19   ODR in North America[*]

Arthur Pearlstein, Bryan Hanson and Noam Ebner

This chapter, offering a regional perspective, involves a daunting challenge, that is providing an all-inclusive survey and analysis of ODR in North America despite the inherent diversity and prevailing multitude of norms and practices. As Melissa Conley Tyler wrote in the first comprehensive mapping of ODR, "most of the early activity in ODR took place in North America".[1] As a result, all of the perspectives listed above have roots, examples and lessons grounded in the North American experience even though ODR is intrinsically borderless and geographically unconstrained. Accordingly, whilst one can comment on how North American based entities might apply or offer ODR, the services involved might be utilized by a Malaysian importer (accessing the web in an airport in Australia) and a distillery in Scotland, assisted by a Belgian mediator. That, of course, is even before one considers that due to the way Internet technology works, communication between these far-flung parties might be broken up and routed through a dozen different countries before arriving at their destination.

These challenges might be easier to acknowledge than overcome. Our primary focus in this chapter is providing a comprehensive picture of the *status quo* of ODR in North America from the perspective of North America-based service providers, institutions and governments. Our review of service providers and institutions shall be exclusive to US and Canada, as the chapter on ODR in Latin America addresses initiatives in Mexico and Central America.

In the following pages, we shall commence by mapping out the state of ODR private market services. Subsequently, we look at the federal government and its potential roles as a major provider, and user, of ODR services. Thereafter, we shall address ODR professionals and providers, looking at organizational and structural themes as well as the nature of the services they provide. The US and Canada not only spear-headed the offering of ODR services; North American institutions were also the first to set up research institutes in this area of dispute resolution, as well as to incorporate it into academic curricula, as

1   M. Conley Tyler, "115 and Counting: The State of ODR 2004", *Proceedings of the Third Annual Forum on Online Dispute Resolution*, International Conflict Centre, University of Melbourne, 2004, p. 3.

we shall discuss. Finally, we shall shed light on the prospects of the existing combination of practice, research and institutionalization in order to try and determine which trends might provide a trajectory for ODR in North America over the coming few years.[2]

1   ODR Services in the Private Sector

The landscape of private sector organizations, governmental agencies, companies and individuals offering ODR services in North America has continued to shift since the extensive map of ODR providers across the world was presented in Melissa Conley Tyler's 2005 article *115 and Counting: The State of ODR 2004*. In this section, the current landscape of ODR services in North America is explored by addressing the following issues: (a) Who is offering ODR? (b) What processes are being offered? (c) What platforms and communication methods are being used? and (d) What organizational frameworks do providers adopt?

Conley Tyler[3] reported that by 2004, 57 ODR service providers had launched in North America. Her report indicated considerable flux: She reported that quite a few of these were inactive at the time of writing, and that on the other hand a significant number were new additions (as compared to an earlier mapping effort she had conducted), indicating a wave of entrepreneurship and a rise in overall activity. Six years later, the current map of ODR services in the US and Canada has changed substantially. Building on the 2004 map, we incorporate much of the methodology section of Conley Tyler's article in constructing our own strategy for mapping the field, and expand on it in several important ways.[4] However, it is worth noting that, owing to the rapid change in data and information,

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2   Colin Rule has stated that one of the problems with any technology-related book is "trying not to look silly after two or three years". See C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, San Francisco, Jossey-Bass 2002.

3   Conley Tyler (2004).

4   The adopted methodology is as follows: (1) the 57 sites identified by Conley Tyler's 2005 study were reviewed. We paid a site visit to each, including the sites she had listed as inactive at the time of her writing. (2) An assessment of activity was conducted on the basis of a three-stage examination: (a) service providers whose reported domain names no longer belonged to the service provider or no longer related to ODR (based on the site's content) were deemed inactive; (b) sites showing clear, *dated* signs of activity in December 2010 were deemed active; and (c) sites that still existed (indicating that the domain name has probably not yet been purchased by some other entity), but which did not show any such signs of activity were contacted by email, asking if their services were still available and explaining the reason for our inquiry. This email was sent to any e-mail addresses available on the site, and was often posted into and sent though another "contact us" automated field as well. Lack of response led to a label of "inactive". (3) Conducting an extensive search of sites beyond the previously identified 57 sites. This search included: (a) checking out service providers included on lists of ODR-related sites which may have been updated since the previous mapping; (b) reviewing the 2009 and 2010 Cyberweek sites, for mention of service providers; (c) reviewing the programs/websites of the 2009, 2010, and 2011 International Forums on ODR, and the 2010 Colloquium on ODR and Consumers; and (d) conducting Google-searches (first 100 results) for: "ODR", "online dispute

the survey undertaken may not be treated as all-inclusive or exhaustive; it can *exemplify* ODR in North America, and at best *represent* it in an informative manner.

For present purposes, it is submitted that only instances in which parties actually conducted some significant part of an ADR process, including interaction with one another or with a human/electronic neutral, online were included, as these processes reflect proper use of ODR. This approach led to setting aside two types of professional services. The first type includes organizations offering administrative software or services aiming to assist professionals offering ADR or ODR services.[5] The second type includes organizations utilizing technology to a limited degree at some stages (usually the filing stage) of a predominantly face-to-face process.[6]

It is a safe bet that as technology is increasingly integrated into the day-to-day practices of ADR professionals, examples will proliferate and distinctions between what might be considered "full ODR", "semi-ODR" or "ADR support" will blur and lose importance.

Unless there was an element involving a familiar form of ODR, we also did not include online commerce trustmarks, or services allowing parties to file complaints against online vendors or other businesses. Such was the case with the TRUSTe seal, and the Better Business Bureau (while this last largely tends towards face-to-face interventions, we have heard of cases where BBB "hotlines" or individual representatives have conducted telephone mediations supported by email for document exchange).

