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Feasibility Analysis of Online Dispute Resolution in Developing Countries

María Mercedes Albornoz¹
and Nuria González Martín²

I. INTRODUCTION

Is online dispute resolution a science fiction fantasy for developing countries? Some months ago, we both wanted to buy a book on international law, but were unable to find it in the local Mexican market. Browsing the Internet, we saw it offered at a Brazilian online bookstore. So we bought the book – ordering it and paying electronically – and happily received it a couple of weeks later. Unfortunately, however, we found that there were several blank pages in the chapter we needed the most. We immediately contacted the vendor to explain the situation but received a very disappointing reply: he claimed that there was nothing he could do about it.

After receiving such a disappointing answer, we asked ourselves what we could do. Was there a legal way out of this predicament? Or should we just let it go and do nothing about it? Was there an authority with the power to protect our rights as buyers? Maybe a Mexican authority? A Brazilian one? An international tribunal? Should we travel to Brazil and hire a Brazilian law firm? According to which rules would each of these bodies decide? Were there any international principles and/or treaties that could have some influence on this case? Would Inter-American, Brazilian or Mexican legislation be applicable? Would we be able to take shelter under the umbrella of legal provisions that protect electronic consumers (“e-consumers”)? And, supposing that a binding deci-

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sion were reached by a Mexican or international authority, would it be enforceable in Brazil?

These complexities and many other aspects of such a common, and to an extent, futile situation caused us to wonder about the availability and convenience — in cases like these — of some kind of alternative dispute resolution mechanism conducted online. Importantly, these wholly online transactions involve a number of factors, i.e., place of access to the vendor's website, place of delivery of the good, buyer's place of residence, vendor's place of residence, place of issuance of the credit card, language, which connect them to a variety of countries. The parties to those contracts may be both residents of Latin America — intra-regional e-commerce, as in our case — or only one of them may reside in a Latin American country while the other resides in a more developed country — inter-regional e-commerce.

The constantly evolving information and communication technologies ("ICT") improve the environment and tools for managing and solving disputes online. We find it pertinent to emphasize the fact that the scope of online dispute resolution ("ODR") exceeds the field of online and mobile electronic commerce (e-commerce), embracing other subjects, such as domain names, some family law issues,³ e-consumer protection,⁴ as well as disputes generated offline.

As is widely known, a great economic divide still exists between developed and developing countries, and one of the consequences of this divide is that developed countries are several steps ahead of emerging countries in the area of ICT, widely enjoying the benefits of connection technologies.⁵ It follows that, within rich nations, the use of an Internet environment in conflict-resolution is becoming quite widespread. With all this in mind, we aim to analyze the feasibility of ODR for developing countries. This article focuses on one of the developing regions of the world with "con-

3. Other family law issues, however, interfere with public policy and therefore, cannot be settled through ODR — or even ADR — methods.

4. E-consumer claims can be settled through ODR, provided that the minimal public policy consumer protection is guaranteed. This applies to cases of mechanisms in which, once the out-of-court proceeding has been concluded, consumers are allowed to seek relief by resorting to courts or any other administrative authority.

5. Connection technologies are "tools that connect people to vast amounts of information and to one another." Eric Schmidt & Jared Cohen, *The Digital Disruption: Connectivity and the Diffusion of Power*, 89 FOREIGN AFFAIRS, 75 (2010).

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necting nations”⁶ that have a high potential for raising Internet⁷ and broadband⁸ penetration rates: Latin America.⁹ In Latin American countries, ODR is still in its early stages.¹⁰ As a result of globalization, developing countries share the common characteristic of unequally distributed wealth; therefore, many of the observations and conclusions regarding Latin America may also be valid for other developing countries.

Is ODR suitable or convenient for Latin American states? Would it be possible for ODR mechanisms to develop in regions without massive Internet connectivity? Would these mechanisms be useful in countries where access to the Internet is only available to a limited segment of the population? In this article, we argue that ODR is feasible for emerging economies such as those in Latin America, even though access to the Internet has yet to

6. Eric Schmidt & Jared Cohen use the expression, “connecting nations,” and define it as “places where technological development is still nascent and where both governments and citizens are testing out tools and their potential impact.” *Id.* at 83.

7. On June 30, 2012, Internet penetration rates in the Americas were: 1) North America (mainly United States of America and Canada): 78.6%; 2) South America: 48.2%; 3) Central America (including Mexico): 32.6%; and 4) the Caribbean: 32.4%. To complete the landscape, the world average was 34.3%. INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS (March 31, 2011), available at <http://www.internetworldstats.com/stats2.htm> (last visited Sept. 28, 2013). The gap of Internet penetration rates among the diverse Latin American sub-regions considered in these statistics and the North American region suggests a high potential of growth in Latin America.

8. Inter-American Development Bank, BRIDGING GAPS, BUILDING OPPORTUNITY: BROADBAND AS A CATALYST OF ECONOMIC GROWTH AND SOCIAL PROGRESS IN LATIN AMERICA AND THE CARIBBEAN: A VIEW FROM THE INDUSTRY 7 (2012), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36882814> (last visited Sept. 28, 2013).

9. Latin America comprises the following countries: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Commonwealth of Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, the Commonwealth of The Bahamas, Trinidad and Tobago, Uruguay and the Bolivarian Republic of Venezuela. These countries, plus Canada and the United States of America, are Member States of the Organization of American States. ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/member_states/default.asp (last visited Sept. 28, 2013).

10. Given the current stage of development of ODR in all the countries of Latin America and for the purpose of the present article, we will deal with them collectively. We would like to point out that we do not intend to ignore the diverse aspects of the countries in the region. See Mark B. Baker, *Integration of the Americas: A Latin Renaissance or a Prescription for Disaster?* 11 TEMP. INT’L & COMP. L.J. 309, 311 (1997) (explaining that most U.S. citizens wrongly believe that Latin America is homogeneous, while it is in fact probably one of the most diverse regions of all continents).

become widespread. Despite these opportunities for technological infrastructure improvement, the benefits substantially outweigh the difficulties involved in overcoming the challenges of ODR implementation in developing countries.

The existing literature on the state of ODR in Latin America is very scarce. A recent contribution by Gabriela R. Szlak¹¹ deals with the challenges and opportunities of ODR in the region. She takes for granted that ODR is appropriate for these developing countries, and having described the regional landscape, she forecasts a promising future for ODR implementation.¹² Our paper discusses this study and finds that our own position generally adheres to Szlak's prediction.

