised to create a solution.

D. International Application and Enforcement Questions Remain

Even if international laws and consumer standards could be brought together and standardized, applying and enforcing those standards under traditional choice of law and choice of forum mechanisms would present further challenges. Traditional courts are ill suited for settling small claims due to cost barriers. In addition, court systems are unlikely to be equipped to handle the explosion in volume of disputes that will arise from Internet transactions. Notwithstanding the increased volume problem, traditional courts are not an ideal forum due to the differential between the speed with which courts manage their dockets and that of cyberspace transactions. The courts would be forever lagging. Finally and importantly, traditional judges who are well versed in the law are not typically sophisticated in the technical aspects of the Internet and may fail to appreciate its subtleties, leading to improper outcomes.

As a result of the above discussion, electronic ADR has been

30. Id. at 13.
31. Id. at 13-14.
32. Id.
33. Id. at 14.
34. See Alejandro E. Almaguer & Roland W. Baggott III, Shaping New Legal Frontiers: Dispute Resolution for the Internet, 13 OHIO ST. J. ON DISP. RESOL. 711, 711 (1998) (“The Internet promises to be a fertile ground for novel disputes.”).
35. See id. at 712.
36. See generally id. at 712.
37. See generally id.
38. See generally id.
proposed as a way to resolve Internet disputes in a fast, fair and effective manner well suited to the global nature of the Internet.  

II. Proposal for Creating a Cyberlaw Jurisdiction for Business to Consumer Disputes

This paper contends that a new cyberjurisdiction needs to be created to resolve Internet disputes. The scope of this paper is limited to business to consumer transactions. The hope, however, is that eventually this model could be applied in other contexts as well. Given the complexity of the Internet, limiting the scope of this paper to business to consumer disputes will improve the analysis. The limitations of cross application are also noted, but are beyond the scope of this discussion. So far, this paper has established that current choice of law and choice of forum solutions cannot easily be applied in the business to consumer global Internet context. This paper will now demonstrate that ADR mechanisms, if properly designed, can be successful and will thereby be capable of ensuring confidence in e-commerce leaving all parties better off.

A. What Is ADR and How Does It Operate in Traditional and International Settings?

Private forms of ADR have existed in the western world for many years. In mediation, a third party aids disputants in seeking common goals and settling the dispute. A mediator lacks the power to make a binding decision, but helps the disputing parties to negotiate a resolution themselves. After a mutual agreement has been reached, a contract may be negotiated to make the agreement binding. In arbitration, a dispute is privately adjudicated. The final decision is legally binding, traditionally drawing its power from contract law. There are many other current and potential forms of ADR.

41. See id. at 979.
42. Id.
43. Id.
B. How Has ADR Been Applied in the Internet Context?

As a starting point for developing the model, it is helpful to examine how Internet ADR models building upon traditional ADR models in the business to consumer context have fared.

1. The Virtual Magistrate Project: What It Offered and Why It Failed

One of the first Internet based ADR tools was largely unsuccessful. An examination of why it did not fare better assists in designing a more workable model for the future. The Virtual Magistrate Project ("vMAG"), an experimental online arbitration tribunal, was designed to resolve disputes concerning online messages, postings and files on worldwide computer networks. 44 If an Internet dispute occurred between two or more parties anywhere in the world and the parties were willing to have vMAG arbitrate their dispute, then the parties could turn to vMAG on the world wide web. 45 An individual with a complaint could access the service by clicking on an e-mail button on the vMAG website. 46 An American Arbitration Association ("AAA") member determined if the complaint was within vMAG's jurisdiction. 47 If so, the complaint was forwarded to the non-complainant, who was given an opportunity to respond. 48 Within seventy-two hours, vMAG would e-mail its decision to the parties. 49 Disputes were handled under the procedural rules posted on the vMAG website. 50 E-mail was the predominant tool used. 51 In the first two years, however, vMAG decided only one case. 52

VMAG's inability to settle more disputes stems from several attributes of the system. First, many potential cases were determined to be outside the scope of vMAG's jurisdiction. 53 If the subject matter for which e-users could utilize the service were broader, vMAG

44. Almaguer & Baggott, supra note 34, at 719.
45. Id. at 720.
46. See Perritt, supra note 17, at 686.
47. Id.
48. Id.
49. See Almaguer & Baggott, supra note 34, at 720.
50. See Perritt, supra note 17, at 685.
51. See generally id.
52. See id. at 686.
53. Id.
would have yielded better results.\textsuperscript{54} Second, better advertising or links from other sites might have led to increased use. Online service providers did not provide referrals or links to the site as originally anticipated.\textsuperscript{55} Thus, users were either not aware of the service or did not know how to access the site where the service was provided.