Finally, we only included service providers oriented toward the resolution of existing disputes. We did not include organizations and platforms providing automated negotiation services or the like in non-dispute contexts. In other words, we focused on the dispute resolvers, not the deal-makers.[7]

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resolution", "online mediation", and "online arbitration". (4) Finally, an "extensive supplementary searches and expert consultations" were conducted to determine other unknown sites.

5   Examples of this might be case or document management software offered by <mediate.com> and LibertyADR.

6   Examples might include JAMS' e-JAMS system, or "online case filing" offered by the AAA, FINRA and other organizations. On the other hand, organizations offering even some convening at-a-distance on top of such systems were included in our list. An example of this is Resolution System's (<settleonline.com>) incorporation of telephone participation in addition to online filing and document management.

7   Examples of deal-making services might be an e-HRM firm that offers its clients a negotiation support system to handle their salary negotiations. Another might be a sourcing company offering its clients a platform through which they can not only locate multiple suppliers, but also make contact and negotiate with them. A platform allowing buyers and sellers of real estate to contact each other and make offers and counteroffers would also fall into this category. While we feel that such services might ultimately hold great promise for ODR development they are not, as yet, usually treated as ODR. See N. Ebner, "Negotiating via E-Mail", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Scientific Publishing, Singapore 2011.

1.1 ODR Service Providers in North America

In addition to the above mentioned (57) providers already identified by Conley Tyler we identified another 13, bringing an estimate of the service providers who have operated in North America to 70.[8] Altogether, we identified 27 service providers currently active.[9]

1.1.1 Longevity and Constant Initiative

As in any industry, we see ebb and flow of ODR service providers. The great majority of providers launched in ODR's early days are no longer active. One way to demonstrate this is to note that of the (57) service providers identified by Conley Tyler as having been launched by 2004 in North America, only 14 still active. Not all of the other service providers have disappeared, but some of them are no longer providing ODR services, as defined herein. Longevity appears to be a challenge to ODR service providers, and this is certainly true of the first wave of innovators who had to figure out how to package and market ODR as well as face the bursting of the dot.com bubble. As Figure 14 shows, we found only six active providers who were established before 2000.

Figure 14 Established Online Service

Established Online Services
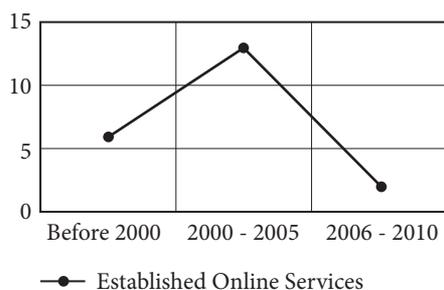
Conley Tyler's article left readers with a sensation that new players were constantly getting in the game. Has this trend shifted? Figure 14 would seem to indicate that it has, with only

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8   This number is not precise, for two reasons: First, as noted, there may be some differences between Conley Tyler's criteria for inclusion on the list and our own; some of her 57 providers did not make our cut, even though they are still active, perhaps others who are now inactive would have similarly been disqualified. Whether this is because we applied different criteria (and would not have included them in the first place), or because the services they offered at the time of her review were different than those offered 7 years later, cannot be established. Second, there are probably providers who established their services and subsequently shut them down during the uninvestigated period between 2005 and 2010 and were therefore not included in either of these two studies. However, as the first issue might lower the total number of providers, and the second might increase it, we feel that the numbers discussed in this Chapter are appropriate figures for portraying ODR in North America.

9   A full list of these service providers is provided herein below as Appendix A.

a couple of new services established over the past five years. However, we suggest that new players are getting involved – but in different organizational structures and business models, as discussed below.[10]

1.1.2   Geographical Dispersion

The review of the active service providers enabled us to map them geographically. A majority of the service providers are located in the US, as shown in Figure 15, with only five providers based in Canada.

Figure 15   Service-Provider Locations in North America
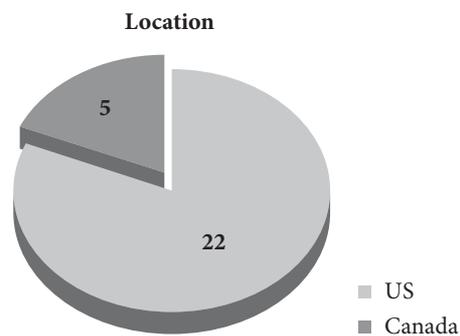

1.1.3   ODR Processes Offered

It is no easy task to try and map the range of ODR processes being offered. Many websites discuss ODR generically, or are vague about the specific processes being offered. We found service providers offering mediation, arbitration, complaint handling, automated and assisted negotiation, case appraisal, adjudication, negotiation support, mediation support, information exchange, facilitation, early neutral evaluation and settlement conference. A visual layout of these processes and their prevalence can be seen in Figure 16.

10   We also note that this chart is missing data: First, some service providers did not provide information on their establishment date on their websites. Second, this chart only lists active service providers' date of establishment. There may have been a number of service providers established after Conley Tyler's efforts and abandoned before our own, which are not reflected in these numbers.