In order to precisely delineate the boundaries of the topic of our article, we defer to what has already been written by other scholars regarding the advantages and disadvantages of ODR in general.¹³ We will only deal with those articles of particular relevance to the development of ODR in Latin America. Precisely because our article is anchored in this regional context where ODR is in its nascent stage, some factors considered as strengths still need to be improved upon, and in that regard, they will also be qualified as challenges.

After an overview of ODR (Section II), we will focus on the strengths (Section III) and challenges (Section IV) of ODR development in Latin America, before making some conclusive remarks (Section V) on the feasibility of ODR in developing countries.

II. AN OVERVIEW OF ODR

Since the beginning of the 21st century, the use of the Internet has grown at a rate of 566.4% as a result of the rapid evolution of ICT.¹⁴ Despite the 2000-2001 economic crisis known

11. See generally Gabriela R. Szlak, *Online Dispute Resolution in Latin America: Challenges and Opportunities*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 529-559 (Mohamed S. Abdel Wahab et al. eds., 2012).

12. *Id.* at 545.

13. See, e.g., COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 61 (2002).

14. *Internet Usage Statistics: The Internet Big Picture: World Internet Users and Population Stats*, *INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS* (June 30, 2012), <http://www.internetworldstats.com/stats.htm> (last visited Sept. 28, 2013).

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as the “Dotcom bubble burst”¹⁵ and the 2009 recession,¹⁶ the Digital Economy has boomed,¹⁷ resulting in an exponential rise in e-commerce.¹⁸ Ethan Katsh refers to this phenomenon as the “e-commerce revolution.”¹⁹ Consequently, there has also been an increase in the number of disputes arising from commercial activity carried out in cyberspace. Such online claims may arise in B2B (Business to Business), B2C (Business to Consumer) or even C2C (Consumer to Consumer) e-contracts. Therefore, it seems natural²⁰ for all of them to be resolved in an online environment. When talking about disputes settled in cyberspace, we are in the land of ODR.

ODR has its roots in the alternative dispute resolution movement.²¹ In fact, ODR directly emerged as an online extension of ADR.²² ADR has had significant success in resolving a number of offline controversies as a private alternative to courts. Courts are often congested, procedures are formalistic, it may take years before a judgment sees the light, and the economic or even emotional costs involved can be devastating. Obviously, this situation undermines ready access to justice, a right so important that it is

15. Ian Peter, *History of the Internet: The Dotcom Bubble*, NET HISTORY, <http://www.nethistory.info/History%20of%20the%20Internet/dotcom.html> (last visited Sept. 28, 2013); see also Yan Tiang & Concetta Stewart, *History of E-Commerce, Electronic Commerce: Concepts, Methodologies, Tools, and Applications*, 3 CONTEMPORARY RESEARCH IN INFORMATION SCIENCE AND TECHNOLOGY HERSHEY, PA: INFORMATION SCIENCE REFERENCE (2008), <http://www.omnilogos.com/2012/05/23/history-of-e-commerce/> (last visited Sept. 28, 2013).

16. Scott Cooper, Colin Rule & Louis Del Duca, *From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross-Border Redress Systems*, 43 UCC L.J. 749, 750 (2011).

17. The concept of Digital Economy is related to the substitution of exchange mechanisms. In carrying out transactions, there has been a shift from barter trade to money, and then from money to exchange in virtual space, that makes it possible to avoid the transaction costs of intermediation. Rossella Cominetti C., *La infraestructura de soporte para la economía digital en Chile*, in 77 REVISTA DE LA CEPAL (Comisión Económica para América Latina y el Caribe) 163, 165 (2002).

18. “Ironically, despite the bankruptcy of many Internet companies, e-commerce sales actually increased in the year 2000 and 2001.” And they have continued to grow. Tiang & Stewart, *supra* note 15.

19. Ethan Katsh, *Online Dispute Resolution: Some Lessons from the E-Commerce Revolution*, 28 N. KY. L. REV. 810, 821 (2001).

20. Indeed, e-buyers and e-sellers already have a certain familiarity with cyberspace. And disputes are settled in the same environment in which they were originally generated.

21. “ODR has qualities acquired from the online environment, but it also has traits acquired from ADR.” ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION. RESOLVING CONFLICTS IN CYBERSPACE 19 (2001).

22. ODR “has come to light as an adaptation of the Alternative Dispute Resolution.” Sami Kallel, *Online Arbitration*, 25J. INT’L ARB. 345, 345 (2008).

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considered a quintessential human right.²³ The different methods of ADR — mainly, negotiation, conciliation, mediation and arbitration²⁴ — have proved an effective way to circumvent the heavy burden imposed by judicial procedures with flexibility, speed, and lower costs.

When these forms of ADR are combined with ICT, the result is ODR. It should be noted that some courts have also started to gradually incorporate advanced technology into their procedures, e.g. using electronic means of communication or admitting audiences held via video conferencing. In this sense, they are known as “cybercourts” or “cybertribunals”, but they are not and could not be considered “alternative.” They are traditional state courts that conduct everyday judicial proceedings using new ICT to carry out certain procedural steps.

Unlike cyber-tribunals, ODR is indeed an actual alternative to traditional litigation in domestic courts. It embraces several private or out-of-court mechanisms. In general, ODR can be defined as “any method by which parties attempt to resolve disputes online.”²⁵ Several different approaches to ODR exist in the current literature. ODR can be conceived as “simply transposing the traditional ADR mechanisms online without substantive differences from their traditional counterparts except being more convenient and effective.”²⁶ It should be stressed that some special mechanisms designed for meeting the needs of Internet users “are not completely new from a legal perspective.”²⁷ Alternatively, ODR is seen as “an important new tool, a new system, a new way of doing business that is more efficient, more cost effective and much more flexible than traditional approaches. . . It combines the efficiency of alternative dispute resolution with the power of the

23. *See generally* ACCESS TO JUSTICE AS A HUMAN RIGHT: COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Francioni Francesco ed., 2007).

