

Online Consumer Dispute Resolution: a narrative around (and an example of) postmodern law**

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Karim Benyekhlef

INTRODUCTION

The passage from paper to digital continues to amaze us. The appearance of the printing press in fifteenth century Europe revolutionized law as the science of norms and conflicts. For example, the oral and manuscript legal tradition had made precedent very difficult in common law¹, but the printing press made it possible to disseminate legal decisions broadly and to thereby create a corpus of case law that was accessible and credible. It could be used for reference, and thus led to the emergence of the key concept of precedent in common law:

Less than a century later, when the age of printing began, a revolutionary change in attitudes concerning the past and present and the value and meaning of words on paper also began. Printing “replaced precarious forms of tradition (oral and manuscript) by one that was stable, secure and lasting; it is as if mankind had suddenly obtained a trustworthy memory instead of one that was fickle and deceitful.”²

Legal memory gained greater verisimilitude and became more trustworthy. The technique of precedent could be deployed:

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1. On the effects on law of changes in the media on which law is recorded, see Ethan Katsh, *The Electronic Media and the Transformation of Law*, New York, Oxford University Press, 1989, and Ethan Katsh, *Law in a Digital World*, New York, Oxford University Press, 1995.
 2. Ethan Katsh, *The Electronic Media and the Transformation of Law*, New York, Oxford University Press, 1989, p. 33.

In England and later in this country [the United States], the technology of print also supplied one of the means through which the law has worked to balance stability and change. This method is the modern concept of precedent, one of the cornerstones of our system of law. As one author has recognized: “English justice, if it were not to remain fluid and unstable, required a strong cement. This was found in the common-law doctrine of precedent with its essential and peculiar emphasis on rigidity and certainty” [...] The law’s attitude toward the use of prior judicial decisions has changed over time, and the way in which law today looks at prior cases would be unintelligible to a judge who lived before Gutenberg.³

This simple example is a good illustration of law’s sensitivity to the media through which it is conveyed. Since law is first information (a rule, decision, statement), it needs to be recorded on a medium (manuscript, paper, printed copy, digital recording). However, the type of medium has an impact on the law itself.

A second hypothesis is that technology has normative effects⁴: the Internet’s architecture is based on computer code that necessarily constrains users’ behaviour and actions⁵. Indeed, the code constrains users in the sense that they cannot move freely in cyberspace. By requiring a password, for example, code can prevent a user from visiting some web sites. It can also prevent users from copying photos and music files, require them to register

3. *Ibid.*, p. 35.

4. See, among others, Langdon Winner, *The Whale and the Reactor. A Search for Limits in an Age of Technology*, Chicago, University of Chicago Press, 1986; Joel R. Reidenberg, “Lex Informatica: The Formulation of Information Policy Rules Through Technology”, (1998) 76 *Texas L. Review*. 553; Joel R. Reidenberg, “Governing Networks and Rule-Making in Cyberspace”, in B. Kahin and C. Nesson, (Eds.), *Borders in Cyberspace*, Cambridge (Mass.), MIT Press, 1997, p. 84; Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York, Basic Books, 1999, and Lawrence Lessig, *Code version 2.0*, New York, Basic Books, 2006.

5. “[...] an analog for architecture regulates behavior in cyberspace – code. The software and hardware that make cyberspace what it is constitute a set of constraints on how you can behave. The substance of these constraints may vary, but they are experienced as conditions on your access to cyberspace. In some places (online services such as America Online for instance) you must enter a password before you gain access; in other places, you can enter whether identified or not. In some places the transactions you engage in produce traces that link the transactions (the “mouse droppings”) back to you; in other places this link is achieved only if you want it to be. In some places you can choose to speak a language that only the recipient can hear (through encryption); in other places encryption is not an option. The code or software or architecture or protocols set these features; they are features selected by code writers; they constrain some behavior possible, or impossible. The code embeds certain values or makes certain values impossible. In this sense, it too is regulation, just as the architectures of real-space codes are regulations.” Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York, Basic Books, 1999, p. 89.

in order to have access to some sites (for example, Facebook and Twitter), prohibit use of cryptography, make logging in necessary, and block access to certain sites (for example, in China).

The last hypothesis is that the best way of solving problems arising on the Internet (for example, a dispute with an online seller concerning a product bought online) is via the media through which it results. In other words, using the Internet to solve a dispute that is a consequence of using the Internet seems to be the optimal practical solution with respect to difficulties in identifying a competent forum and applicable law⁶, and to the costs and delays involved in taking legal recourse outside of the claimant's jurisdiction. It is easy to see the interest in using the Internet to solve micro-disputes, such as those involving consumers and online sellers in different jurisdictions.

These three hypotheses are the foundations of the Cybertribunal⁷ experiment launched in 1996 at the Centre de recherche en droit public (CRDP) of the Faculty of Law at the Université de Montréal. In this text, I do not intend to review the legal issues surrounding online mediation and arbitration⁸. Instead, I would like to tell the story of this intellectual and technological adventure into which I and others were thrown in the late 1990s. Recourse to the *je-en-droit* ("I-in-law"), to employ Jean-François Gaudreault-Desbiens' highly useful expression⁹, is not common in doctrine. The "I" makes it possible to write an essay or, in this case, a narrative that recognizes its own subjectivity. According to Gaudreault-Desbiens, authors have to avoid "anecdotes and raw emotion," which can only corrupt legal thought. I do not know whether this text can be claimed to be doctrine, even the attractive contemporary doctrine proposed by Gaudreault-Desbiens, a doctrine that takes advantage of recent work on interpretation and hermeneutics.

6. See, among others, Karim Benyekhlef, "Réflexions pour une approche pragmatique des conflits de juridiction dans le cyberspace", in Vincent Gautrais (Ed.), *Le droit du commerce électronique*, Montréal, Thémis, 2002, pp. 137-168.

7. Vincent Gautrais, Karim Benyekhlef and Pierre Trudel, "Les limites apprivoisées de l'arbitrage cybernétique: l'analyse de ces questions à travers l'exemple du CyberTribunal", (1999) 33 *Revue Juridique Thémis* 537 and Vincent Gautrais, Karim Benyekhlef and Pierre Trudel, "Cybermédiation et cyberarbitrage: l'exemple du CyberTribunal", (1998) *Droit de l'informatique et des télécoms* 46.

8. The short bibliography appended to this text provides a good starting point on these issues.

9. Jean-François Gaudreault-Desbiens, "Libres propos sur l'essai juridique et l'élargissement souhaitable de la catégorie 'doctrine' en droit", in Karim Benyekhlef (Ed.), *Le texte mis à nu*, Montréal, Thémis, 2009, par. 35.