Figure 16   Types and Prevalence of ODR Processes Being Offered
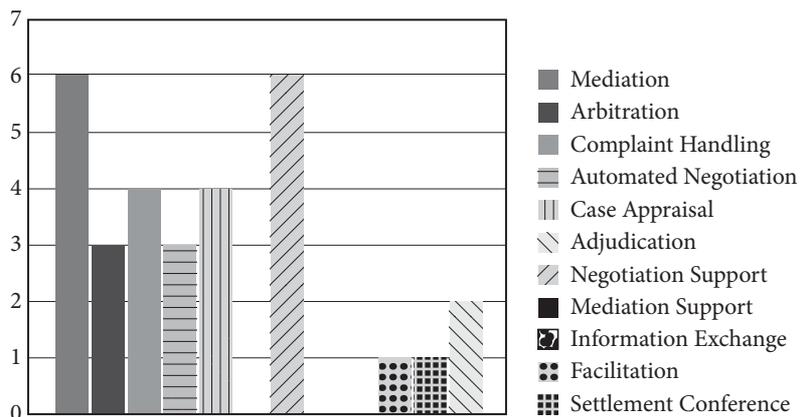
The breakdown in Figure 16 may tend to mislead. It is helpful as a tool for understanding how service providers tend to present themselves to the market and for understanding certain contexts of ODR (for example, to realize that four of the sites surveyed employ ODR in the context of complaint handling). However, we found that use of these terms by service providers did not always synch with the way they are usually used in the ADR field. Some service providers use hybrid names, brand names or trademark process names to jazz up a traditional ADR process. Others describe their process without using the label that would be given in traditional ADR. For the purposes of better identifying what is being offered, we made an effort to understand the essence of each service being offered, and broke down what we found into three broader categories: negotiation (assisted or automated negotiation, or negotiation support systems, all *sans* human third party inter-vention), mediation (with a human third party utilizing the technology as a fourth party), and arbitration (whether binding arbitration or non-binding, case appraisal-type processes). Many service providers, of course, offer more than one of these services. Our findings are displayed in Figure 17.

Figure 17   Categories and Prevalence of ODR Processes Being Offered
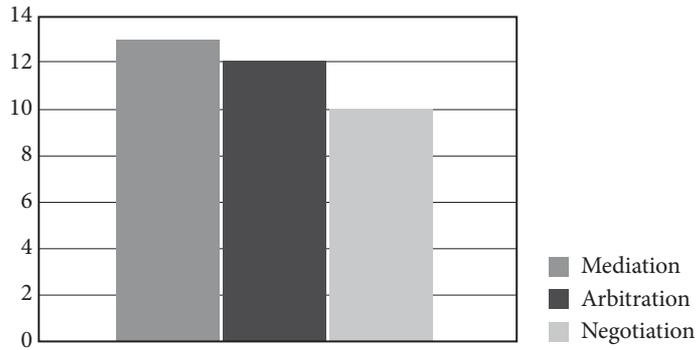
1.1.4   Multilanguage Services

It is interesting to note that many service providers do not see multilanguage services as something important or remarkable. Only a third of the service providers reviewed indicated on their sites that they offered their services in languages other than English, as Figure 18 demonstrates.

Figure 18   Language Offering of ODR-Process Service Providers
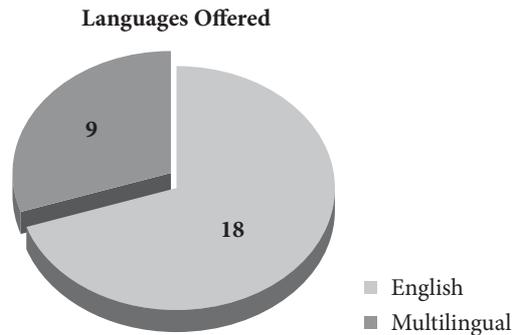
This might indicate that North American service providers are aiming their efforts primarily at the North American market. In Canada, of course, most of the websites have English and French sides, and even if not clearly advertised, probably offer services in both languages. However, the predominance of the English-language services in general is notable.

1.1.5   Explored, but Uncharted

In conducting our review, we noted several other interesting issues which resisted charting due to vagueness or a lack of uniformity in the way service providers inform their customers

about them, or because they require case-specific attention. We will briefly discuss three such issues: technology used by service providers, process cost and process timeframe.

1.1.5.1   Technology Used for Communication

While the issue of technological platforms and media used by service providers is of great interest, it is difficult to present a precise picture of the state of the art. A detailed analysis of this issue would involve conducting a test through every service provider – something far beyond the scope of our research which was mostly limited to exploring the way providers depicted their services on their websites. Some websites said little about the technology involved, others made sweeping statements (*e.g.*, "Through email, phone, fax, videoconferencing and other communication methods, we will…") which do not provide a real picture of how a process is conducted. Others provide only vague details (*e.g.*, "Our state-of-the-art technology will allow you to submit your claim and discuss your issues with the mediator and the other party…"). By contrast, many providers are very clear about communication methods (*e.g.*, "Private discussions between the Mediator and each party individually are held in an online chat-room environment." or "During the hearing phase, all of your testimony and evidence is given by email"). It is not clear why some service providers chose to be vague; this might be to avoid overwhelming potential customers with technological specifications or daunting thresholds; on the other hand, it may indicate a desire to disguise the fact that the actual technology used is not so cutting-edge.

Despite difficulty in mapping this out precisely, several trends were very obvious.

First, as of 2011 the age of video clearly has *not* arrived for ODR in North America. Excellent broadband infrastructure, and high level of user hardware and skills notwithstanding, the state-of-the-art of ODR communication media does not generally include use of video. Most of the service providers who have advertised use of video conferencing have by now either removed these references from their websites, or have become inactive (*e.g.*, the now defunct MARS, which advertised its unique video conferencing platform). ODR providers using video (such as the National Mediation Board, which uses video for arbitration and mediation) are the exception rather than the norm.

Second, text, whether synchronous or asynchronous, is by far the preferred ODR communication medium. Most service providers offer parties the ability to conduct text communication through their web platforms, while others prefer utilizing email for communication, document transfer, etc.

We also explored service providers' use of telephone conversations as a primary or supporting mode of communication. We found that quite a few did indeed offer this opportunity (although, they did not always advertise this prominently on their website's front page).

Finally, to get a sense for how the field is portraying itself, we noted that quite a few service providers advertise something new and unique in their communication platform

or in the technology used for dispute resolution (utilizing terms such as "unique", "patented" or "patent-pending", "dedicated", "custom-tailored") whereas we are only aware of a few systems that might authentically be called groundbreaking or notably original.