2. \textit{E-Bay's Pilot Online Mediation Project: Why Was It More Successful Than vMAG?}

\textit{a. The Objectives of the Program}

E-Bay is the largest online auction site on the web.\textsuperscript{56} In 1999, e-Bay implemented an online mediation pilot project to handle disputes arising in the e-Bay setting.\textsuperscript{57} The objectives of the program were to see if mediation could be effective online without the face-to-face interaction available in the physical world and to find appropriate tools and resources for confronting large scale online conflict.\textsuperscript{58}

\textit{b. Mediation Could Be Used Successfully}

The project determined that mediation could be provided effectively for disputes arising out of auction-related transactions.\textsuperscript{59} Due to the lessons learned from vMAG's less successful experience with arbitration, e-Bay selected mediation as its tool instead.\textsuperscript{60} It was thought that the non-complaining party would be more willing to participate if voluntary, non-binding mediation was used.\textsuperscript{61} Like vMAG, the system relied almost exclusively on e-mail as the online communication method.\textsuperscript{62} While the goal was for fifty percent of disputes to be resolved to the satisfaction of the parties,\textsuperscript{63} the program

\begin{itemize}
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} Ethan Katsh, Janet Rifkin & Alan Gaitenby, \textit{E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law,”} 15 OHIO ST. J. ON DISP. RESOL. 705, 707 (2000).
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id. at 708.
  \item \textsuperscript{59} See generally id.
  \item \textsuperscript{60} See id. at 709 (suggesting that online arbitration projects such as the Virtual Magistrate project have encountered serious problems obtaining cases because respondents have been unwilling to consent to the decision-making authority of the arbitrator).
  \item \textsuperscript{61} See id.
  \item \textsuperscript{62} Id. at 710.
  \item \textsuperscript{63} Id. at 711.
\end{itemize}
yielded an amazing forty-six percent success rate. Moreover, less than twenty-five percent of the respondents refused to participate, which was also an encouraging sign.

3. Other Online Mediation Programs

Other online mediation programs have proved successful as well. The University of Massachusetts Center for Information Technology and Dispute Resolution created and implemented the "online ombuds office," establishing a forum for online mediation in the college setting. This virtual mediation project also met with much greater success than vMAG. It was hypothesized that this was due to the site's association with a university that referred a large number of complaints, to good marketing, or even to the possibility that disputants may prefer mediation to arbitration.

Thus, it appears that the use of an online site link, an appropriate jurisdiction, and mediation as an ADR tool are successful ingredients for online ADR.

4. Chargebacks: A Successful Non-Mediation ADR Model

Currently, credit card chargebacks are the most common form of ADR. In the United States, under the Fair Credit Billing Act, credit card issuers are required to investigate alleged billing errors claimed by cardholders. When cardholders claim non-acceptance or non-delivery, a card issuer can only allow the charge if it is proven that "goods were actually delivered, mailed or otherwise sent to the obligor." Interestingly, "[m]ost major credit card networks extend chargeback protection internationally" even though the protection is not required outside the United States. This suggests that credit card issuers know that fairness makes for good business. There are no

64. See id.
65. Id. at 712.
66. See id.
67. See Perritt, supra note 17, at 688.
68. See id. at 689.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. at 689-90.
74. Id. at 690.
75. Id. at 690-92.
reported cases in regular courts on the subject, which is evidence that consumers are not motivated to go beyond the chargeback process to the courts. The lack of reported cases in this arena may indicate that the value of the disputed amounts is minimal relative to the cost of litigation or that the chargeback forum successfully resolves disputes. At the very least, it seems the users found the process more convenient or effective than traditional forums.

a. A Win-Win-Win Scenario Is Created Using Chargebacks

In the chargeback context, ADR is not only an alternative paradigm but also a superior one to traditional adjudication procedures. Chargeback mechanisms are so successful because they create a win-win-win scenario for all involved.