My “I” is probably special in that the narrative constructs it. This text is not an essay because it can be only subjective; this narrative is my version of the facts, even if I am telling...the truth. That is, unless we consider this story, with a nod to Henry Wigmore and because of its subjectivity, to be like a “legal novel.” According to Wigmore, literature has three main functions with respect to law:

[To] be familiar with those features of his profession which have been taken up into general thought and literature [...] to realize the operation of the old rules now gone – to feel their meaning in human life and to appreciate the bitter conflicts and their lessons for to-day [...] [and to] know human nature [...], [one] must go to fiction, which is the gallery of life’s portraits.¹⁰

In the same spirit, Frank J. Loesch considers “[t]here are but two ways in which [the legal practitioner] may study human nature – one is by contact with people, the other is by reading.”¹¹ Perhaps this story will contribute – I hope – to better understanding of an area of law, even though I have to admit that it will not have the qualities that I intuitively ascribe to novels. It is thus a subjective narrative that tries to avoid anecdotes and provide the reader with a feeling and impression of, as well as shed light on, the phenomenon of “norm entrepreneurs”¹², in other words, civil society’s contribution to the emergence and, possibly, crystallization of norms.

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10. John Henry Wigmore, “A List of Legal Novels”, (1908) 2(9) *Illinois Law Review* 574, 576-579. Anne Simonin summarizes Wigmore’s position on literature’s three main functions, in regard to law, in such terms: “(1) To inform the legal practitioner of the common man’s idea of law [...] (2) to bring concrete application and, consequently, awareness of necessary evolution of law, to the legal practitioner’s attention [...] (3) to inform the legal practitioner about human nature: ‘[The legal practitioner] ... must have recourse to fiction, which is a portrait gallery taken from nature.’” (My translation) See Anne Simonin, “Make the Unorthodox Orthodox: John Henry Wigmore et la naissance de l’intérêt du droit pour la littérature”, in Antoine Garapon and Denis Salas (Eds.), *Le droit dans la littérature*, Paris, Michalon, 2008, 27, pp. 48-49.
11. Frank J. Loesch, “Is Acquaintance with Legal Novels Essential to a Lawyer?”, (1926) 21(2) *Illinois Law Review* 109, 110. The author also states, at page 111: “Whether a lawyer confines his activities to the office or engages in addition in the wider field of the trial of causes, he must deal with human nature. He should be a student of it at all times and under all conditions, but the pressure of his professional work, the necessities of social life and the limitations of a short lifetime will prevent his learning what he needs to know solely from contact with people. He is forced to go to the writers whose work has been or is the study of human lives in every conceivable state and condition and to portray their natures, characters, dispositions, minds, souls and environment”.
12. See Paul Schiff Berman, “From International Law to Law and Globalization”, (2005) 43 *Colum. J. Transnat’l L.* 485, 504. See also: Sidney Tarrow, *The New Transnational Activism*, New York, Cambridge University Press, 2005; M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change”, (1998) 52 *Int’l Org.* 887; Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, (1990) 44 *Int’l Org.* 479.

Cyberspace lends itself well to regulation by norms developed by non-state stakeholders. This peek into what is going on backstage, behind norms, is revealing of modern times: it is a period of change and transformation of the foundations of modern law under the influence of contemporary phenomena, such as cyberspace, human rights that are global and a-national, and globalization, to name only a few¹³. Online dispute resolution is also one of these phenomena. I am inviting the reader to listen to its story. I will try to tell the story of its law, in other words, its more or less direct relationship with classical doctrine. I will present its version of law, of course, but a version that is not foreign to us because we are its instigators. In short, the norm entrepreneur is a self-advocate. He wants to persuade others of the normative appropriateness of the legal propositions that he advances; he does not take the more classical approach of trying to advocate for the normative appropriateness of other people's (such as legislators') interpretations of propositions.

The distinction may seem slight, but it is crucial. Is it a component of this change in modern law? Perhaps. One thing is sure: It opens unusual perspectives in modern legal circles. In a way, the work of norm entrepreneurs is reminiscent of that of the glossators struggling with the rediscovery in the High Middle Ages of the *Corpus Juris Civilis*, a sparse and often inconsistent legal corpus. The glossators tried to persuade others of the correctness of its legal propositions in a rapidly changing world. They were trying to fill in holes, reconcile the irreconcilable, participate in developing royal and then state normativity, and thus contribute to the establishment of the modern state¹⁴. Norm entrepreneurs also try to participate in developing normativity, however, this time the normativity is global and designed to facilitate the taking into account and legal handling of contemporary phenomena that are blind to national borders and, consequently, difficult to grasp using the conceptual apparatus of modern law.

So, here is the narrative. In any case, in the end, the label is not very important given the purpose: to tell the story of a human adventure at the crossroads of law, innovation and entrepreneurship. It is an adventure that rejects simplistic oppositions between basic and applied research, ideal and real worlds, erudition and trade, oppositions that deliver hard certainties to reassure and comfort those who champion them. The experience with

13. On changes in modern law, see Karim Benyekhlef, *Une possible histoire de la norme. Les normativités émergentes de la mondialisation*, 2nd ed., Montréal, Thémis, 2015.

14. Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge (Mass.), Harvard University Press, 1983.

online dispute resolution has instead revealed that these various considerations are crossbred and intertwined, which highlights the complexity resulting from novelty, and the urgent need to abandon prejudices, presuppositions and blinders with respect to innovation. Thus, legal practitioners cannot act alone: they can probably think about the legal consequences of online dispute resolution, but they absolutely have to have input from information sciences experts, computer scientists and system engineers to model software and dispute resolution platforms so as to get a better idea of what resolving disputes using technology will look like. Describing a phenomenon is not sufficient. Experiments have to be conducted in order to know what one is talking about and to identify, through the experimentation, the phenomenon's real legal impact. In the same way, academics cannot act alone. Designing an online dispute resolution platform and deploying it in real-life require financial means that are not offered by funding bodies in the social and human sciences. Collaboration with the private sector is necessary and has been obtained on the condition of scrupulous respect for the intellectual freedom of the researchers involved. Oppositions, which were often ideological, have faded away and been replaced by collaboration among well-understood complementary interests and needs.

1. A short history

The idea of online resolution of disputes arising on the Internet during informational transactions¹⁵ germinated at the CRDP in 1996 during the preparation of a major work, *Le droit du cyberspace*¹⁶, which, under the direction of Professor Pierre Trudel, was the first French-language attempt to do an inventory of the legal structures governing the Internet. At the time, I and others wondered how national laws could be enforced in a borderless world that was, indeed, blind to the notion of national frontiers, which are at the heart of the paradigm of modern law. How could users located abroad be attracted into one's jurisdiction? How could the competent jurisdiction be determined? What would be the governing law for a given informational transaction? Was there any way at all to resolve disputes arising between Internet users? Very quickly, the idea came up of using the

15. This term has a very broad definition and includes all interactions on the Internet, including sale and purchase of material and immaterial goods, email exchanges, writing or participating in a blog, etc. All of these actions suppose an exchange of information and thus constitute informational transactions.

16. Pierre Trudel, France Abran, Karim Benyekhlef and Sophie Hein, *Droit du cyberspace*, Montréal, Thémis, 1997.

technology that was the source of these issues. The idea of using alternative dispute resolution emerged just as fast. Mediation, conciliation and arbitration seemed to be the mechanisms most likely to meet users' needs since they eliminate the obligation to employ state courts which, owing to their formal and procedural requirements, complexity and essentially national nature, cannot meet the challenges of the ubiquity and a-nationality of the Internet. Moreover, alternative dispute resolution is known for its flexibility, speed and relatively low cost, which are qualities in line with the disputes that we suspected would account for a large proportion of the cases.