1.1.5.2   Cost

Some service providers do not provide information about their fees. Sometimes, this is done by saying it depends on the appointed neutrals rate (*e.g.*, Virtual Courthouse). Others ask to be contacted with questions regarding price (*e.g.*, Cybersettle). Others provide information in a way that is not likely to be familiar to an average disputant looking to resolve a claim (*e.g.*, SmartSettle, which is aimed at repeat players who must purchase software. The costs are comprised of the software licensing fee, optional additional facilitation and technical support services at a price, case filing fees and a bonus for successful, beneficial resolution).

On the other hand, some providers offered very clear pictures of their costs. In these cases, flat fees seem to be the norm: Resolution Canada, for example, offering domain name dispute resolution, provides a chart depicting the costs as a function of the number of disputed domain names, and the number of panelists desired. Similarly, Net-Arb asks USD 299 for a single arbitrator and USD 599 for a panel decision. The Sports Dispute Resolution Center also works according to a flat fee of USD 250 per claim. The AAA charges USD 50 for its online mediation service handling claims of under USD 10,000. Settle Today charges USD 99 per case. Filing a case for jury decision at i-Courthouse is free.[11]

1.1.5.2   Process Timeframe

Most service providers note that speedy resolution is a benefit of their ODR process. However, most are (wisely) cautious about pinning down a time frame. Often this is left vague, or explained as an outcome of the speed with which parties pursue the case.

Other service providers provide a careful projection of a time frame, such as the AAA's online mediation program which informs customers that "Issues usually are resolved within a 30-day time period". Others offer at least the hope of a more speedy resolution, such as The Virtual Courthouse, which states that "Most cases are resolved in less than 30 days. As the parties become familiar with the processes, the time is often under 7 days, sometimes a matter of hours". This is backed up by their committing not to cause unnecessary delay on the service provider's end, or as they aspire: "A neutral decision is filed

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11   We note that individual practitioners offering mediation online, as discussed below, are generally forthcoming about their fees, and these are generally structured in a way that reflect the practitioner's face-to-face fee structure, with clients usually being charged by the hour or by the session. This is not always the case, though, as exemplified by <http://settlebyemail.com> offering to mediate disputes for a flat fee of USD 100.

usually in under 24 hours after the case presentation is complete." Settle Today also promises 24 hour resolution.

1.2   New Trend: Individual Practitioners

Another chapter of this book (Ebner, chapter 17) has suggested that the future might hold a shifting of the organizational structure and branding practices of the online mediation practitioner. As this change already seems to be underway in North America, it merits a brief mention herein below.

Early ODR practice and literature has tended to focus on "service providers" and not on individual practitioners. There are many reasons for this, including the need to invest capital in designing and maintaining a technological platform, the sense of legitimacy accompanying an "internet company" as opposed to an individual offering services, and the large case-volume orientation of early vendors, which necessitated an organizational framework of a central business employing or maintaining a roster of individual practitioners.

As a result, in the early days of ODR, there were few, if any, individual practitioners offering their services to the public. Of course, an individual practitioner may have been a sole operator of an e-mediation service providing site, but this is hard to assess. To rely on the data we have at our disposal, none of the early books on ODR describe trailblazing individual practitioners, and in Conley Tyler's 2004 survey, we could not identify a single individual practitioner portraying themselves as such.

As noted, a new trend may be on the horizon, as some individual ODR practitioners are offering their services without trying to wrap themselves in a larger organizational blanket. The desire to gain an edge in a competitive market, the increasing adeptness and comfort of the general population with online activity, and the increasing availability of low-to-no cost platforms for communication all point to this trend taking hold across ODR in general.

In order to gain a sense of whether this trend is underway in North America we reviewed our previous search efforts, and identified 9 sites of individual practitioners (including small partnerships of 2-3 mediators) taking their practice online. All these practitioners offer mediation services, with two offering negotiation services as well. A list of these small-scale practices is provided in Appendix B. We did not find individuals offering online arbitration services.

While this is purely conjecture, we would suggest that these practitioners may only be the tip of the iceberg of ADR (including arbitration) professionals conducting hybrid and wholly online processes alongside their existing, face-to-face practice – to say nothing of

those who would be happy to do so if the opportunity arose – without advertising themselves as offering online or ODR services.

2   Government Initiatives in ODR

As mentioned elsewhere in this book,[12] the potential for the use of ODR in government is virtually limitless. In the US, the federal government has only begun to explore the depths of the possibilities. Across the federal government, ODR commonly exists more in the promise than in the execution. As of early 2011, an exhaustive search of Google's search platform for the US government reveals very few active applications of ODR, at least as far as what agencies are reporting on their websites.

By far the agency to have most extensively examined and successfully experimented with the promise of ODR has been the National Mediation Board (NMB), leveraging the National Science Foundation (NSF) grant to the University of Massachusetts at Amherst with NMB as a partner. Dan Rainey, who spearheaded NMB's share of the effort, has become a leading advocate of applications of ODR in the federal government. The Federal Mediation and Conciliation Service (FMCS) was itself an early adopter of a form of ODR with its "Technology Assisted Group Solutions" (TAGS) program. TAGS was, perhaps, ahead of its time in that its use originally required the transport and set-up of hundreds of pounds of equipment and wiring of multiple computer stations for use in facilitated sessions with labor and management negotiators. More recently, FMCS has set up TAGS electronic conference centers in several locations around the US and also has developed collaborative meeting tools and virtual conferencing using facilitate.com collaboration software.