24. Even the so-called “Managed Dispute Resolution” process, “which integrates in one procedure, the ‘best practice’ concepts of mediation, arbitration and collaborative law,” has been suggested by practitioners for resolving certain international business disputes in Latin America. Frank G. Evans & Erich L. Sowell, *Resolving Business Disputes in Latin America: A Continuing Quest for Efficient and Affordable Dispute Resolution in International Transactions*, 17 CURRENTS: INT’L TRADE L.J. 80, 82 (2009).

25. Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be*, 38 U. TOL. L. REV. 193, 193 (2006).

26. ZHENG SOPHIA TANG, ELECTRONIC CONSUMER CONTRACTS IN THE CONFLICT OF LAWS 152 (2009).

27. RULE, *supra* note 13.

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Internet to save businesses money, time, and frustration.”²⁸ Other scholars think that ODR encompasses not only ADR, but also cybercourts due to the fact that “ODR is a reaction to constraints of the offline world, not strictly to courts.”²⁹

While the defining characteristic of ODR is that it is done online, the ADR aspect is also significant and should always be present, even in those ODR methods that do not strictly have an equivalent ADR mechanism in the offline environment. Therefore, for the purpose of this feasibility analysis, cybercourts will not be taken into account.³⁰

In determining the scope of ODR proceedings, two specific features of a dispute should be taken into account: 1) its origin (whether online or offline), and 2) its domestic or international nature. Firstly, ODR is perfectly suitable for online claims; the dispute is dealt with in the same environment where the relationship was formed. Nevertheless, ODR proceedings can also be effectively used for claims coming from the offline world. In this latter case, the parties to an offline dispute agree on its settlement through an ODR proceeding, i.e., online mediation. Secondly, ODR is helpful in both domestic and international claims. But, it is in the international arena where ODR may fully deploy its strengths, especially if the parties’ places of residence are very far from each other and the cost of travelling and legal assistance is much higher than the amount claimed. As an example of a claim generated offline and involving foreign elements, let us think of cases of international child abduction. In these kinds of cases, online mediation may bypass court appearances to preserve the best interests of the child by encouraging friendly outcomes that are essential to healthy and long-lasting family relationships. A warning must be made: despite the above example, practice shows that it is in the field of e-commerce where ODR has been better received, mainly because of the frequent cross-border nature of e-commerce.³¹

The development of ODR procedures is made possible by ODR

28. *Id.* at 3. It has also been stated that: “ODR does borrow from ADR, but in the future, ADR will also borrow from ODR.” KATSH & RIFKIN, *supra* note 21, at 24.

29. GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 7 (2004).

30. Cybercourts are usually studied separately from ODR methods. ANA MONTESINOS GARCÍA, *ARBITRAJE Y NUEVAS TECNOLOGÍAS* 41 (2007).

31. Piedad González Granda, *El arbitraje en el ámbito del comercio electrónico: perspectivas de futuro en el ordenamiento español XX* REVISTA VASCA DE DERECHO PROCESAL Y ARBITRAJE 1, 3 (2008).

platforms and ODR providers. On one hand, ODR platforms host ODR services managed by third party providers; on the other hand, ODR providers are professionals or institutions that become involved at the request of the parties in conflict.³² There are several methods of ODR, and ODR platforms and providers may concentrate on only one or a few of them, usually using a model of progression as a framework. Some ODR methods are directly inspired on traditional ADR methods and others are not. While this article references the main types of ODR — assisted negotiation, automated negotiation, online mediation, and online arbitration — it should be kept in mind that ODR methods, just like ICT and the needs of the interested parties, are constantly changing.

- Assisted negotiation is more than a direct, plain negotiation between the parties. It is an online computer-assisted negotiation in which technological tools enhance the probabilities of reaching an agreement. Given the absence of a human third party, it is technology that plays the role of helping the parties work out a solution by asking questions, suggesting answers, and sending reminders.³³ One of the leading ODR providers offering assisted negotiation was Square Trade, which specialized in claims originating from eBay transactions.³⁴ “However, following changes in the eBay feedback system in May 2008, Square Trade decided to stop resolving eBay feedback disputes after June 2008.”³⁵ Another ODR provider is Modria,³⁶ a young company founded in 2011 that offers assisted negotiation services as one of the phases of its Modular Dispute Resolution System.
- *Automated negotiation* is a specific type of assisted negotiation known as “blind-bidding” negotiation. It is limited to monetary claims in which money is the only variable of

32. Aura Esther Vilalta Nicuesa, *Resolución electrónica de conflictos*, Chapter 7, in *PRINCIPIOS DE DERECHO DE LA SOCIEDAD DE LA INFORMACIÓN* 409 (Miquel Peguera Poch ed., Aranzadi 2010).

33. *Id.* at 14-15.

34. EBAY, DISPUTE RESOLUTION OVERVIEW, <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited Sept. 28, 2013).

35. PABLO CORTÉS, *ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION*, 66 (2001). At present, eBay no longer has a third party ODR provider; ODR is integrated into the eBay code base, so this service is directly provided by the eBay Resolution Center. See Cooper et al., *supra* note 16, at 13. See also EBAY, RESOLUTION CENTER, <http://resolutioncenter.ebay.com> (last visited Sept. 28, 2013).

36. MODRIA, <https://www.modria.com/> (last visited Sept. 28, 2013).

the dispute. The proceeding is conducted entirely online with no human intervention. Each party makes a confidential bid at each round of the negotiations. If the system finds that the offer of the opposing party is equal to or less than the complainant's offer for a round, the case is automatically settled. Cyber Settle³⁷ and Smart Settle³⁸ are good examples of providers of this ODR method.

- *Online mediation* is a voluntary mediation proceeding conducted over the Internet with the assistance of a human third party. Online mediation has similarities and differences with traditional mediation. For instance, as in traditional forms of mediation, the online mediator is a neutral, impartial third party who works with the disputants facilitating communication between them. The mediator has no decision-making power; the parties are the ones to decide on the outcome, which is not binding. Online mediation is characterized by the absence of face-to-face interaction,³⁹ and technological tools play such an important role that they are considered a "fourth party."⁴⁰ Some of the ODR providers that offer an online mediation service include Juripax,⁴¹ Modria⁴² and The Mediation Room.⁴³
- *Online arbitration* is an arbitration proceeding conducted over the Internet with the assistance of a human third party. Online arbitration also shares similarities and differences with traditional arbitration. As with traditional arbitration, the parties must have an express agreement to arbitrate, and the online arbitrator must be a neutral, impartial third party in order to direct the proceedings and settle the dispute by delivering an award. As for the

37. PAY MD, <http://www.cybersettle.com> (last visited Sept. 28, 2013).

38. SMARTSETTLE, CHANGING THE WAY THE WORLD NEGOTIATES, <http://www.smartsettle.com> (last visited Sept. 28, 2013).

39. Several ICT tools have been developed to overcome the lack of physical interaction in ODR proceedings. Videoconferencing has made progress in this field, but the cutting edge technology is holographic telepresence. See Susan Nauss Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12, 36 CARDOZO J. OF CONFLICT RESOLUTION 19 (2010).