Verification was required. In 1997, the Information Superhighway Fund, as it was called then, gave Pierre Trudel and I a grant¹⁷ to see whether these intuitions were well-founded. The CyberTribunal project began. Full of good intentions, we wondered whether it was possible to model mediation and arbitration procedures, and thereby create a software application to provide a framework for those procedures and guide stakeholders. There was already another experiment of this nature, Virtual Magistrate¹⁸, but it was rather elementary in terms of technology since it was based simply on email. Parties exchanged information and documents by email. We could not base our experiment on that example.

First, I hired a programmer, explained to him our objectives and described mediation and arbitration procedures in detail. After several months of work, the programmer was still unable to find a method for modeling the procedures. It was then chance who brought me into contact with an information sciences specialist, Aubert Landry. With a programmer, Houssam Fawaz, Landry managed to develop a method for modeling mediation and arbitration procedures. In 1998, CyberTribunal offered a unique platform integrating both mediation and arbitration. It was a world first. CyberTribunal was different from Virtual Magistrate since it provided a veritable dispute resolution platform and not just an interface based on email. It was also different from Ombuds Online¹⁹, an experiment conducted in the United States by Professor Ethan Katsh. Ombuds Online dealt with mediation only, but our platform integrated mediation and arbitration. We were very proud of the result. It should be remembered that the idea first met with a great deal of skepticism, not to say mockery, from practitioners in Québec and Canada, as well as in Europe (France, Belgium, England). While I was des-

17. We received a \$300,000 grant.

18. Karim Benyekhlef and Fabien Gélinas, "Online Dispute Resolution", (2005) 10-2 *Lex Electronica* 1, 88, online: <http://www.lex-electronica.org/docs/articles_87.pdf>.

19. *Ibid.*, 91.

cribing the first work on CyberTribunal and our objectives at various conferences on information technology law (thus before audiences that could be considered informed), many legal practitioners questioned the possibility of modeling mediation and arbitration procedures. They cited legal reasons, which were quickly swept away through examination of relevant texts²⁰, and, more naturally, the impossibility of resolving disputes without the physical presence of the parties. This was the recurring argument that the physical presence of the parties in the same place at the same time is an essential, not to say indispensable, ingredient in all procedures designed to resolve disputes²¹.

Nothing could be further from the truth. Physical presence is not necessary during every steps of proceedings. Moreover, in a cyberjustice system, there is nothing to prevent the parties from meeting if they think it useful or if the procedure requires them to. It should also be noted that the physical presence of the parties can prove absurd in the case of micro-conflicts (for example, consumer disputes) and when the parties are located in different jurisdictions. Can a Québec consumer really demand the physical presence of a Californian cybermerchant to resolve a dispute over the purchase of something costing \$300? Common sense prevails over considerations related more to ritual than to law in the strict sense.

Once the technological issues had been overcome and it had been proven that it was possible to model mediation and arbitration procedures, we still had to test CyberTribunal in the field. The question was, and remains, whether the dispute resolution system could attract parties. At the time, CyberTribunal was not partnered with a merchant site, such as eBay or Amazon. It was also not in partnership with a certification site, such as TrustE²²

20. See in particular, Thomas Schultz, *Réguler le commerce électronique par la résolution des litiges en ligne. Une approche critique*, Brussels, Bruylant, 2005.

21. “Conducting the proceedings in the parties’ absence is not, contrary to what one might think, an essential feature of cyberjustice. They can meet, if required. This does not detract from cyberjustice because putting even part of a procedure online saves an enormous amount of time and money. Yet, why is physical presence a recurring theme among those who seem to fear the establishment of cyberjustice? Beyond immediate and contingent arguments, such as the importance of cross-examination in the common law, a plausible explanation lies in the deep ritualization of the legal process in general. If the parties are absent, there is a loss of theatricality, and this troubles some lawyers. Law remains today ‘one of the most ritualized functions of social life.’ One need only visit a courtroom or read a judgment to find a very special and often repetitive style.” See Karim Benyekhlef and Fabien Gélinas, “Online Dispute Resolution”, (2005) 10-2 *Lex Electronica* 1, 6, online: <http://www.lex-electronica.org/docs/articles_87.pdf>.

22. <<http://www.truste.org>>.

or Trustedshops²³, which would have permitted it to handle disputes involving web sites displaying those organizations' certification logos. Parties thus came to CyberTribunal freely, and their trust in it was founded essentially on the fact that it was based in a university. Complainants may have been free to go to CyberTribunal, but what about "defendants"? Obviously, they were not obliged to submit to the dispute resolution process offered by CyberTribunal. As in the physical world, there was nothing to force a party to submit to mediation. Nonetheless, many users did submit cases to CyberTribunal, and the other side often agreed to bow to the exercise. In fact, we found that the simple fact of submitting a case to CyberTribunal incited the opposing party to resolve the dispute. It led to out-of-court settlements, as people in the profession would say. The experiment was successful: the platform functioned and provided the parties with the tools needed to resolve their disputes. However, since only around 50 cases were submitted, we could not conclude with certainty that CyberTribunal was a reliable, credible means for resolving disputes on a large scale.

2. The domain name adventure: eResolution

We had to speed things up, and propose a platform that could enable the resolution of a large number of disputes involving many stakeholders and complex legal issues. Domain names provided us with an opportunity to test the expertise developed for CyberTribunal on a life-size scale. Remember that when the World Wide Web began in the early 1990s, the Internet opened up to the general public and became an important tool for communication and exchange. Domain names are web site addresses:

On the Internet, every domain name is associated with an IP address, which makes it possible to identify the location of the computer hosting the corresponding website on the Internet. The domain-name system allows the holder to be identified in a more personalized and user-friendly way, using an alphanumerical system. The domain name is neither more nor less than a mnemonic version of the numerical address.²⁴

23. <<http://www.trustedshops.com>>.

24. Karim Benyekhlef and Fabien Gélinas, "Online Dispute Resolution", (2005) 10-2 *Lex Electronica* 1, 27, online: <http://www.lex-electronica.org/docs/articles_87.pdf>.

Domain names are registered with a registrar on a first-come, first-served basis. In short, one has only to pay a fee set by the registrar to register a domain name, and the registrar's role is limited to simply receiving fees. It has no obligation to determine intellectual or industrial property rights relating to the name to be registered. The result of this was that many users took advantage of the situation and registered the trademarks of major companies (Universal Pictures, Banque populaire, Cisco, Royal Bank, etc.) as domain names. These "cybersquatters" then contacted the trademark holder and offered to sell the domain name, at a profit of course. The situation could not continue. The World Intellectual Property Organization (WIPO) was mandated by the United States National Telecommunications and Information Agency (NTIA), which is an agency of the Department of Commerce, to develop for ICANN [Internet Corporation for Assigned Names and Numbers] "an effective and affordable means of resolving disputes" concerning domain names²⁵. An initial report was submitted in 1999 for consultation. The report gave rise to many reactions in the Internet community. Some found that WIPO was making it too easy for trademark holders and neglecting freedom of expression by condemning the use of famous trademarks in parodies and criticism (for example, the critical site www.microsoftsucks.com). WIPO intended to reserve for itself exclusive control over the management of disputes concerning domain names. In fact, this was an opportunity for the international organization to secure a return on its new mediation and arbitration centre, which had not yet handled any cases.