One of the largest new frontiers for ODR in government may be found in the National Archives and Records Administration's (NARA) new Office of Government Information Services (OGIS). OGIS has been created to help mediate disputes over Freedom of Information Act (FOIA) requests and is part of a larger emphasis on "open government". OGIS is focusing on dispute prevention and resolution in connection with FOIA and has committed to use of ODR in a systematic way.

More broadly, the federal government is actively exploring ODR and quasi-ODR processes for use by agencies that tend to have very high-volume caseloads. The US Congress has directed the Administrative Conference of the United States (ACUS) to develop rec-

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12   See Chapter 12.

ommendations for improvements to Federal administrative processes and ACUS is taking a lead in exploring how agencies can use technology to resolve disputes more efficiently.[13]

The US Commerce Department's Commercial Service has taken some steps to promote the use of ADR generally and more specifically ODR for disputes between buyers and sellers in the context of US exports overseas.[14]

It should be noted that in the US, there are currently no court-annexed ODR programs. One intriguing application of ODR was Michigan's Cyber Courthouse, a fully online courthouse system, which was enacted by law in 2002 but which never got off the ground due to lack of funding.

In Canada, an interesting initiative for court connected ODR is CyberJustice's program involving ODR in small claims courts in Quebec.[15]

2.1   ODR Education

ODR is starting to catch on as a topic of study worthy of its own space in the curriculum of legal, business and dispute resolution programs.[16] In academia, most of the programs offering ODR courses are in the US, making this issue worthy of a section in this chapter.

The first university course on ODR was offered, not surprisingly, by The University of Massachusetts at Amherst. It was an undergraduate course in the department of Legal Studies. The first course on ODR offered at the graduate level (and, the first course offered in the framework of a JD program) was at Hamline University Law School. Other graduate programs offer courses on ODR at Southern Methodist University, the University of Maryland at Baltimore and California State University at Dominguez Hills. The Werner Institute at Creighton University School of Law was the first program to make ODR a mandatory course in a degree program. Viewing online activity as a fundamental element of *any* ADR practice, the Werner Institute has included a course on ODR as part of the core curriculum in the online-based instance of its master's degree in negotiation and dispute resolution.

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13 In late 2010, ACUS and OGIS jointly sponsored a workshop on "Technology in the Management of High-Volume Caseloads". Agencies involved included those working with disability claims, immigration review, and medical records access.

14 The US Department of State has convened an ODR study group with special attention to ongoing work of the UNCITRAL to develop legal approaches to ODR for resolving both B2B and B2C disputes. This is in addition to the USA's own ODR initiative pending in the Organization of American States (OAS), including a draft model law/cooperative framework for electronic resolution of cross-border e-commerce consumer disputes.

15 See Chapter 14.

16 See D. Rainey, *Teaching Online Dispute Resolution: Results form a Survey of Students*, 2010, available at <www.mediate.com/articles/raineyD1.cfm>, last accessed 26 April 2011.

Of course, ODR-related topics are incorporated in curricula in many other frameworks. Computer science programs offer courses on computer mediated communication (CMC) and other topics are covered in programs on communications and business. Many law schools offer courses dealing with "Law and Technology" or "Internet Law", many of which, depending on their teachers' inclinations, are partially related to ODR topics or include units on ODR. Courses on negotiation and ADR sometimes also include units on ODR, or on ODR-related topics such as online negotiation.[17]

Outside of academia, education directed at practitioner training and accreditation is scarce. In the past, the University of Massachusetts at Amherst offered its ODR course not only to undergraduate students, but in a separate format for professionals interested in continuing education.[18] Current examples include courses and trainings offered by the Northern Virginia Mediation Service (NVMS),[19] the InternetBar.org Institute[20] and private practitioners.[21]

2.2   ODR Research Centers and Initiatives

There are many research centers in North America whose span of interests touch on ODR-related topics, amongst which are the following centers, which deal most directly with ODR's core topics.

2.2.1   The National Center for Technology and Dispute Resolution (<www.odr.info/projects.php>)

Established in 1997 at the University of Massachusetts at Amherst, NCTDR is the central research institute focusing directly on ODR. NCTDR has been a partner to most of the major events and initiatives in the ODR field, including the International Forums and yearly Cyberweek conferences. NCTDR is currently engaged in a wide range of projects involving practice and research, including the use of ODR by US Army ombudsman units, the federal government, institutions dealing with electronic medical records and small claims courts.

NCTDR maintains ODR.info, the main e-portal for information, resources and news on ODR.

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17   N. Ebner *et al.*, "You've Got Agreement: Negoti@ting Via Email", in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009.
18   CITDR, 2008. Courses. Available at <www.odr.info/courses.php>, last accessed 15 January 2011.
19   Rainey, supra note 16.
20   InternetBar.org (2011). Online Dispute Resolution 101. Available at <http://iboinstitute.org/course/category.php?id=3>, last accessed 15 January 2011.
21   J. Melamed, Online Case Management / Communication, 2011. Available at <www.internetmediator.com/pg1.cfm>, last accessed 15 January 2011.

2.2.2   The Center for Research in Public Law (CRDP) (<www.crdp.umontreal.ca>)
Established at the University of Montreal in 1962, this institute was one of the first to conduct programmatic research in ODR, beginning with the Cybertribunal project. Elements of that early ODR project evolved into an ODR service provider, e-Resolution, which provided commercial e-mediation and e-arbitration of domain-name disputes until 2001. The software developed through these two projects then served as the basis for the platform used by ECODIR, the European Commission -backed ODR pilot initiative. The most recent initiative, undertaken in partnership with McGill University, is the CyberJustice Laboratory (see detailed description below). This project aims to develop different software solutions to the many problems currently plaguing the justice system. This research facility, a virtual courtroom to which it is attached, and a transportable courtroom housed at McGill University, will be used to develop and test software modules for facilitating online dispute resolution, virtualizing court files, managing court dockets in a more effective manner, and helping judges write decisions.