40. The concept of the "fourth party" was introduced by Ethan Katsh and Janet Rifkin in the first book dealing entirely with ODR, *supra* note 21, at 5.

41. JURIPAX: TECHNOLOGY FOR EARLY DISPUTE RESOLUTION, <http://www.juripax.com/EN/home.php> (last visited Sept. 28, 2013).

42. See MODRIA, <http://modria.com> (last visited Sept. 28, 2013).

43. THE MEDIATION ROOM, <http://www.themediationroom.com> (last visited Sept. 28, 2013).

differences in online arbitration, in principle, there is no face-to-face interaction, technology plays the role of a fourth party, and notice of the award is given/delivered online. One additional special feature of online arbitration is that the award may or may not be binding. In fact, non-binding awards⁴⁴ are more frequent in online arbitration than binding award which are equivalent to court judgments.⁴⁵ Non-binding awards are, nevertheless, frequently technologically self-enforced,⁴⁶ as occurs with the outcomes of proceedings under the Uniform Domain-Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN).⁴⁷

A thorny subject concerns how much online activity is needed to affirm that a particular ADR proceeding is also an ODR proceeding. Is it sufficient for the third neutral party to send emails reminding the parties of the upcoming session? Or is it required that the whole proceeding be conducted over the Internet? Up to now, it has not been possible to strictly answer that question,⁴⁸ so the issue remains open. *Grosso modo*, we could say that at least for an ADR proceeding to be considered ODR, a substantial amount of the procedural acts should be performed online and, “resorting to [offline activity]. . . should only take place when there are strong reasons that call for it or when it is convenient for the greater efficiency and quality of conflict resolution.”⁴⁹

44. “Opening up online arbitration to a subsequent de novo decision by another tribunal does not vitiate entirely the effect of online arbitration.” Henry H. Perritt Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 683 (2000).

45. KAUFMANN-KOHLER & SCHULTZ, *supra* note 29, at 33.

46. On technological self-enforcement, see THOMAS SCHULTZ, RÉGULER LE COMMERCE ÉLECTRONIQUE PAR LA RÉOLUTION DES LITIGES EN LIGNE. UNE APPROCHE CRITIQUE 374 (2005) available at <http://www.thomasschultz.org/SchultzPhD.pdf> (last visited Sept. 28, 2013).

47. ICANN: INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, <http://www.icann.org/en/help/dndr/udrp> (last visited Sept. 28, 2013).

48. Other scholars have posed this question before and have not been able to reach a definitive conclusion. *Id.* at 7 ss.

49. GARCÍA, *supra* note 30, at 42. This statement can be linked to those of Gabriela Szlak & Amada Arley, in the sense that the entire procedure does not necessarily have to take place online. They assert that it would be extremely strict to exclude, for instance, the use of paper as a support for final agreements, from the concept of ODR. Gabriela Szlak & Amada Arley, *Resolución Electrónica de Disputas: novedades internacionales, oportunidades y desafíos*, 1 REVUE DROIT INTERNATIONAL, COMMERCE, INNOVATIONS & DÉVELOPPEMENT 31, 33 (2012).

III. THE STRENGTHS OF ODR DEVELOPMENT IN LATIN AMERICA

E-commerce is the field that best allows for the development of the full potential of ODR. In Latin America, e-commerce has had a 98.5% growth-rate during the period from 2009-2011,⁵⁰ with Brazil leading the way in the region in terms of engaging in e-commerce.⁵¹ While it is expected that global e-commerce spending will increase more than 90% by 2014, the forecasted growth for Latin America ascends to 204%.⁵² Such a boom in e-spending will necessarily result in a significant increase in the number of complaints that could be settled through ODR.

In Latin American countries, ODR is still in its early stages and has several challenges to face. But it has great potential strengths, some of which it has already begun to realize, including: (i) its adaptability to local context; (ii) its efficiency; and (iii) its capacity to contribute to the development of emerging economies. Each of these promising features presents several aspects that will be discussed in this section.

(i) From a general perspective, the Latin American context shows that the ICT infrastructure does not cover the entire territory of all the countries in the region. Personal computer penetration in the region is still low; Internet and broadband access, where available, are very expensive and their quality still tends to be poor. Furthermore, low “bancarization” (essentially, the percentage of the population using basic banking services) and the low rate of credit cards are directly linked to the weak development of alternatives for online payment. As a way of creatively addressing local constraints,⁵³ one logical inroad may be the massive expansion of mobile phone usage in the region.⁵⁴ This has

50. *Los años del boom. Estudio de comercio electrónico en América Latina*, AMÉRICA ECONOMÍA INTELLIGENCE AND VISA 2 (2012) available at http://especiales.americaeconomia.com/2012/comercio-electronico-america-latina-2012/pdf/Estudio_de_comercio_electronico_en_America_Latina_Mayo_2012.pdf (last visited Sept. 28, 2013).

51. The high regional figures are, to a large degree, explained by Brazil. *Id.*

52. Available at Euromonitor International, <http://www.euromonitor.com> (last visited Sept. 28, 2013).

53. Olivia Nottebohm et al., *Online and upcoming: The Internet's impact on aspiring countries*, HIGH TECH PRACTICE (2012) at 1, available at <http://www.mckinsey.com> (last visited Sept. 28, 2013).

54. Gabriela Szlak notes: “This might be explained by the development of prepaid mobile phones that do not require a credit card or any other prerequisite. . . . In any case, this massive and fast technology adoption phenomenon means a significant

exponentially multiplied the number of people with Internet access and has begun to breach the digital divide.