At the same time, I was contacted by my colleague Ethan Katsh. He persuaded me not to leave WIPO alone to resolve domain name disputes. With the support of American professors Michael Froomkin and David Post, Ethan Katsh and I wrote to ICANN to offer our services. We did not want WIPO to have a monopoly over resolving domain name disputes because we feared the issue of domain names would be taken over by legal practitioners specializing in trademark. We planned to offer a domain name dispute resolution platform. For that, our colleagues suggested using CyberTribunal's platform. I thought it was a good idea. With a few adaptations, our platform could be used to resolve disputes opposing trademark holders and domain name holders. In the meantime, WIPO took the criticism into account and issued a second report in which it renounced having a monopoly over dispute resolution and tempered its bias toward trademark holders. Thus, on August 26, 1999, ICANN adopted the Uniform Domain Name Dispute Resolution Policy ("the Policy"). The Policy was complemented by the adoption on October 24, 1999 of the Rules for Uniform Domain Name Dispute

25. *Ibid.*, 30.

Resolution Policy (“the Rules”), which “set out the procedural details of the system as a whole (the ‘UDRP procedure’)”²⁶. Examination of the Rules rapidly revealed that extensive changes had to be made to the CyberTribunal platform. In fact, the modifications were so great that we were advised to develop a platform specifically for the UDRP procedure.

A little before that, I had given a talk on the CyberTribunal experiment at Boston at a conference organized by the American Bar Association. Through the intermediary of the Canadian Consulate in Boston, I met the Chief Technology Officer (CTO) of Aliant, a Canadian telecommunications company operating in the Maritime Provinces. Ethan Katsh was with me at the meeting, and we raised the issue of online dispute resolution. The CTO was very interested, so interested, in fact, that after a few months of discussions, Aliant decided to fund our research and our plan to produce a platform specifically for domain name disputes. We decided to form a company: eResolution. We would not use the CyberTribunal platform because it was not robust or adaptable enough to handle disputes on a large scale. In addition to our American colleagues, Aubert Landry continued working for eResolution, and the team was augmented by three lawyers: Robert Cassius de Linval, Fabien Gélinas (former General Counsel of the International Court of Arbitration of the International Court of Justice) and Joëlle Thibault. We were also working with a highly talented computer scientist, André Saintonge, and several integrators: Xwave, Genia Technologies and CSC. The technological aspects were thus taken charge of by an experienced, competent team.

On January 1, 2000, eResolution was accredited by ICANN as a dispute resolution provider for domain name disputes. WIPO had been approved on December 1, 1999, and the National Arbitration Forum on December 23. The task of these three organizations was thus to resolve the growing number of disputes concerning domain names.

The UDRP procedure quickly came under severe criticism. It permitted claimants to choose any of the three organizations accredited by ICANN. Thus, the three accredited dispute resolution providers began competing because parties chose them based on price and service, or any other factor that seemed relevant. It became clear that trademark holders had a much greater chance of winning if the dispute was submitted to WIPO or NAF²⁷. In

26. *Ibid.*, 31.

27. Milton Mueller, “Rough Justice: An Analysis of ICANN’s Uniform Dispute Resolution Policy”, Syracuse University School of Information Studies, November 2000: <<http://dcc.syr.edu/PDF/>

fact, if trademark holders submitted disputes to either of those bodies, their chances of winning were around 90 percent, but only 60 percent if they submitted them to eResolution. How could this significant difference be explained? I refer the reader to the studies indicated in the footnote. I will simply note that eResolution's list of arbitrators included lawyers specializing in intellectual property (specifically with respect to trademark) who were also on the WIPO and NAF lists, but also a large number of legal practitioners who were in fact university professors. This was not surprising since eResolution was, originally, an idea advanced by academics. Academics have no clients to whom they have to answer. Thus, the decisions that they render in domain name disputes cannot come into conflict with the real or potential interests of present or future clients. In short, academics have only the law to defend, and do not have to consider the interests and feelings of various other parties²⁸. It is important to note that our investor, Aliant, was fully aware of the statistics, which gave our two "competitors" an advantage, but never intervened to ask us to soften our position by changing the balance of our list of arbitrators so as to increase the proportion of practitioners in relation to academics. Aliant fully understood that our credibility was our primary appeal.

Despite the harsh, well-documented criticism, ICANN did not change its UDRP procedure. After ten years, the UDRP procedure led to the resolution of thousands of disputes at a fraction of the cost and time that would have been required if the disputes had gone through the courts. eResolution facilitated the resolution of over 500 cases from the four corners of the Earth. At the time, eResolution was the only ICANN-accredited body with a web module integrating ICANN's Rules and Policy²⁹. This large-scale experiment was conclusive. It proved that online dispute resolution is a credible avenue

roughjustice.pdf>; Milton Mueller, "Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy", (2001) 17(3) *The Information Society* 153-163; Michael Geist, "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN-UDRP", Faculty of Law, University of Ottawa, August 2001: <<http://aix1.uottawa.ca/~geist/geistudrp.pdf>>; Michael Geist, "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN-UDRP", (2001-2002) 27 *Brook J. International L.* 903. See also Michael Geist, "Fundamentally Fair.com? An update on Bias Allegations and the ICANN-UDRP", Faculty of Law, University of Ottawa: <<http://aix1.uottawa.ca/~geist/fairupdate.pdf>>.

28. It goes without saying that most lawyer-arbitrators share this vision and demonstrate independence and impartiality when discharging their arbitration duties.
29. "It is interesting to note that in the cases handled by eResolution using a real online process, the respondent rate of participation in UDRP procedures was systematically and significantly higher. One of the reasons given for this statistical difference is that the online system makes it easier to prepare and submit a response." Karim Benyekhlef and Fabien Gélinas, "Online Dispute Resolution", (2005) 10-2 *Lex Electronica* 1, 33, online: <http://www.lex-electronica.org/docs/articles_87.pdf>.

that can meet the highest criteria of excellence and professionalism. eResolution ceased its domain name activities on November 30, 2001.