2.2.3   The InterNeg Research Center
**   (<http://interneg.concordia.ca/index.php?id=home>)**
The InterNeg Research Centre was established in May 2005 Concordia University; with its mission to promote research in the art, science and engineering of negotiation to advance the incorporation of technology into negotiation processes while still focusing on constructing human-centered methods, models and systems. InterNeg has conducted experiments with e-negotiation, has developed the Invite e-negotiation platform, and conducts research regarding negotiation processes conducted online and/or assisted by software.

3   ODR Professional Organizations

While an early initiative considered setting up an organization called CIDR (the Coalition of Internet Dispute Resolvers), professionals working in ODR preferred organizing within existing frameworks to setting up independent bodies. In addition to practitioners associating with one of the research centers described above, they have formed two frameworks within the two largest dispute resolution organizations in the US: The Association for Conflict Resolution's online section (<www.mediate.com/acrodr/>), and the American Bar Association's Dispute Resolution Section, which includes ODR as a special practice area (<www.abanet.org/dch/committee.cfm?com=DR021600>). Another professional organization dealing with ODR-related issues is the Internet Bar Organization (<http://internetbar.org/>).

3.1   Comments on ODR in Canada and in the United States

Having provided a thematic view of ODR in North America, we now focus on ODR in the context of the US and of Canada. As we have noted, much of the well-recorded history and development of ODR is synonymous with ODR in the US. ODR development in Canada, by comparison, has not been so well- publicized or documented. Therefore, we limit ourselves to relatively brief comments on the US and provide a more detailed discussion of ODR development in Canada, including descriptions of several programs and projects currently advancing use of ODR in that country.

3.1.1   ODR in the US

Much of ODR's early development was based in the US for several reasons: (a) the early development of US-based internet, for defense and research projects; (b) the deeply-set roots and early adoption of ADR processes in the US; (c) the competitive and innovative nature of the US ADR market; (d) the high-quality ICT infrastructure; (e) the tech savvy, increasingly wired population; and (f) US corporate culture, demanding instant accessibility of people and information.

We have noted that the spread of ODR service providers in the US may have slowed down over the past few years. Indeed, one gets the sense that the market has paused to some extent while experimentation with new models takes place. One direction of exploration seeks to copy the most successful ODR implementation, eBay, by means of identifying or framing occurrences of similar disputes, in mass volume, in regulated or organized contexts.[22] The best example of this trend might turn out to be the move towards governmental applications of ODR, although this remains to be seen. Other instances, closer to the eBay context, might be mechanisms put into place by credit card issuers to resolve chargeback disputes. Another path of application may take the opposite direction, as small-scale practitioners attempt to encourage use of ADR and increase their own market share by offering ADR services at-a-distance.

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22   eBay is the largest-scaled ODR presence in the North America. It has been implementing dispute resolution schemes since 2003. Until 2008, SquareTrade, another US-based company, was providing dispute resolution schemes for eBay, but solely with respect to disputes regarding feedback given between buyers and sellers in the eBay marketplace. However, eBay regularly handled all other types of disputes through in-house processes that combined automated processes and human intervention. Upon the acquisition of PayPal, eBay's ODR programs based on the latter's experience were extended to PayPal's operations as well, eBay currently handles roughly 60 million disputes per year through its dispute resolution system. The most common disputes are: (a) *Unpaid items*; (ii) *Item not received / not as described*; (iii) *Feedback rating disputes*; and (iv) *eBay motors feedback disputes*, which are outsourced to a US-based company, NetNeutrals, for a staged process involving assisted negotiation and a form of arbitration dubbed "feedback review". Overall numbers indicate that less than ten percent of all disputes are touched in any way by humans. This information is based on Interviews with Colin Rule, Director of Online Dispute Resolution, eBay and PayPal, 2 February 2011 and 10 March 2011.

Three things are certain: First, that there is a great deal of room for innovation in ODR in the American context. In addition to suggesting new ways to employ ODR in existing structures, there are a great many "open spaces" in which ODR can develop. Indeed, the internet itself will become "an even greater site of change by virtue of its existence as an enormous open space in which privately ordered dispute resolution will dominate over traditional litigation" in the US.[23] New concepts for online marketplaces, any of which could be the next eBay, will need new concepts for dispute resolution. Social networking sites open up a range of opportunities – both as a tool for dispute resolution and as a venue for disputes needing a resolution element. As existing communities move online (*e.g.*, school websites becoming a meeting place after school hours) and new communities form online, new roles on ordering, regulating and monitoring these communities evolve, and some roles involve dispute resolution. These opportunities are not limited to the US, but are likely to emerge there first based on past experience and on developing trends in online activity.

Second, is that to service these open spaces, there now exists a cadre of experienced practitioners and systems designers, as well as tried-and-tested technological platforms. No longer do individual enthusiasts need to invent the wheel for each individual context, site or market.[24]

Third, it is certain that there is no shortage of enthusiasm for figuring out how to best approach these open spaces. Beyond our observations of people already in the ODR field, our work with students across the country approaching projects for class or developing their own roads into ADR practice shows us that the technological barrier is no longer as frightening as it once was, and that the new generation of practitioners sees the internet as an exciting extension of their own traditional resources for practice.

3.1.2 ODR in Canada

Canada has an impressive history in alternative dispute resolution (ADR). There are many member organizations, educational initiatives, mediation centers, and individual practitioners throughout the country. This serves as a strong foundation on which to integrate ODR elements into ADR practices, in addition to new development. However, this factor favoring advancement of ODR in Canada is dwarfed by the factor of simple geography. Canada is a country with its population far-flung across vast territory, with approximately 33 million people spread out across over 3.5 million square miles. Territory-wise, it is the second largest country in the world, larger than the US. However, population-wise, it

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23   A. Pearlstein, "Meet the New Lawyer: How Settlement is Transforming the Practice of Law", *Cardozo J.Conflict Resol.* (2008) 10.
24   One good example of this would be Colin Rule's new start-up Modria.com, which emphasizes using approaches and platforms developed for the large-volume caseloads encountered at eBay and PayPal in other dispute contexts.

places thirty-sixth, with a tenth of the population of the US. The distances involved in convening people, and in connecting people with institutions such as courts and government offices, are prohibitive in many ways. This creates a setting that is well positioned to achieve vast benefits from the integration of ODR principles into the resolution of disputes across many contexts.