i. The Merchant Wins
The merchant prefers the use of credit cards to personal checks. Customers will frequently place stop payment orders on their checks if a dispute arises with the merchant. This leaves the merchant with little recourse except not to do business with that consumer again. The end result is that a disputed transaction must be written off as a loss for the vendor. In the chargeback scenario, the vendor can utilize the protection of a credit card service to ensure the customer pays for what the customer agreed to pay.

ii. The Consumer Wins
The consumer prefers the use of credit cards as well because a cardholder's personal liability is limited to $50.00 unless the creditor can prove that the consumer received the goods. Consumers perceive third party interventions as less biased and thus fairer than mechanisms that put one of the parties in direct control of the dispute process. Furthermore, chargebacks give customers leverage against merchants by equalizing bargaining power. Without chargebacks, merchants are free to set the terms of the purchase in boilerplate language, and the consumer is forced either to consent to the terms or

76. Id. at 691.
77. Id.
78. See id. at 692.
79. See Summary of Public Workshop, supra note 8.
80. See Perritt, supra note 17, at 689-90.
81. See generally id.
82. See id. at 691.
forego the purchase.  

iii. The Third Party Intermediary Wins

Finally, the credit card issuer wins as well because more business is generated for the issuer when both the merchant and the consumer are happy and have confidence in the credit card service. This assumes, however, that the increased business outpaces the transactional costs of sponsoring the program.

b. The Reasons for the Success of Chargebacks

The chargeback mechanism puts the private sector intermediary in the position of resolving the dispute. A preliminary report issued by the OECD suggested that financial intermediaries are best suited to resolve individual transaction problems. Chargeback systems encourage merchants to provide high levels of customer satisfaction because merchants with excessive chargeback rates could have their card privileges withdrawn by these intermediaries. Such mechanisms have been available in the United States for a long time and are credited with helping to create consumer confidence in catalogue shopping.

c. International Perspective on Chargebacks

Chargebacks teach us that creative ADR systems can be highly effective and that third party involvement may be the key to leveraging power for consumers while still leaving all parties better off. International application of chargebacks is varied but encouraging overall. Canada opposes chargebacks because of the concern that processing costs would be too high for issuers. In the E.U., chargebacks are not required but are permitted and quite common. Debit cards are more widely used in the E.U. than credit

83. See generally id.
84. See id.
85. Otherwise, the cost of the program would be hard to justify.
86. See Perritt, supra note 17, at 693.
87. Id.
88. Id.
89. Id.
90. Id. at 692. The fear may be even greater as applied to the Internet and its potential volume.
91. Id. at 693.
cards, but the same chargeback principles apply. 92

5. Common Features of Successful ADR Programs

Chargebacks and the e-Bay project share several features that contributed to their success. First, both systems provided incentives for the parties to cooperate. 93 E-Bay users wanted to continue their site privileges, but e-Bay could prevent them from future trading if they did not comply with the contract formed after online mediation. 94 Although the purchase in a business to consumer transaction on a site such as e-Bay may be a one-time event, use of the service is not. 95 In the chargeback setting, merchants had an incentive to treat their customers fairly, as an excessive chargeback rate would mean they could no longer process credit issuers' charges. 96 Thus, the chargeback system motivated merchants to cooperate because the inability to accept credit cards could easily bring Internet business to a screeching halt.

Second, both successful ADR methods were easy to find for the user. In the case of e-Bay, users of the e-Bay site could simply click a button on the site and go straight to the ADR screen. 97 Likewise, customers' monthly credit card statements stated that they could contact their credit card company if a dispute arose.

Third, credit card issuers and e-Bay both knew who their clients were and had sufficient jurisdiction and knowledge to resolve the conflicts that arose. Further, these third parties relied on human beings behind their programs; they were not entirely automated. Although chargebacks are not exclusively an Internet construct, the same services could be applied easily in the Internet context.

6. Differences Between Two Successful ADR Programs

Some differences between the programs emerged as well. While the e-Bay pilot used a mediation model that depended upon the consent of the parties, chargeback mechanisms settled the dispute for the parties. Still, both e-Bay and the credit card issuers acted as

92. See id.
93. Voluntariness is the key.
94. See generally Katsh, Rifkin & Gaitenby, supra note 56, at 731.
95. Id. at 714.
96. See Perritt, supra note 17, at 693.
neutral third parties in the resolution of disputes. These successful models provide proof that industry-led e-ADR can be fair, effective and efficient.