3. The ECODIR project: a European adventure

At the end of the CyberTribunal experiment (December 1999) and the beginning of the eResolution experiment, a decision was made to approach the European Commission for funding for a project that was, in a way, in line with the European Directive on electronic commerce³⁰, which was opening the door to online dispute resolution. For this, a team was created, the members of which included in particular Professor Yves Poulet of the Centre de recherches informatique et droit (CRID) at the University of Namur, who had been collaborating with the CRDP for many years, and Isabelle de Lamberterie, from the CNRS in France. Once we had obtained a research grant from the European Commission's Directorate General for Health and Consumers³¹, the ECODIR (Electronic Consumer Dispute Resolution) project was on track. It had three "work packages," as the Europeans say. The first was entitled "The 'Online' in Alternative Resolution of Disputes between Consumers and Companies. Feasibility Study", and was directed by Isabelle de Lamberterie. Its goal was to examine, from a socio-economic perspective, experiments conducted in Europe by various consumer dispute resolution organizations employing alternative dispute resolution (ADR) techniques. The second, directed by Yves Poulet, was entitled "Evaluation of the Legal Issues involved in the Implementation of an Extrajudicial Dispute Settlement System." It examined the legal issues relating to ADR. Finally, the third "work package" seemed more technical since it consisted in

30. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') *Official Journal L 178, 17/07/2000 P. 0001 - 0016*; Article 17: Out-of-court dispute settlement 1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means. 2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned. 3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

31. The ECODIR team received 500,000 Euros.

designing a web application for resolving consumer disputes. eResolution and its team were in charge of designing the application.

The ECODIR application has two parts: first, a negotiation stage involving only the consumer and the other party (the online merchant, for example). At that stage, consumers are guided by user-friendly questionnaires that invite them to specify the nature of the problem: the consumers have only to check certain boxes corresponding to the situation. The purpose of this approach is to guide consumers but not give them the opportunity to vent too much. The online merchant is also invited to describe its versions of the facts through a guiding table. After they have described the problem, the parties are invited to suggest ways of resolving it. The solutions appear in a table of proposal summaries that can be changed as counter-proposals are made. After 18 days, if negotiation has not led to a resolution, the parties can refer to a mediator. This is when the second stage of the ECODIR procedure begins, in which a third party is introduced. The third party takes cognizance of the exchanges between the parties during the negotiation stage, and performs mediation. Naturally, the mediation takes place online using tools made available to the parties: secure email exchanges, chatrooms, secure filing and exchange of documents, etc.³²

Launched in Brussels in October 2001, the ECODIR platform was well received by the various stakeholders: consumer associations, professional associations, industrial groups, the public sector, the European Commission, etc.³³ The technical aspects of the application were praised, as was its user-friendliness and the ease with which the parties can negotiate directly with one another, without the intervention of a third party. Yet, despite the approval, the ECODIR Project has never really taken off. It should be noted that the European Commission has also funded other projects of this nature that, unless I am mistaken, have never succeeded in setting up a veritable computer platform. Yet, a lot of money has been involved. It probably would have been wiser for the Commission to reserve some of the money to fund ECODIR's deployment phase. It has the best technological features and could have become a model in the European Union. In fact, it has the same technical features as the SquareTrade platform³⁴, which was set up specifi-

32. Karim Benyekhlef and Fabien Gélinas, "Online Dispute Resolution", (2005) 10-2 *Lex Electronica* 1, 107ff, online: <http://www.lex-electronica.org/docs/articles_87.pdf>.

33. ECODIR Project, Final Report, September 2003, p. 40ff.

34. www.squaretrade.com. Concerning SquareTrade, read the article by SquareTrade's President and CEO: Steve Abernethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems*, in ONLINE DISPUTE RESOLUTION (ODR), Papers and Proceedings of the 2003 United Nations

cally to resolve conflicts among users of the eBay auction site. SquareTrade had impressive success: between 1999 and 2008, its platform was used to handle and resolve two million disputes involving 120 countries and five languages, in other words, an average of more than 220,000 cases a year. It is unfortunate that the ECODIR platform has not been deployed in the same way, since it is in many ways equivalent to that of SquareTrade.

Additional resources would have allowed ECODIR to enter into alliances and partnerships with major European commercial sites (and, possibly, also with those based in North America), and to envisage the inclusion of a requirement to use ECODIR in case of dispute as a condition for obtaining certain quality labels:

The integration of ODRs within labelling systems is also an interesting mean to ensure a greater efficiency through a better enforcement of the reached settlements. Of course, the value of the label and the credibility of the labelling authority have a great impact on the usefulness of this synergy. The involvement of public authorities in labelling systems can offer the required credibility (independence and long-term viability). The success of the label sponsored by the Luxembourg Ministry of Economy clearly shows that businesses are waiting for that kind of public scheme.³⁵

Similarly, use of ECODIR's services could have been included in codes of conduct adopted by certain commercial sites and promoted by those sites in order to inspire consumer trust. In short, the ECODIR experiment did not take advantage of all the opportunities that were available. We will come back to this issue because it has to be noted that these problems are not specific to ECODIR.

Moreover, the European Union adopted, on March 13, 2013, the Regulation on Online Dispute Resolution for Consumer Disputes (the Regulation)³⁶, which "aims to create an ODR platform at Union level. The ODR platform should take the form of an interactive website offering a single point of en-

Forum on ODR (Katsh and Choi, Eds., 2003). Online at <<http://www.odr.info/unece2003/pdf/Abernethy.pdf>>.

35. ECODIR Project, *Final Report*, September 2003, p. 17.

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

try to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions”³⁷. It took nearly 15 years for the European Union to equip itself with a legal instrument and an online dispute resolution platform. However, it will still be necessary to wait 2016 for the entry into force of this Regulation and the actual starting of the platform. It is never too late to do the right thing. This being said, the Regulation is not free from ambiguity and it will be interesting to see how the European Commission and the member States will operationalize the platform.

4. Looking for a business model

More generally, the ECODIR case raises the issue of funding online dispute resolution systems. In the early part of the first decade of the new millennium, many web sites claiming to offer online dispute resolution services appeared. After skepticism and even mockery, came a time of copying and adapting. The economic situation encouraged this; it was a time of easy money and Internet fever, and when things began to cool down in the following years, there was still easy credit, a resolutely upbeat stock market and the certainty of eternal growth. Yet, aside from SquareTrade, few projects were credible and success stories were rather few and far between. The Internet bubble is one of the causes of online dispute resolution’s problems. Given the astronomical sums of money and profits involved in the Internet world, and the pre-eminence given to all that comes from the market (rather than the public sector), many could not imagine that online dispute resolution systems could be set up in any way but through the private sector. Only the private sector could have the credibility and means to develop innovative technology. Moreover, in those times of public sector disinvestment, the private sector was the only one that could offer an efficient, effective dispute resolution system. Indeed, since the Internet is transnational, it was difficult to see how a single state could offer this type of service. In short, everything was up to the private sector. For example, Global Business Dialogue³⁸, an association of major multinational companies, supports the principle of online dispute resolution, and it is not alone. Public players, such as the United States Federal Trade Commission, Canada’s Department of Industry and the European Commission, champion the principle of online dispute resolution. However, the public sector’s involvement depends on private initiatives. In other words, the general trend of leaving everything in private

37. *Ibid.*, preamble, par. 18.

38. <<http://www.gbde.org>>.

hands has not changed, and the public sector is counting on private players to fund online dispute resolution systems.