E-commerce and ODR methods have adapted themselves to this restricted context and have been taking advantage of the online and mobile Internet expansion in Latin America. As for e-commerce, the Mexican e-commerce marketplace *Decompras.com*,⁵⁵ for example, has ingeniously circumvented the problem of the population's low "bancarization" by allowing – through an agreement with Telemex, the telephone company with the widest coverage in Mexico – online purchases to be charged to the consumer's telephone bill in up to thirty-six monthly payments. In ODR methods, similar adaptations to the local context can be seen in the current practice of the Latin American Institute of Electronic Commerce (ILCE),⁵⁶ a regional pilot ODR provider. ILCE can intervene in disputes arising from online or mobile e-contracts between an e-customer and a business with the *eTrust*⁵⁷ seal or trust mark on its website. An interesting feature of ODR as a service provided by ILCE is that it allows consumers to file claims free of charge.⁵⁸

Another aspect of ODR adaptation to the Latin American context is that the proceedings can be held in Spanish or Portuguese, that is, in the local language spoken by the claimant. Such an adjustment to the regional linguistic culture⁵⁹ is one of great importance for the Latin American e-consumer: it reduces the language barrier that would probably exist with a vendor from a developed country in the northern hemisphere.

(ii) An additional strength of the embryonic development of ODR in Latin America is its efficiency. The court system in most parts of Latin America is complex, expensive, and inaccessible to many people. Especially in a landscape dominated by a feeling of

change to vulnerable populations of the region, [most of which]. . . did not have regular phones available before." Szlak, *supra* note 11, at 529.

55. *DECOMPRAS*, <http://www.decompras.com> (last visited Sept. 28, 2013).

56. *EINSTITUTO*, <http://www.einstituto.org/site/en> (last visited Sept. 28, 2013).

57. *ECONFIANZA*, <http://www.econfianza.org> (last visited Sept. 28, 2013).

58. We find that this is an important policy for introducing ODR in the region, disseminating it and promoting trust in both e-commerce and ODR proceedings. *See Szlak & Arley, supra* note 49, at 45.

59. The most recent technological advances of translating software may work as an auxiliary tool, making it possible for an ODR platform and or a third party neutral to administrate a procedure with parties speaking different languages. We have nevertheless certain reservations towards automatic translators as they cannot put words into a context and may thus lead to misunderstandings.

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dissatisfaction with the justice system,⁶⁰ ODR emerges as an efficient alternative. Its efficiency is particularly useful for cross-border e-transactions that are most times⁶¹ between one party from an emerging economy – who is likely to be the weaker contracting party – and another from a developed economy.

There are several aspects to efficiency as strength of ODR in Latin America, one of which is its ability to speed up the resolution process. In fact, time saving is a salient feature of ODR methods, which take on particular importance in a region where courts are overloaded with cases and proceedings that can last for several years. Another aspect of this efficiency derives from cost assessment. Especially when it comes to e-consumer disputes, the low cost of the claims is evidently disproportionate to the high cost of overcoming the barriers of distance and travel time, whether to appear before the court for a litigation proceeding, or for any traditional – that is to say, face-to-face – ADR mechanism, in addition to the high professional fees. Without an alternative like ODR, this situation practically compels potential claimants to waive their rights to access to justice.

Yet another aspect of the efficiency of ODR in emerging economies is that it can reduce or avoid the tension of having to negotiate several thorny issues, such as the competent court, the applicable law, and the physical venue of the procedure,⁶² which in these cases will be held in cyberspace.⁶³ Dealing with these issues often leads the parties to a stalemate in their initial negotiations, because neither is willing to give in. This is especially true for a party from a developed country that refuses to accept the choice of law and court from its counterpart's country. The same attitude towards the emerging economy's legal system would probably be adopted regarding the venue of an ADR proceeding. Not having to negotiate on the competent court and applicable law reduces,

60. Szlak, *supra* note 11, at 518.

61. Inter-regional e-commerce happens to be more frequent than intra-regional e-commerce because e-buyers seek to purchase items they cannot easily find on the local or regional market. See Luz E. Nagle, *E-Commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 AM. U. L. REV. 859, 872 (2001) (noting that much of the money made through electronic transactions is leaving the Latin American region).

62. Cheri M. Ganeles, *Cybermediation: a New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 738 (2001-2002).

63. Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUTER & INFO. L. 81, 81 (2009).

postpones,⁶⁴ and could even avoid,⁶⁵ intricate jurisdiction and conflict of law issues.

(iii) The other strength of ODR development in Latin America is its capacity to contribute to the development of the emerging regional economies. In purely economic terms, “the Internet creates the potential for these countries to leapfrog certain steps of development and facilitate faster entry and participation in the global economy.”⁶⁶ As it has been set out, “[t]he future of Latin America’s economic and commercial development is inextricably linked to the Internet and electronic commerce.”⁶⁷ The beneficial influence of ODR in the economic growth of the countries in this region works indirectly. Indeed, ODR encourages trust in e-commerce, which in turn increases e-commerce and therefore, stimulates Digital Economy expansion. Digital Economy growth has a direct effect on the development of the general economy of the countries under consideration. Seen from this perspective, ODR is an important factor that may be able to help boost the development of emerging economies in Latin America.

IV. CHALLENGES OF ODR DEVELOPMENT IN LATIN AMERICA

ODR in Latin America is still in its initial phase. Even so, it already shows some concrete advantages addressed in the previ-

64. It is true that, given the high rates of voluntary compliance, Private International Law issues of jurisdiction and applicable law may rarely emerge. Nevertheless, the possibility exists that the ODR outcome will not be complied with voluntarily and would consequently need to be enforced before the courts. In the case of the outcomes of assisted or automated negotiation, online mediation or even non-binding online arbitration, as remote as it may seem, there is certain likelihood that during the contract enforcement proceeding before a State court, the issue of the applicable law would be taken into consideration. Dealing with a binding online arbitration award, when recognition and enforcement are sought, the State court would analyze if the recognition or enforcement is contrary to its public policy, and could lead – by invocation of the defendant – to study the validity of the arbitration agreement, the source of the arbitral tribunal’s jurisdiction.

65. Negotiation on the jurisdiction and the applicable law could be completely avoided when the e-transaction takes place within a digital community – for instance, a specific marketplace — whose website has a trust seal, certifying not only compliance with a code of conduct or a set of best practice rules, but also the willingness to be subject to ODR proceedings. The risk of having the trust seal removed would stimulate the voluntary compliance with the ODR outcome. See SCHULTZ, *supra* note 46, at 356.