Canada has been home to ODR initiatives since the mid-to-late 1990s, and is increasingly becoming home to a lively ODR scene. While relatively low on active service providers (see Figure 15, above), innovative practice initiatives and research are being led by practitioners and academics across Canada. Some of these have already been mentioned in previous sections of this chapter regarding service providers and research centers. In this section, we will touch on a few central elements of ODR in Canada.

3.1.2.1   *SmartSettle*

Smartsettle is a series of negotiation support systems developed by Canadian company iCan Solutions, Inc. Led by Ernest Thiessen, the Smartsettle team has developed systems aimed not only at helping parties exchange offers or identify middle ground, but at allowing them to identify opportunities for creating and gaining value that so often goes unnoticed in many traditional negotiations. Parties inform the platform of their real preferences and priorities, beyond what they are willing to share with the opposite party. In the event that parties reach agreement on their own, the platform can conduct an analysis of the agreement to see if it maximizes each party's gains, and offer the parties *improved* solutions which are at least as good as the one they reached on their own – and usually better. Parties can, of course, reject these offers and stay with their own solution; however, the advantages of the computer-optimized solution are usually very obvious to both parties. Smartsettle's original product, Smartsettle Infinity, was developed for multi-issue disputes. Recently, their new product, Smartsettle One, was launched; this product offers an original form of blind-bidding for parties in single-issue negotiations, which incorporates optional second-level ODR processes, in the form of intervention-at-a-distance by a human arbitrator if agreement is not reached by the parties.[25]

3.1.2.2   *The Sports Dispute Resolution Center of Canada (SDRCC)*

The Sports Dispute Resolution Center of Canada (SDRCC), the body tasked with handling mediation and arbitration of all sports-related disputes with athletes who belong to, or participate in, a Sport Canada related organization, has long facilitated dispute resolution processes at a distance via telephone and email communications. The SDRCC is now rolling out an online case management program to assist the parties involved throughout

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25   For more on Smartsettle's negotiation support systems, see E. Thiessen *et al.*, chapter 16 in this book.

the entire mediation or arbitration process. This program, developed in-house, is ready for release in its English version, with the French version in final testing.

There are multiple facets to the SDRCC case management and dispute resolution program: Participants can view cases they are involved in, view documents pertaining to the case submitted by parties or by neutrals, and find general information aiming to assist or educate the parties, mediator, or arbitrator. The program also includes a calendar (which can synch with a user's web-based calendar) which lists events and sends out event reminders to all parties.

In conjunction with the case management process, the SDRCC provides a fairly inno-vative process combining phone conferences with a web-based service for facilitation by the mediator or arbitrator. The platform allows parties to call in via a toll free number. The mediator can track who has called in via a web-based platform, and can call in other witnesses or related parties by typing their number into the program. Caucuses or private meetings can be convened by simply dragging the phone number into another room. The SDRCC system is a good example of tailoring technology to suit a particular organization's entire dispute resolution process.

3.1.2.3   The Distance Family Mediation Project

An important initiative regarding the feasibility of integrating ODR principles into the context of family mediation was piloted by the British Columbia Mediator Roster Society, between May 2009 and February 2010. This pilot project, funded by the Law Foundation of BC, set forth as the goal:

> "…to explore the feasibility of providing British Colombians, living in remote,
> non-urban areas with access to competent, qualified mediators through the
> use of information and communication technologies."[26]

All in all, 31 cases were mediated and 23 of them concluded with agreement. It is important to note that whereas all the mediators participating in the project, after participating in training and conducting role-play, initially saw the most potential in using platforms with multiplatform videoconferencing (*i.e.*, more than one person are shown on the screen at once) which allowed for document sharing and editing, this high-tech environment was not the one in which the mediation processes ended up being carried out. In practice, mainly due to parties' access to, and comfort with, technology, most of the work was done through telephone, teleconference and e-mail (in fact, web conferencing was only utilized in one case) – and parties and mediators both expressed high satisfaction rates with the

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26   C. Getz., *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*, Victoria, BC, British Columbia Mediator Roster Society 2010.

media.[27] This holds promise not only for the potential for success of ODR in the context of family mediation, but also for the potential success of ODR even when circumstances or resources dictate relatively low-tech contexts.

3.1.2.4   Cyberjustice

We have already noted the CyberJustice Laboratory at the University of Montreal's Centre de Recherche en Droit Public (CRDP). For more information on this initiative, the reader is advised to consult the chapter on ODR and Courts.[28] If there is any question remaining in our minds after having reviewed ODR in Canada, including interviewing many of the actors in the field, it is why is there not more ODR in Canada, and why does the field seem to be developing slowly? Given the obvious need for ODR, the positive experience Canada has enjoyed in developing comparable systems such as e-government and distance learning, and the wealth of knowledge and enthusiasm demonstrated by the examples we have mentioned – why do we not encounter more service providers, and more government initiative? Our own explorations and our conversations with Canadians involved in ODR have provided suggestions but no clear answers.[29]

Finally, if there was one clear theme running through our interviews with people involved in the ODR field in Canada, it was one of optimism. The spate of current projects, combined with the boost in energy and attention Canada's ODR field has received as a result of the recent conferences hosted in Canada, has them anticipating a well-developed ODR field in the near future.