Yet, until now and aside from SquareTrade, which was able to take advantage of a captive market in the form of the formidable armada of buyers and sellers on eBay, major Internet stakeholders have not agreed to open their wallets to facilitate the establishment and operation of an online dispute resolution system³⁹. The cost seems high. Not only is it necessary to create a platform, but the platform has to be operated, maintained and adapted as technology changes. Despite stakeholders' discourse, nothing concrete has been done. Could it be that the private sector considers that, after all, rendering justice – which is also what is involved in ADR, whether or not it is online – is a public duty that belongs to the state? States seem either powerless or uninterested in developing such mechanisms. Are national borders obstacles? Probably. We might then think that the European Union could solve these problems because its authority transcends the borders of 28 states. Yet, aside from ECODIR and the Regulation, which is not yet in force, Europe has not produced any veritable online dispute resolution system that has won the trust of Internet users. Perhaps we need to create an association of major private Internet players, states and international organizations to provide a viable solution? Again, nothing has been done. Money is probably an important factor, but what would the amount involved be to such major players? Very little.

These experiments, from CyberTribunal to eResolution and ECODIR, also taught us that online dispute resolution can be used for disputes that do not have their source in the Internet. Indeed, there is no obstacle to using this technology to facilitate the processing and resolution of consumer conflicts arising in the physical world. I and others presented the ECODIR prototype to various departments of justice (in Québec, Belgium and Luxemburg), and all recognized the usefulness and pertinence of such a system for processing small claims. Thus, despite the entirely national nature of such disputes and the state's recognized and accepted control over them, no one has taken the step and established a domestic small claims mechanism involving negotiation and mediation stages such as those offered by ECODIR⁴⁰.

39. It is worth noting that Squaretrade does not provide, since quite a few years, the administration of eBay's dispute resolution process. Since then, eBay built its own platform and administer it without the help of any intermediary. For more information, see Louis F. Del Duca, Colin Rule and Kathryn Rimpfel, "eBay's De Facto Low Value High Volume Fast Track Resolution Process: Lessons and Best Practices for ODR Systems Designers", (2014) 6 *Y.B.Arb. & Mediation* 204.

40. Although it has yet to come into force later this year, British Columbia's Civil Resolution Tribunal

How can we explain public and private stakeholders' proclaimed enthusiasm for ODR systems when it seems they are unable or have no desire to really establish them? It is true that the world of (classical and alternative) justice is typically portrayed as conservative. However, after more than 15 years, beyond that stereotype, it is difficult to identify the exact causes of this failure to put sustained effort into effectively establishing online dispute resolution mechanisms. The obstacles seem to be neither specifically legal nor strictly financial, though such stumbling blocks should not be ignored. It seems that they are more psychological or cultural. At least, this is the hypothesis that I am suggesting. Indeed, it is one of the research areas of the Cyberjustice Laboratory that I have set up and of which I am the Director.

5. The Cyberjustice Laboratory: a little hindsight

After more than 15 years of studying software modeling and networking of mediation and arbitration processes, it seemed natural to turn to the "classical" justice system. Indeed, there is no reason to neglect the technological aspects of the legal system. Has it not been suffering the same problems for centuries: slow justice and high costs⁴¹. Recourse to information and communication technologies is one way among many others to reduce these costs and delays. Obviously, such recourse alone cannot solve all the problems plaguing our justice system, but it could probably diminish the harm. Moreover, I am suggesting the same kind of hypothesis as the one stated at the beginning of this article: that digitalization and networking

is very promising on this front. This tribunal, which has been established in 2012 by way of statute, is poised to provide a "broad range of collaborative dispute resolution tools", while integrating technology and focusing on access to justice (for more information, see: <<http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/>>). This project is part of a larger, transnational trend, recently emphasized by the publication of the Susskind Report, which insists on the utmost necessity of effecting a radical change in the way the British judicial system handles low value civil claims. To this end, the report strongly recommends the implementation of a publicly funded and administered online dispute resolution system. See Online Dispute Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, February 2015, online: <<http://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>.

41. "In the fifteenth century, Jean Juvéal des Ursins, Bishop of Reims, addressed a lengthy reprimand to Charles VII. He complained that justice was too expensive, too slow and confused. It was even remarked that 'it is as if court cases were immortal' in Parliament in 1413." Jacques Krynen, *L'empire du roi*, Paris, Gallimard, 1993, p. 267. [Our translation.]

will certainly have an impact on procedural and evidential law. That “action” should lead to a veritable *aggiornamento* of procedural law.

Indeed, modeling and networking court procedure should lead us to rethink procedure (and evidence) as it is deployed today; we should take advantage of the possibilities offered by technology to reconsider the very architecture of procedural law. Is the physical presence of the parties necessary? Cannot the absence of a party because of distance, for example, be compensated for through videoconferencing? Could not certain interlocutory procedures be conducted entirely online through a secure web site, exchanges of documents (electronic filing), chatrooms or videoconferencing? Quid for recourse to virtual reality and holographic technologies to recreate crime scenes or dispute circumstances without forcing those involved travel or rely on photographs? Other examples can be given that put the parties’ needs first and are initially limited to modeling existing procedures, though they are also the foundations for deeper reflection on procedure, which should lead to a revolution in court practices.

It is not a question of simply making justice faster and cheaper, though that is already a heroic, necessary mission! We also have to think about the deep roots of justice and identify procedural methods that correspond to contemporary socio-economic stakes. For example, is today’s justice equipped to process thousands of cases simultaneously and in a timely manner? There are many cases that cannot be brought (or are difficult to bring) before the courts owing to procedural complexity and cost, such as consumer disputes arising on the Internet and micro-disputes that the courts often ignore (neighbourhood quarrels; claims involving insurance, housing, banking and telecommunications, etc.). It can be argued that these cases do not belong before the courts, and that they can very well be settled out of court or simply by the passage of time. This slightly aristocratic vision of justice, according to which the courts examine only noble, important cases (which are decreed to be so by a small club), cannot meet the general public’s contemporary justice requirements. It is not a question of “judicializing” all possible conflicts, but of giving the opportunity to those who consider themselves wronged to get their voices heard rapidly and at low cost. In its present form, the court system cannot meet these requirements. Clearly, this issue goes beyond the legal framework, and encompasses broader considerations that overlap with philosophy, sociology and even history. This is also one of the research objectives of the Cyberjustice Laboratory. A few words about the original objectives of this ambitious research project:

The purpose of the Cyberjustice Laboratory project is to create research infrastructure for developing different software solutions to the many problems now plaguing the justice system. Thanks to a virtual hearing room, the Laboratory will be used for, among other things, developing a basic software structure for elaborating and testing computer models for facilitating online processing of disputes, digitalization of files, more efficient case management and establishment of decision-assistance systems. The purpose is thus to create software tools that will make it easier to network the court system and offer concrete, functional solutions to the various problems now facing the justice system (long delays, cost of procedures, etc.). These tools will not be limited to simply reproducing court procedures; they may also suggest new ways of doing things and thus revolutionize procedure thanks to innovative software design.⁴²

Since its inauguration, following the completion of its cutting-edge virtual hearing room in 2010, the Cyberjustice Laboratory has worked tirelessly toward the realization of those objectives. Initially funded by the governments of Canada and Québec⁴³, the Cyberjustice Laboratory project has been carried out, since the beginning, in collaboration with Professors Fabien Gélinas of McGill University's Faculty of Law and Professor Nicolas Vermeys of Université de Montréal's Faculty of Law, the latter acting as Assistant director. Whereas the main physical infrastructure of the Laboratory is hosted at Université de Montréal, a portable hearing room, hosted at McGill University, can be quickly set up anywhere in Canada, making possible the simulcasting of any proceeding. We are thus able to conduct simulations and test software modules developed in the Laboratory and by other integrators. This functionality also makes it possible for departments of justice to test web applications purchased from specialized companies.