66. Nottebohm et al., *supra* note 53, at 13.

67. Robert M. Kossick, *International Law and Technology: The Emerging Disharmony of Electronic Commerce Legislation in Latin America*, 9 TUL. J. INT’L & COMP. L. 387, 447 (2001).

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ous section. In spite of its existing and potential strengths, it nevertheless has a long way to go before ODR achieves an advanced stage of development in the region. We identify three main challenges of ODR will have to face in Latin America: (i) the cultural challenge; (ii) the ICT infrastructure challenge; and (iii) the regulatory challenge. An underlying ingredient permeates the three of these: a lack of trust.

Building trust for online and mobile e-commerce, and therefore a reliable ODR system, is a major undertaking in which all the stakeholders should be involved. Governments, businesses, e-consumers and ODR providers each have their own share of the responsibility in generating confidence. This task is one of particular relevance in the Latin American context described above.⁶⁸

(i) Before focusing on the cultural challenge of ODR in the region, it is useful to establish the meaning of “culture” as used in this article. “Culture” can be defined⁶⁹ as, “[t]he distinctive ideas, customs, social behavior, products or way of life of a particular nation, society, people or period.”⁷⁰ Latin American societies have not yet fully assimilated the idea of using ICT for activities like buying and selling or settling disputes. Local idiosyncrasy gives priority to personalized relationships over impersonal treatment.⁷¹ For instance, instead of e-buying a product alone at home over the Internet, most Latin consumers would feel more comfortable going to a shopping mall. In that venue, they can see and maybe also touch, test, or try on what they are going to buy, while having face-to-face contact with the seller. Furthermore, they can take the opportunity to meet other family members or friends and have a pleasant conversation over a cup of coffee or a meal.

Even in the 21st century, the region bears the burden of persistent illiteracy among a certain percentage of its population,⁷² especially in rural areas.⁷³ It is obvious that within such a context,

68. *See supra* text in Section III.

69. There are many ways of defining “culture”. We have chosen this definition only as a reference framework. Our choice does not intend to reject all other definitions of this concept.

70. OXFORD ENGLISH DICTIONARY, ONLINE EDITION, *available at* <http://www.oed.com> (last visited Sept. 28, 2013).

71. *See Nagle, supra* note 61, at 869-870.

72. SISTEMA DE INFORMACIÓN DE TENDENCIAS EN AMÉRICA LATINA, *El analfabetismo en América Latina, una deuda social*, 2 Graph 1, Dato destacado 18 (November 2010); Tasa de analfabetismo de la población de 15 años y más según país. (2000-2008), *available at* http://www.siteal.iipe-oei.org/sites/default/files/datodestacado_furosevich_20101130.pdf (last visited Sept. 28, 2013).

73. *Id.* at 4, Table 1.

there is also plenty of room for computer illiteracy. In order to address this kind of illiteracy, we believe there should be efforts to raise the awareness of the existence of online and mobile e-commerce and ODR, as well as the advantages they bring with them on one hand, and of the fact that they save substantial time which can be then used for other activities – including social ones – on the other. Precisely because of the poor dissemination given to ICT and its possible applications in everyday life, there is a lack of confidence in these kinds of online activities.

To improve the population's level of computer and cyber literacy, a proactive and effective education policy in the field is needed. Governments have a crucial role to play in the design and implementation of programs to provide nationwide access to computers and corresponding training. Some actions have already been undertaken in this direction,⁷⁴ but its reinforcement and maintenance requires time to bridge or at least reduce the digital divide. Moreover, for an ODR process to take place fairly, both parties – as well as the neutral third party, in the cases where there is one – should have an adequate level of digital literacy – or, in its absence, qualified assistance. Otherwise, a web-savvy defendant would be able to take advantage of all the features of the ODR platform, while a claimant who is not comfortable in an online environment would be at a disadvantage from the outset.

(ii) Latin American countries face the challenge of filling, or at any rate reducing, the gap in ICT infrastructure that separates them from the more developed regions of the world. Indeed, “[t]he first step to a robust Internet ecosystem is quality infrastructure. Basic infrastructure, such as reliable electricity supply and roads to allow postal delivery, is a must, as well as quality fixed or mobile Internet infrastructure.”⁷⁵ In many places, basic infrastructure presents areas of opportunity not only in rural areas, but also along the belts of economically depressed populations surrounding

74. See, e.g., Argentina's "National Information Society Program", available at <http://www.psi.gov.ar> (last visited Sept. 28, 2013); Brazil's "Digital Inclusion Programs" available at <http://www.inclusaodigital.gov.br> (last visited Sept. 28, 2013). For an overview of the programs in English, see <http://www.brasil.gov.br/sobre/education/access-to-public-libraries-in-the-internet/digital-inclusion-programs> (last visited Sept. 28, 2013); Colombia's "Compartel" program, available at <http://archivo.mintic.gov.co/mincom/faces/index.jsp?id=6097> (last visited Sept. 28, 2013); Costa Rica's national network of Intelligent Community Centers (CECI), available at <http://www.micit.go.cr/index.php/direccion-tics/ceci.html> (last visited Sept. 28, 2013); Mexico's program Digital Skills for Everyone, available at <http://www.hdt.gob.mx> (last visited Sept. 28, 2013).

75. Nottebohm *et al.*, *supra* note 53, 14.

big cities, some of which⁷⁶ do not have Internet access available.⁷⁷ One of the areas of opportunity that has direct influence on the day-to-day of commercial activities is the poor condition of roads. “[A]s is the case with traditional, paper-based commerce, the primitive state of Latin America’s physical delivery infrastructure is a bar to the optimum development of e-commerce.”⁷⁸

To develop robust online and mobile e-commerce environments, we believe it is essential to increase the level of “bancarization” of emerging economies in such a way that users have more mobile and online payment alternatives. Of course, these options to pay for an e-commerce transaction should be secure for both contracting parties and remain confidential. And how might this goal be achieved? It has been stated that, “[t]he only way to protect data and to guarantee confidentiality is through encryption.”⁷⁹ Under these conditions, trust would be expected to increase.

Feeling comfortable in mobile and electronic environments enhances a population’s willingness to subject e-disputes to ODR proceedings. Other factors that can favor the choice of ODR are easy and affordable Internet access and high-quality broadband connection.