III. How ADR Programs Should Be Phased in as a Foundation for a New Cyberjurisdiction

A new cyberjurisdiction needs to be formed to resolve Internet disputes. It has been established that current choice of law and choice of forum solutions cannot easily be applied in the Internet business to consumer context. It has also been shown that ADR mechanisms, if properly designed, can be successful and thereby are capable of ensuring confidence in e-commerce.

While governments remain undecided and in a stalemate as to what policies should apply to business to consumer Internet transactions, this paper now proposes that industry take action by gradually introducing ADR as a first phase in building a global cyberjurisdiction. A five-step plan illustrates this approach. (1) In the first phase of development, industry should be primarily responsible for creating, testing and implementing various ADR programs. (2) Concurrently, a global organization such as the OECD should track data from these systems for a two-year period. (3) The organization should then issue a report identifying the successes and failures of various business to consumer ADR systems and outlining suggested uniform approaches to various dispute resolution models. (4) Businesses should make every effort to implement these standards. (5) After this important groundwork has been laid, a second phase of development could begin, which would entail multinational global organizations, governments, industry and consumer groups working together to fashion remedies with stronger teeth. Specifically, cybcourts of last resort should be created. By the time such cybcourts were created, more data would be available from the results of the first phase of the plan described above. This data would assist designers of such new constructs in determining how to proceed with the development of the cybcourts.

A. Industry Should Be Primarily Responsible for Implementing Various ADR Programs

Industry should be responsible for taking the lead in development of ADR programs because it is the largest organized stakeholder in Internet transactions, has the most direct financial
benefit to gain from ensuring e-consumer confidence and has great resources available. Vendors have different needs and they must be free to design systems that work for them. Only through trial and error will appropriate systems for particular vendors emerge.

In many cases, chargeback mechanisms could be implemented. Various combinations of third party intermediaries in this role may prove effective. To accommodate the potential increase in the number of disputes, models could be created that would share the cost among participants. Eventually, an “e-card” could be invented on which all e-transactions could be made; a third party could resolve any disputes that arose either via mediation or arbitration, depending on which model proves most effective. For one-time purchase scenarios, it is likely that having a third party decide the dispute would be a better idea than mediation. The chargeback model is an example of this type of non-binding arbitration that is effective because it prevents further litigation.

Mediation is better suited to e-Bay type transactions where the issue may not be limited to money or a one time event, but where membership on a given site or an auction piece could not be replaced merely with money. In this way, mediation may be a preferred method. Mediated solutions have great potential to provide the foundation for the creation of a more formal jurisdiction.

Among the ADR community, there is an understanding that “ADR operates in the Shadow of the Law.”\(^9\) As no applicable laws or jurisdictions have yet been developed for the disputed transactions that are the subject of this paper, ADR does not operate in the shadow of any law. For this reason, this paper encourages mediation as the first widespread industry-led method of ADR. Mediation allows parties to create solutions to the conflict themselves and is therefore less constraining than adjudication or arbitration. In this way, mediation is naturally more aligned with the Internet’s culture of freedom of expression and creativity.\(^9\) Internet users would likely be inclined to use a mechanism that mimics the background and culture of the medium they use to make purchases. Traditional forms of

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98. Katsh, Rifkin & Gaitenby, supra note 56, at 707-08: It is generally agreed that ADR occurs “in the shadow of the law,” meaning that negotiation, mediation and arbitration take place with the parties being somewhat aware that law, looming in the background is a force that should enter into any calculation in how one develops and pursues a strategy for resolution.

99. See Bordone, supra note 3, at 198.
ADR do operate in the shadow of the law in the sense that private contracts are legally enforceable by legal jurisdictions. As applied to the Internet and to business to consumer transactions, however, this is not necessarily true as no legitimate workable choice of law provisions or jurisdictions exist. For the creative problem solving part of the ADR process, however, existing substantive and procedural laws are not necessary. Mediation should be used to create a solution that can be codified.

Empirical evidence suggests that mediated agreements have a higher compliance rate than court judgments. This is thought to be true because of the cathartic effect of communicating one's side of the events that led to the conflict, being heard and seemingly understood, and the empowerment felt from having some part in fashioning a solution. In a similar way, by reporting their experiences with ADR, businesses will be more likely to comply with new rules grown from such experience.