Unlike the integrated information system projects that have encountered major obstacles, in particular in Ontario⁴⁴ but also elsewhere, this project is based on strong stakeholder involvement. Thus, rather than trying to network all of the court system at once, or giving the mandate to a single

42. Cyberjustice Laboratory, *Presentation Document*, Montréal, Centre de recherche en droit public, Faculté de droit, Université de Montréal, June 2009.

43. The research infrastructure costs \$6.2 millions.

44. Carl Baar, "Integrated Justice: Privatizing the Fundamentals", (1999) 42 *Canadian Public Administration* 42; Kirk Makin, "Computer lawsuit costs Ontario \$63 million", (June 1, 2005) *The Globe and Mail* A1, and Sarah Lysecki, "Integrated Justice Project 'too large, too complex, too ambitious': AG's office", (2005): <<http://www.allbusiness.com/technology/896690-1.html>>.

software integrator managing the project, our approach is modular and consensual (“bottom up”). It is modular in that we want to develop specific software applications for dealing with individual aspects of procedure one at a time. Our ambition is not to develop, in a single stroke, a computer platform that encompasses all aspects of procedure and all stakeholders in the justice system. Module construction is consistent with advancing by stages: after a number of years of work, it will be possible to unite the modules developed in open code, and form a complete chain representing all stages in civil and criminal proceedings. For example, we have, amongst others, conceptualized and developed the following software applications:

1. A case management module

The case management module acts as an electronic judicial registry. It allows the parties and their representatives to file, share and manage the documentation relevant to their case, while maintaining all of the court clerk abilities and prerogatives. The integrity of this module is insured through a secured, yet user-friendly online interface;

2. An electronic agreement as to the conduct of the proceeding

This application consists of a modelling of the electronic agreement as to the conduct of the proceeding, in accordance with the rules set out by the Code of civil procedure of Quebec. It allows the parties and their representatives, through an online application synchronized with their electronic agendas, to negotiate and conclude the terms of the agreement as to the conduct of the proceeding and to easily generate a PDF copy of this agreement.

3. A fully web-based courtroom management module

The courtroom management module is a web-based application allowing the electronic management of a courtroom’s technological infrastructure. Through a streamlined interface accessible on a mobile platform, this module enables the judicial actors (judge, court officers, lawyers, parties, witnesses) to control the courtroom functions according to their role and prerogatives in the trial.

More importantly, we have developed, in collaboration with judicial actors, the PARLe application. PARLe, which stands for “Platform to Assist in the Resolution of Litigation electronically”, is an online dispute resolution platform fully integrating negotiation and mediation functionalities. It aims to facilitate the resolution of low-intensity disputes by providing to litigants

an inexpensive, swift and user-friendly solution. PARLe is actually geared toward consumer disputes, but it could easily be adapted to a vast array of dispute types, in many fields of law.

Moreover, our software development approach is consensual in the sense that judges, lawyers, court administrators and representatives of civil society are involved in the software development process from the beginning. In fact, they are the ones who propose the procedural points that are the objects of our work. Our work schedule is thus determined in very close collaboration with all relevant stakeholders. We are far from the steering committees of major software integrators, which are composed mainly of technicians and in which law professionals are only sidekicks. Stakeholders' involvement at every point seems to me to be an essential condition for successful implementation of information and communications technologies in hearing rooms. Stakeholders' reservations with respect to technologies can be explained, in part, by the fact that they have been involved very little in the design and development of those technologies. The Laboratory has thus, for example, been closely collaborating with the Barreau du Québec, preminent members of the judiciary, as well as high-ranking civil servants, both on federal and provincial levels.

Nevertheless, software development is only one of the Laboratory's two primary research areas: it is the techno-legal area. The other area brings us to the reflections described above concerning deep reformation of procedural law and the obstacles that plague online dispute resolution systems: this is the socio-legal area. The latter area includes two objectives:

To identify psychological, social and cultural factors that are obstacles to or that curb networking and computerization of the legal system;

To provide avenues for restructuring our procedural law in light of findings discovered through work on new models for networking court procedures⁴⁵.

Once again, the Laboratory has been, since its inauguration, very engaged on this front. It has devoted important resources to theoretical and applied research and experimentation regarding these issues, which led to

45. The techno-legal and socio-legal research areas are primarily carried out through the *Toward Cyberjustice* project, as part of the work of the Major Collaborative Research Initiative, funded by the Social Sciences and Humanities Research Council (SSHRC) of Canada. For more information, see: <<http://www.cyberjustice.ca/en/projets/vers-la-cyberjustice/>>.

many publications⁴⁶. As a way of sharing our growing expertise, we hosted or participated, in the last few years, to numerous high profile symposiums, conferences and other events in line with this socio-legal work. We have, for example, hosted, in June 2013, the ODR Forum 2013 in the main hearing room at Université de Montréal, actively participated, in October 2013, to the World Social Science Forum in Montreal and, in December 2013, to the Law, Justice and Development Week 2013 in Washington, D.C. Finally, the Laboratory hosted in October of last year, the international colloquium E-Access to justice.

The pioneering innovation demonstrated by the Laboratory concerning the reformation of procedural law and the implementation of online dispute resolution processes allowed us to spearhead major global initiatives related to these matters. In this respect, the Laboratory leads, since 2011, the Toward Cyberjustice project, focused on rethinking procedural law and regrouping 36 academics in 20 universities and research centers around the world⁴⁷. This expertise has frequently been called upon on the international scene. Furthermore, we are currently co-leading the World Bank's Community of Practice on alternative dispute resolution, which emphasizes computerization, networking and implementation in developing countries.

The objectives are ambitious and the work schedule promises to be heavy. There are major obstacles facing any fresh approach to thinking about procedural law and evidence. Nevertheless, the academic milieu, to which the Laboratory is party, is currently the best place for such reflection to be conducted, thanks to its neutrality and long-term approach.

CONCLUSION

As just noted, the Cyberjustice Laboratory did not limit its work to the single issue of ODR. It also intends to contribute to shape 21st century justice by facilitating the networking of judicial actors and by rethinking judicial procedure and evidence through the lens of information technologies. In this regard, our work is well in progress, thanks to the remarkable contri-

46. Cyberjustice Laboratory, "Documents", online: <<http://www.cyberjustice.ca/en/documents-en/>>.

47. *Ibid.*

butions of the researchers part of the international network we established for the Toward Cyberjustice project⁴⁸.