For an ODR procedure to take place in cyberspace, an ODR platform is required. If necessary, specialized know-how and professionals could be brought from developed countries to create new ODR platforms and software. However, we believe it is of paramount importance to make the most of local expertise, which has the added benefit of opening the doors for professionals in the region to get involved in this kind of project. In this sense, the generation of local high-quality technology for ODR would be strongly stimulated by the implementation of research and development (R&D) policies by national governments. Besides, R&D could also be helpful in terms of facing what is arguably the hardest challenge, the cultural one.⁸⁰

76. In others, like in some Brazilian favelas (slums), nongovernmental organizations have made Internet access available to low income communities. This is the case of “Viva Rio”, which launched “Viva Favela”, a program that runs an Internet portal and free Internet access centers for favela residents. See <http://www.vivafavela.com.br/> (last visited Sept. 28, 2013).

77. Notwithstanding, to a certain extent, mobile phones have come to meet the communication needs of this segment of the population.

78. Kossick, *supra* note 67, at 450.

79. Esther van den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border E-Disputes: An Introduction to ODR* 1, 15, available at <http://www.oecd.org/dataoecd/63/57/1878940.pdf> (last visited Sept. 28, 2013).

80. Szlak, *supra* note 11, at 537.

(iii) Lastly, the third challenge of ODR development in Latin America identified at the beginning of this section is the regulatory challenge. Despite the fact that ODR is not limited to e-commerce, e-commerce is the environment where ODR can develop to its full potential. Indeed, the region needs a coherent framework to build trust in e-commerce and ODR.

In the area of e-commerce, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996⁸¹ served as a point of reference for several countries in the region that have enacted domestic legislation on e-commerce.⁸² However, in trying to follow this model, legislators may not have been concerned with harmonization of fundamental principles among their domestic legislation, and such inconsistent results may have caused more problems than they resolved.⁸³ Kossick argues that, as the Model Law failed, “to engender substantial uniformity in domestic e-commerce legislation. . .the emergence of disharmonious rules, standards, and procedures constitutes a new and different obstacle to the continued growth of electronic commerce in Latin America,”⁸⁴ and suggests that the solution would be to create and enact a new uniform convention in this field.⁸⁵

Significant attempts to create a uniform, regional legal framework for consumer protection – including e-consumers⁸⁶ – were made with full support offered by the Organization of American States at the 7th Inter-American Specialized Conference on Pri-

81. UNCITRAL, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 as Adopted in 1998, *available at* http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last visited Sept. 28, 2013).

82. Colombia, Dominican Republic, Ecuador, Guatemala, México, Panamá, Paraguay and Venezuela are some of the Latin American countries who have adopted such e-commerce legislation. Status Page on Jurisdictions that have Adopted the Model Law, UNCITRAL, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 as Adopted in 1998, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last visited Sept. 28, 2013).

83. Kossick, *supra* note 67, at 408.

84. *Id.*

85. *Id.* at 450-452.

86. For an in-depth study on the online aspects of consumer protection of the different projects submitted by American countries to the CIDIP VII, see JUAN MANUEL VELÁZQUEZ GARDETA, LA PROTECCIÓN DEL CONSUMIDOR ONLINE EN EL DERECHO INTERNACIONAL PRIVADO INTERAMERICANO: ANÁLISIS SISTEMÁTICO DE LAS PROPUESTAS PRESENTADAS PARA LA CIDIP VII (Asunción, Paraguay, Centro de Estudios de Derecho, Economía y Política (CEDEP) (2009).

vate International Law (CIDIP VII) held in June 2003.⁸⁷ That year, Brazil submitted a draft Convention on Consumer Protection and Choice of Law, which was revised and simplified, and then jointly re-submitted the Convention with Brazil, Argentina and Paraguay in 2008. Canada submitted a draft Model Law on Jurisdiction and Choice of Law in 2006 and a revised version in 2008. The United States submitted a draft Legislative Guidelines on Consumer Redress Mechanisms in 2006. A revised version of the draft, along with four additional Model Laws⁸⁸ were presented in 2008. In spite of these efforts, no agreement has been reached on any of the proposals.

At present, there is no global, regional or domestic hard law⁸⁹ applicable in Latin American countries specifically regulating ODR. So, we have to turn to regulations on ADR and assess if they are also applicable to ODR proceedings. For instance, one of the issues that may arise is the applicability of Article II.2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958⁹⁰ to online arbitration. In referring to the agreement to arbitrate, this article provides that: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁹¹ To apply this rule

87. ORGANIZATION OF AMERICAN STATES, Private International Law - CIDIP VII, available at http://www.oas.org/dil/CIDIP-VII_consumer_protection.htm (last visited Sept. 28, 2013).

88. Annex A: Draft Model Law for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes. Annex B: Draft Model Law on Alternate Dispute Resolution for Consumer Payment Card Claims. Annex C: Draft Model Law on Small Claims. Annex D: Draft Model Law on Government Redress for Consumers (Including Across Borders) available at http://www.oas.org/dil/CIDIP-VII_consumer_protection_united_states.htm, (last visited Sept. 28, 2013).

89. See GARDETA, *supra* note 86, at 329-333 (comparing hard law codification techniques). See also Nuria González Martín, *Private International Law in Latin America: From Hard to Soft Law* XI ANUARIO MEXICANO DE DERECHO INTERNACIONAL 393 (2011) available at <http://www.journals.unam.mx/index.php/amdi/article/view/23613> (last visited Sept. 28, 2013) (describing the differences between hard law and soft law techniques).

90. Many Latin American countries are bound by this convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Peru, Uruguay and Venezuela. Status Page on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Sept. 28, 2013).

91. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, UNCITRAL, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited Sept. 28, 2013).

to arbitration agreements conducted online, an extensive construction of its text is needed. This might pose a problem to a judge who is unwilling to interpret norms under a flexible approach.⁹² From this perspective, facing the regulatory challenge would require, first, conducting a study on the feasibility of enacting special hard law for ODR in the region, and, second, in the case of only adhering to existing ADR regulations, encouraging judicial construction with a positive attitude towards ODR.