4   Anticipating the Future: ODR in North America

The corporate culture in North America, not unlike that in other parts of the developed world, has rapidly transformed itself through emphasis on and mechanisms for rapid communication and collaboration. Greater use of multiple IT capabilities, including real time and non-real time communications, have made it possible to find people in virtually any location, on almost any kind of device, placing an ever-greater premium on responsiveness.

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27   *Id.*

28   See Chapter 14.

29   These suggestions revolve around: (i) the relatively low comfort level with technology experienced by many practitioners; (ii) the quality of internet access in outlying areas; and (iii) the fact that some of the institutional and practitioner energy is aimed at court automation initiatives, which could ultimately integrate ODR schemes. However, as noted by our colleagues, this does not prevent low-tech ODR methods such as hybrid email/phone mediation. It was suggested that the success of The Distance Family Mediation Project was likely to encourage similar projects on the individual and organizational level.

At the same time, businesses are also making increasing use of team collaborative tools such as shared applications, online white-boarding, and virtual group workspaces, enabling geographically dispersed employees to work together more effectively. Likewise, companies that fail to make use of blogs, social networks, podcasts, wikis, tweets, and other such tools are becoming the exception to the rule. Many of these approaches involve a blurring of the line between corporate and popular culture.

In North America, most large enterprises involve geographically dispersed teams that heavily depend on the ability to work effectively on the fly: faster, better decision-making, more robust communications, more efficient work flow. In the same way, these large enterprises must also wire themselves for conflict resolution. They need to become at once creative and aggressive in application of technological tools for dispute resolution just as they are for enhancing their productivity in other ways. Which is to say: such enterprises are natural environments for the increasing utilization of ODR.

Corporate trends are just one indicator of what lies ahead for ODR in North America. Trends in government culture and practice seem to lead in the same direction. Canada has regularly ranked first in the world in the development and quality of its e-government services.[30] The US, usually placing second in these rankings, has seen substantial commitment and investment in the executive branch aimed at increasing the visibility, effect and efficiency of e-government programs. Other programs may involve greater use of ODR as an unintended, but positive consequence. The fast-changing government and private-sector dynamic in the healthcare context is likely, for example, to entail ODR systems being implemented in issues pertaining to medical records. At the same time, the accelerating growth of online education at all levels is not only leading to an expansion of infrastructure, but to more people becoming accustomed to conducting meaningful activities online. The efforts in the education context will continue to involve activity in government, non-profit, and for-profit sectors, mirroring to a degree the landscape of ODR.

This leads to one last supporting indicator: the average North American user. It is obvious that people are increasingly moving elements of their lives online. This has important implications for ODR: as people become used to shopping, dating and studying online, they grow more comfortable with handling issues of transactional security, inter-personal trust and safety and generally with pursuing relational engagement online. All of these traditional barriers to ODR may simply melt away as a result of people simply "getting used to it". Factor in the number of North Americans sharing their lives on Facebook or MySpace, or inhabiting virtual worlds, and you reach the conclusion that the line between the online and the offline may be disappearing. ODR cannot help but continue its growth in this context.

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30 E. Chabrow, *Canada is Still No. 1 in E-Government Rankings*; World Bank, *E-Government Experience in the US and Canada: How Relevant is it to Developing Countries?* 2004.

With business, government and personal/cultural trends all pointing in the same directions, the next few years are likely to be exciting for ODR in North America. Beyond the trends we have mentioned, and the developments we have anticipated, we are dreaming of the unforeseeable aspect of ODR (and of the technological avalanche carrying it along in general): future developments usually turn out to be even more interesting than current predictions. We are especially looking forward to that.

Appendix A

Table 5   Service Providers in North America

Service providers identified by Conley Tyler (2005) and still active		
American Arbitration Association	<www.adr.org>	US
Better Business Bureau Online	<www.bbbonline.org>	US
Cybersettle	<www.cybersettle.com>	US
Family Mediation Canada	<www.fmc.ca>	CAN
Federal Mediation and Conciliation Service	<www.fmcs.gov>	US
iCourthouse	<www.i-courthouse.com>	US
National Arbitration Forum	<www.arbitration-forum.com>	US
PayPal	<www.paypal.com>	US
Resolution Canada	<www.resolutioncanada.ca>	CAN
Settle Online	<www.settleonline.com>	US
SettleTheCase	<www.settlethecase.com	US
SmartSettle	<www.smartsettle.com>	US
TRUSTe	<www.truste.com>	US
WebAssured	>www.webassured.com>	US
New Finds		
Settle Today	<www.settletoday.com>	US
Electronic Courthouse	<www.electroniccourthouse.com>	CAN
National Mediation Board	<www.nmb.gov>	US
Onlinearbitration.net	<www.onlinearbitration.net>	US
Fair Outcomes	<www.appellex.com>	US
Virtual Courthouse	<www.virtualcourthouse.com>	US
net-ARBitration Works	<www.net-arb.com>	US
Juripax	<www.juripax.com>	US

Chamber Settle	<www.cybersettle.us>	CAN
Netneutrals	<www.netneutrals.com>	US
eBay Resolution Center	<www.resolutioncenter.ebay.com>	US
Sports dispute resolution center of Canada	<www.crdsc-sdrcc.ca>	CAN
Fiserv	<www.fiserv.com>	US

Appendix B

Table 6   Individual Practitioners Offering Online Mediation in North America

<www.butlermediation.com>	US
<www.onlinemediationworks.com>	US
<www.settlebyemail.com> (same provider)	
<www.gsaxbymediation.com>	CAN
<www.mediatingattorney.com>	US
<www.mediation-solutions.us>	US
<www.themediationline.com>	US
<www.mediationinitiatives.com>	US
<www.genesismediation.com>	US
<www.bostonchasemediationgroup.com>	US