However, it is also important to offer resolution avenues to those millions of low-intensity disputes for which no proper forum – that is, one that would be able to meet citizen’s expectations – currently exist. Traditional justice appears too sophisticated and complex to treat these low-intensity disputes, even though they must be resolved and whose importance, in the eyes of those directly concerned, should not be minimized⁴⁹. For these reasons, the issues raised in this article regarding online dispute resolution’s viability (low value, high volume) remain to be addressed.

Enthusiasm for the Laboratory’s work might be tempered by the rather disappointing results, historically, of implementing online dispute resolution systems on the Internet (online mediation and arbitration). However, it is not. Indeed, it would be difficult to imagine changing centenary habits in the space of a decade. The work is just beginning. Moreover, the outcome has not really been that disappointing when we consider the skepticism when such ideas were first presented. Moreover, far from being disappointing, the outcome has been until now very promising, especially considering the enthusiasm of the numerous actors involved and the skepticism initially directed toward our ideas.

Modeling and networking mediation and arbitration procedures has given me a better understanding of what the theory of legal pluralism means in practice. I jumped on the information and communication technologies bandwagon without knowing that it would lead me to the tasks of a “norm entrepreneur.” Participating in the design and implementation of norms governing electronic commerce is one of the by-products, so to speak, of developing online dispute resolution systems⁵⁰. This has made it possible for me

48. These contributions are available on the Laboratory’s website: <<http://www.cyberjustice.ca/en/documents-en/>>.

49. It is worth noting that the late Roderick A. Macdonald addressed the question of the existence of norms, normative processes and structures inherent to a vast array of apparently non-legal everyday situations and very low-intensity disputes. See Roderick A. MacDonald, *Lessons of Everyday Law*, Montreal, McGill-Queen’s University Press, 2002.

50. On this, read the remarkable work by Thomas Schultz, *Réguler le commerce électronique par la résolution des litiges en ligne. Une approche critique*, Brussels, Bruyant, 2005. Schultz says, rightly, on pages 5 and 6: “Consequently, here we will commit ourselves to introducing ODR (Online Dispute Resolution) as a new player in regulation of electronic commerce. Our thesis is that this player can develop, in certain very specific situations, significant regulatory power, characterized by marked independence from state law. This regulatory power can encompass contract law, dis-

to grasp the practical essence of the virtues and reality of legal pluralism. The state is no longer the only source of law. Asserting this may be easy, but proving it is more complex. Online dispute resolution reveals it clearly.

This said, “norm entrepreneurs” do not necessarily reject the state’s contribution. The state may seem capital for ensuring real deployment of the principle of online dispute resolution. This was noted above. Indeed, the success of this principle can depend on state action. There are thus three possible situations.

First, an online dispute resolution system could be developed to meet the needs of businesses engaging in commerce: B2B (business to business). Obviously, what is in question in this case is mediation or arbitration for disputes opposing two companies. A long tradition dating back to the Middle Ages (*lex mercatoria*) recognizes that merchants have the capacity to resolve their disputes among themselves, without state intervention. In this case, the development and operation of an online dispute resolution system would depend on the players themselves. This is how commercial arbitral institutions have been established around the world. For example, eResolution designed online mediation and arbitration software for the Centre de médiation et d’arbitrage de Paris (CMAP), the Chambre de commerce et d’industrie de Paris and the Québec National and International Commercial Arbitration Centre (CACNIQ). In such cases, the state’s role is minimal.

Second, there could be a situation like that of eBay, the leading auction site on the Internet. In this case, there are both consumers and merchants buying and selling products (C2C, B2C and B2B). It is a closed community that has developed its own rules of operation⁵¹. I mentioned above that, until 2008⁵², SquareTrade dealt with disputes arising from the use of that site. In this case also, the state does not intervene in dispute processing or in the operation of the online dispute resolution system. It is a case of a closed community that buys and sells products and services (well-defined actions) and that has adopted rules: to buy or sell on eBay, the user has no choice

pute resolution and settlement execution. The emergence of online dispute resolution as a player in regulation is due first to the fact that online methods for resolving disputes are sometimes the only recourse that is economically possible, and thus the only form of justice really open to parties.” [Our translation.]

51. <<http://pages.ebay.ca/help/policies/user-agreement.html>>.

52. Following changes in eBay’s feedback system, in May 2008, SquareTrade discontinued its online dispute resolution service regarding transactions made on eBay. See Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union*, Abingdon, Routledge, 2011, p. 148.

but to obey the rules. The success of the online dispute resolution system is obviously linked to that of the auction site itself. State action does not seem necessary for the deployment and smooth operation of online dispute resolution systems.

Third, there could be an online dispute resolution system for the general public. In such a case, we would not be dealing with a specific group of players (merchants) or a closed community in which compliance with the rules is a membership requirement. This would instead be a case of domestic and foreign users who employ the Internet in their everyday lives. They are probably very much like consumers in the physical world. The systems designed for this situation, such as ECODIR, have not been as successful as anticipated for the reasons suggested above (and probably for many others). Nonetheless, we can wonder whether state intervention is not necessary for the success of such systems. Indeed, who other than the state⁵³ has the financial power to back such systems (from design to implementation and operation) and to provide the consumer protection that in European Union countries and Québec falls into the domain of public order? Indeed, enabling the introduction of online mechanisms for managing and resolving small claims is probably the state's responsibility⁵⁴.

Development of norms for regulating electronic commerce thus especially requires online dispute resolution systems. The state's role seems to vary depending on the situation. It can take direct action (small claims within national borders), assist other players (co-regulation of electronic commerce involving the general public) or take a *laissez-faire* approach (business to business). It should be noted that Québec's National Assembly adopted, on February 20, 2014, a new Code of Civil Procedure, which accords a greater importance to the parties to a dispute and their role in its resolution, by putting a strong emphasis on the use of private dispute resolution processes⁵⁵.

53. Surely, we can look at the State, but we are well aware of the territorial limitations of its action. It is therefore worth considering *ad hoc* associations of states, as well as organizations of states, such as the European Union.

54. The United Nations Commission on International Trade Law's Working Group III has been drafting, since 2010, a set of non-binding procedural rules governing online dispute resolution for cross-border electronic commerce transactions. Once finalized, such rules could be used as reference frameworks for states wishing to regulate online dispute resolution mechanisms. For more information on these draft procedural rules, see the following United Nations Commission on International Trade Law's webpage: <http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html>.

55. For example, sections 1 to 7 of this new *Code of Civil Procedure*, R.L.R.Q., c. C-25.01, deal exclusively with "principles of procedure applicable to private dispute prevention and resolution

If the past is any indication of the future, this new development may very well enhance the capacity of private actors such as the Cyberjustice Laboratory to conceptualize, develop and eventually export new norms in the continuously growing field of online consumer dispute resolution.

This is not the end of the story. New chapters will be added as new technological innovations emerge and are accepted. It is a formidable task, but what is at stake is so big that it is more urgent than ever.

processes”, whereas section 26 states: “In applying this Code, appropriate technological means that are available to both the parties and the court should be used whenever possible”. The overwhelming majority of the dispositions of this new Code will enter in force in the fall of 2015.

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