Moreover, as the regulation of cyberspace is being carved up,⁹³ there is also plenty of room for soft law rules resulting from self-regulation by the different private stakeholders in the world of ODR. It is precisely in the online environment for dispute resolution that best practices and codes of conduct are generated. From this perspective, addressing the regulatory challenge requires that Latin American actors interested in ODR – not only sovereign States, but also and mainly private stakeholders – gradually create their own set of soft law rules, best practices, and codes of conduct that are adapted to the regional context. This, of course, does not exclude the possibility for Latin American parties to refer, in the future, to other global soft law instruments like the Draft Procedural Rules on Online Dispute Resolution for Cross-Border Electronic Commerce Transactions, which are currently being discussed by the UNCITRAL Working Group on Online Dispute Resolution.⁹⁴

In our opinion, hard and soft law approaches to the regulatory challenge are not mutually exclusive but complementary, and will enhance trust in ODR as an effective alternative for settling disputes involving at least one Latin American party.

92. See Kossick, *supra* note 67, at 403. Conversely, it has been noted from a larger perspective of comparative law – that is, not only focused on developing countries – that most courts have had no problem in understanding that modern communication technologies fall within the scope of the New York Convention. Pilar Perales Viscasillas, *Arbitraje electrónico*, Chapter 10, in RAÚL A. ETCHEVERRY & RAFAEL ILLESCAS ORTIZ (dir.) / Josué Fernández Escudero & Antonio Robles Martín Laborda (coord.), *COMERCIO ELECTRÓNICO: ESTRUCTURA OPERATIVA Y JURÍDICA* 602 (2010).

93. See Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19:4 EUR. J. INT'L L. 799 (2008) available at <http://www.ejil.org/pdfs/19/4/1662.pdf> (last visited Sept. 28 2013). See generally ANDREW D. MURRAY, *THE REGULATION OF CYBERSPACE. CONTROL IN THE ONLINE ENVIRONMENT* (2007).

94. See, e.g., *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules* (11 March 2013), A/CN.9/WG.III/WP.119, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/556/94/PDF/V1255694.pdf?OpenElement> (last visited Sept. 28, 2013).

V. CONCLUDING REMARKS

At present, we can assert that ODR is not a science fiction fantasy for developing countries. Throughout this article, we have presented and examined the landscape of ODR, noting its already existing strengths in its current state in Latin America, as well as the main challenges it needs to overcome in order to increase its presence in the region.

As we have underlined on several occasions throughout this paper, ODR is not limited to online or e-commerce disputes, but given the frequent cross-border nature of such transactions, it is in this area where ODR can best develop to its full potential. The different kinds of e-contracts – B2B, B2C and C2C – can benefit from this way of solving claims. Having said this, it is time to weigh the strengths and challenges of ODR development in emerging countries and to analyze its feasibility in Latin America.

In spite of its embryonic state of development, ODR has proven its flexibility by adapting to the regional context. This is a very important feature because the task is not about blindly transposing dispute settlement methods from developed countries, but about tailoring them to local cultural characteristics, as well as local constraints, particularly those concerning ICT infrastructure. ODR has also demonstrated its high efficiency in Latin America, offering an affordable and speedy alternative to the often unsatisfying official justice system, allowing the resolution of disputes to progress quickly and at a minimum cost. Trust in ODR as a method for settling disputes allows the parties to reduce or even to avoid the tension of having to negotiate on which is the competent court, the applicable law, and the physical location of the procedure. Another strength we have pointed out is the ability of ODR to contribute to the development of emerging economies. By enhancing trust in e-commerce, ODR boosts the growth of Digital Economy and, hence, that of the general economy. ODR can thus be used as a valuable tool for promoting the development of less favored countries.

The development of ODR in Latin America faces three main challenges, all of them permeated by an underlying lack of trust. The first, and probably biggest, challenge is cultural in nature. People from the region still give precedence to face-to-face relationships, not only in their personal life, but also for buying, selling and settling disputes, which adds to the constraints of computer and cyber literacy. Another challenge is closing or reducing the ICT infrastructure divide that continues to separate

Latin American countries from the developed regions of the world. Last but not least, there is the regulatory challenge, which involves both hard law and soft law. In terms of the hard law, facing the challenge requires studying and evaluating the feasibility of enacting special regulations for ODR in the region. In the case of a negative outcome – which would imply just keeping ADR regulations – it would be necessary to encourage judicial construction with a more favorable attitude towards ODR. The soft law side of the regulatory challenge entails the gradual creation of a set of particular soft law rules adapted to the regional context.

We believe ODR is highly feasible and can develop successfully in emerging economies like those of Latin America, even though Internet penetration is not yet massive. The strengths of the budding ODR development in the region outweigh the local constraints. The strengths are highly beneficial for the growing share of the Latin American population that already is or is becoming engaged in cyberspace activity, as long as they are allowed access to the courts after ODR proceedings. In addition, the advantages of ODR for the region can be maximized by boosting a change in the attitude held by businesses, which should not see ODR as a burden,⁹⁵ but rather a positive opportunity⁹⁶ to build trust⁹⁷ and successful commercial relationships.

As for the constraints, the truth is that those challenges are not impossible to overcome. On the contrary, they should be considered as areas for potential improvement. We think the cultural issue could diminish by raising the awareness of and trust in ODR as well as its advantages, through effective education policies. The ICT infrastructure challenge requires larger public and private investment to increase the reach and quality of available ICT services, such as online payment. In addition, R&D is needed to stimulate the generation of local high-quality ODR technology. In terms of the regulatory challenge, a dialogue between hard and soft law codification techniques could improve the current regulatory landscape and enhance trust in ODR for settling disputes that involve at least one Latin American party. Such combination of soft law and hard law would allow ODR proceedings to be carried out in observance of some fundamental principles (system

95. Szlak & Arley, *supra* note 49, at 44.

96. KATSH & RIFKIN, *supra* note 21, at 23 (“Offering ODR at a marketplace should be seen as positive, as adding value to the marketplace, and as something that provides a competitive advantage.”).

97. Szlak, *supra* note 11, at 538.

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reliability and accessibility, third party impartiality, confidentiality, prompt process, due process) and their outcomes could be compulsorily enforced, when it becomes necessary, by domestic courts of the countries of the region. Of course, recognition and enforcement of ODR outcomes would be facilitated by domestic legislation or international treaties that fully respect the parties' willingness to settle their disputes through ODR and that accept the validity of electronic agreements or awards.

We are very much aware that overcoming the indicated challenges is quite a daunting job, the results of which will only gradually be seen. Even so, we believe it is worth the effort. In one way or another, all of the stakeholders involved will greatly benefit from the strong future potential of ODR in Latin America.