Concerns regarding the potential self-interest of industry can be minimized if one considers that industry players must appear fair and effective to sustain their livelihood. In the event that collective efforts of self-interested industry players take root, the OECD report would reflect this and more efficient systems could be recommended to safeguard against such self-interest. Agreements with Internet Service Providers ("ISPs") could also help regulate business activity. Also key is the idea that self-interest may lead to a certain amount of innovation that may be lacking in more neutral government or organizational parties. Industry, on the other hand, has the incentive to put research and development resources into such a program because the potential benefit is enormous. The speed and efficiency with which business moves relative to government is crucial for industry to develop ADR mechanisms successfully.

Using ADR as an intermediate and perhaps partially permanent solution to conflict resolution for cybertransactions would respond to the interests of parties in cyberspace. Through ADR, "cooperation and collaboration" can be encouraged "rather than gamesmanship and distrust." The adversarial systems of law in the United States and the United Kingdom, for example, are often criticized for

101. See id.
102. See Bordone, supra note 3, at 189.
creating more problems than solutions. A new Internet model may unlock the door for better alternative dealings in the physical world as well.

Current users must be treated as test subjects to gradually create a legal jurisdiction for the Internet. In order to fashion solutions for both the physical and the cyberworld, the persons responsible for suggesting the new jurisdictional laws and infrastructure should be well respected in both arenas. Mediators should be neutral third parties who are not especially accountable to any one party. As some sites may need to use the services of a specific mediator or mediation organization, these businesses will necessarily have a connection with the mediator; the mediator, however, must not be controlled by the party. It is important that the mediator is versed in the law and technology as both are necessary to fashion remedies that are appropriate in the cyberworld context. Ideally, the mediator should also have general business knowledge as well. Although solutions will not be held to the laws of a particular physical jurisdiction, legal constructs that have been built up over time have a certain value. By not being held to these standards, though, the mediator and parties would have a chance to modify the current standards and could address new problems that arise in this unique medium.

B. The OECD or ICC Should Track Data from These Systems for Two Years

In order to gauge what programs and systems are fair, efficient and effective, information should be gathered regarding the efficacy of various systems (just as the three ADR systems described in this paper were reviewed). Two years is a long enough time period to track disputes from beginning to end and a short enough time period to respond effectively to an issue of increasing scope and importance. The OECD and the International Chamber of Commerce ("ICC") are prime candidates to collect this data and make recommendations because of their status as non-biased organizations.

Although privacy within a dispute should be maintained, businesses should collect and report data to the OECD while maintaining the e-consumers' confidentiality. In order to protect against industry self-interest, information needs to be collected from consumers as well. One proposed method of collection would be for

103. See generally id.
104. The concept of stare decisis illustrates this point.
the ADR site to offer a voluntary opinion survey regarding the process after the service has been performed. This data could be electronically sent and stored with the data sent from industry. Audit trails could be used to ensure this data is accurate and not selectively omitted.

Gathering and interpreting this data is an enormous and costly task. Industry should provide a small payment when they send their data on ADR to the agency selected for review. This expense could be passed along to consumers by including it in the purchase price of the product offered. Businesses should also contribute to the project in proportion to their share of disputes. This amount could correspond with either the business’ market share or share of disputes. The latter approach seems most reasonable. If disputes are disproportionately small or large relative to a businesses’ market share, the business is rewarded for having fewer disputes or would be forced to look at the reasons for its numerous disputes if it is paying a large share. The reviewing agency could set a fee for each dispute reviewed. This way, the agency could pay appropriate professionals from all fields of industry, government and academia to attack the problem with a multidisciplinary approach. Due to the scope of the project, contracting for such parties to do the work would almost certainly be necessary. In addition, governments and other interested stakeholders should contribute some revenue to the project as they also have a lot to gain in encouraging e-commerce. Perhaps this amount could be related to the number of users in a given region. As this number is likely also linked to a region or country’s ability to pay, this seems to be a fair measure.

C. The Report

The report compiled after a two-year tracking and analysis period should provide recommendations for effective ADR systems. Pertinent topics for the report should include: (1) whether ADR sites administered by the business offering the product or a separate ADR provider should be used in various settings; (2) whether education of consumers regarding the purpose, availability and use of the site has been sufficient or whether additional measures should be taken; (3) whether ADR users conducted business transactions either at the same site or similar sites after going through ADR; and most importantly, (4) whether e-commerce confidence is improving as a result of net-based ADR systems.
D. Businesses Should Voluntarily Implement These Programs

Business should make every effort to follow the guidelines issued by the report. Inevitably not all businesses will comply and thus more global enforcement mechanisms, such as networking with ISPs to sanction vendors for non-compliance as suggested above, need to be in place.

E. Cybecourts of Last Jurisdiction

The report generated during the two-year period would give stakeholders an idea of what works effectively on the net to resolve conflict and what does not. Cybecourts could be designed with this in mind. As technology increases, independent tribunals to resolve conflicts could be created so that disputants and those who hear the disputes need not leave their computers. It is suggested that these tribunals be comprised of a cross section of web stakeholders, including businesses, consumers, government representatives and legal professionals from many nations.

The raging success of chargebacks suggests that sometimes, online ADR systems other than mediation can create winning outcomes for all parties. The second phase of creating a jurisdiction that goes beyond voluntary and non-binding decisions must inevitably develop. Once data is gathered from experience rather than theory, cybertribunals could be set up to act as an appellate construct for disputes that either could not be sorted out with mediation or are not well suited for it. By the time these tribunals could be created, technology may provide better means than e-mail for multiple party interactions. Special chat rooms and videoconferencing are not available to all e-consumers at this time so are not yet viable options. Yet methods of communication will increase as technology expands. This arrangement would eliminate choice of forum concerns as the forum would be everywhere in cyberspace.

Choice of law problems could be easily solved with a much older model, the Law of Merchant, which arose from medieval trade fairs. Under the Law of Merchant, merchants developed their own set of norms, customs, and rules that applied regardless of the physical jurisdiction in which they found themselves. There was a separate and concurrent set of rules:

105. The medium of the Internet makes this possible because data can be generated, collected and compiled quickly.
106. Bordone, supra note 3, at 190.
Although the enforceable customs and practices existed apart from the "ordinary rules of law that applied to non-merchant transactions" and no statute or other authoritative law gave rise to the existence of the Law of Merchant, . . . decisions were final and enforceable, having power equal to that of a decision rendered in any commercial court. 107

The global nature of the Internet in some ways provides for a common law superior to that of the physical world. Traditional common law developed in small communities where differing jurisdictions were likely to result in conflicting decisions. The Internet's global village could provide a much broader set of knowledge with an enriched cultural mix. The Internet could actually be a place where the best laws and procedures of each region of the world are melded into one great international set of cyberlaws allowing for unprecedented practical convergence of laws. Over time, cases would be decided and could be electronically made available over the net; thus, precedent would be created over time. Where ADR would prove inapplicable or ineffective, these courts would act as a last resort. The number of cases would be minimized because onsite ADR could dispose of the great majority of disputes. This two-tiered system of ADR and a backup of a cybercourt of last jurisdiction provide a practical solution to a complex jurisdictional problem.

Enforcement agreements may be arranged, in many cases, independently of the physical world. For example, if a party did not comply with an agreement, the newly formed "cybercourts" could prevent the user from selling or buying on certain sites. 108 Enforcement would also have to operate in a non-traditional manner. Businesses and consumers who did not comply with a judgment could have their Internet privileges restricted until compliance was gained. This may require coordination with the Internet service provider, but is one potential solution. Limiting the enforcement mechanisms to the medium prevents conflict with physical world enforcement capabilities and ensures the punishment fits the offense. E-cards, discussed above, could be used to achieve the same objective. For the reasons discussed above, the body behind these strategies would have to be global, not unlike the International Court of Justice, but would

107. Almaguer & Baggott, supra note 34, at 718.
108. Measures would have to be taken to ensure that the punishment fit the offense.
also have to be interdisciplinary. As the Internet is currently tax free, the revenue needed to pay for these courts would have to come from the parties. The cost of bringing the suit would have to be less than the value of the underlying transaction. As in the successful chargeback model, if a particular vendor or customer brings an unusually high number of cases, a penalty fee or other sanction could be levied. Alternatively, a method of payment similar to that suggested above for the OECD or the ICC might be used.

IV. Conclusion

The time has come to develop a common cyberlaw for cross border business to consumer transactions, reflecting both the Internet’s unique place in history and its future possibilities. This new body of law could transcend traditional notions of law and jurisdiction and hopefully, in some ways, improve upon it. The model discussed in this paper would effectively build this law from the ground up and allow workable solutions to gradually rise to the surface.