Cyberhandshakes: How the Internet Challenges Dispute Resolution (...And Simplifies It)

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Independent Studies Paper

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The worldwide spreading of the Internet, with its unique structure and culture, global reach and low barriers to entry, is changing and reshaping social behaviours and commercial exchanges – with important effects on jurisprudence and legal systems at the national and international levels. Specifically, the steadily increasing quantity and variety of Internet-based transactions and activities prompts the necessity to find innovative solutions in the field of dispute settlement – a need acknowledged by both IT law practitioners and scholars.

This author means to provide a contribution towards the integration of theoretically- and practically-oriented perspectives on the subject, and argues that the Internet's very features that pose challenges to the field of dispute settlement can become the primary key to solve, or at least simplify, these challenges. She focuses this study on the specific domain of dispute resolution mechanisms for Internet-based commercial exchanges, and places a special attention to the European legal and social dimensions as case studies.

The study starts with a discussion of the Internet and its unique structural and cultural features; continues with a discussion of how the use of the Internet as a venue for commercial transactions and activities raises a number of jurisdictional issues; turns to analyse the suitability of alternative dispute resolution (ADR) mechanisms to regulate such activities, and how these mechanisms could be incorporated in a private-public hybrid regulation system. Finally, it examines how the limitations of traditional ADR can be overcome by making use of the very Internet during dispute resolution proceedings (thus called Online Dispute Resolution - ODR), and assesses the future of ODR as an emerging field currently in a phase of steady development, before drawing some concluding remarks on the future of dispute resolution "for the Internet, via the Internet".

This Independent Studies Paper is submitted in partial fulfilment of the requirements for the degree of Master of Arts in International Law and the Settlement of Disputes.

Science and technology multiply around us.
To an increasing extent they dictate the languages in which we speak and think.
Either we use those languages, or we remain mute.
- J. G. Ballard

Acknowledgments.

Thank you to my family for their love and support. At least for a while, I'm coming home now – I promise! ☺

Thank you to my advisor, Prof. Gudmundur Eiriksson, for his guidance and assistance during the writing of this study.

Thank you to the University for Peace family – faculty, staff and my fellow students – for making this year the diverse, lively and unforgettable experience it was.

Prelude…

With a somewhat distressed look on her face, that a smile manages only partially to erase, my mother often shares with me this perception: the world is going so fast, that sometimes she thinks of herself as unable to sustain the pace it is imposing.

She grew up listening to her own mother's recollections of World War struggle, survival and death – of days when food was not an option, let alone electricity.

Now she listens to her daughter, who has spent most of the last three years on the other side of the Atlantic Ocean, telling her about her research on Internet participatory practices – scores of times, for free, by the only means of a laptop and a software application running on VoIP technology.

She cannot help but finding it almost unbelievable. But this is the world where we are living now, a world in which – needless to say – it is no longer conceivable for many to live without technology.

1. Introduction

The Internet has radically changed and newly shaped social behaviours, economy and commercial exchanges; the reasons that made this possible are to be found in the set of main values that are reflected both in the engineering principles that guided its design and in the culture that supports it, namely decentralisation, responsiveness, availability, anonymity, absence of boundaries, egalitarianism and openness, and last but not least, a cost of use that makes it accessible to a scale whose extent is unprecedented.[1]
This has enabled not only the formation of new habits, in a general sense, for the public of end users, but has favoured and developed new forms of juridical and economic relationships – that jurisprudence inevitably needed and needs to acknowledge and follow. The Internet, today's primary engine of creation of and challenge to human exchanges in many sectors, not only has become, at the same time, the main ally of jurisprudence scholars in the search for uniform system(s) of regulation, but further permits the elaboration of innovative solutions to the main deficiencies and pathologies of current ones (e.g. the excessive slowness of judiciary procedures in traditional fora).

This author intends to focus the present study on the specific domain of commercial exchanges and dispute resolution, and argues that the Internet's very features that challenge the field of dispute settlement become the primary key to solve, or at least simplify, these challenges. This argument is supported by an analysis of promises and challenges of the Alternative Dispute Resolution field, and in particular of its online equivalent, called Online Dispute Resolution (ODR).[2]
This study provides a contribution towards bridging the perspectives of scholars and practitioners in the field of IT law, that focus on one hand on the Internet as a juridical entity and on the effects it has on individuals and companies as juridical persons, and on the other hand, on the Internet as a practical tool in dispute resolution proceedings. It consists of an analysis of literature and cases relevant to the topics of Jurisdiction and the Internet; the shift encouraged by the Internet to hybrid and alternative dispute resolution frameworks; Online Dispute Resolution. Throughout the analysis, the author gives particular importance to the challenges posed by the Internet to the current international legal system as well as its potential to provide solutions to these challenges. More in detail, the study is divided into four chapters.
It starts with a brief – albeit necessary for any meaningful social and legal

1 Gelbstein E. and J. Kurbalija, *Internet Governance: Issues, Actors and Divides,* DiploFoundation and Global Knowledge Partnership, 2005.

2 Also called Internet Dispute Resolution (iDR), Electronic Dispute Resolution (eDR), Electronic ADR (eADR), Online ADR (oADR).

analysis of the Internet – introduction of how the Net was born, the core elements of its technical architecture, as well as the main principles that inspired its creators.
The second chapter of the study analyses one of the Internet governance legal issues requiring the most urgent attention: the possible inadequacy of the traditional concept of jurisdiction when it comes to Internet-based transactions and activities. Some different approaches to this issue will be discussed, as well as the author's stand on each of them.
The third chapter shows how the social and legal landscape outlined up to this point determine the need – that can no longer be delayed – to find dynamic (but binding) solutions to disputes and controversies, especially in fields like Internet-mediated commercial exchange. It examines how this has led to the diffusion of alternative systems and institutions such as arbitration, mediation and conciliation (methods known as Alternative Dispute Resolution) that are today the subject of renewed interest because of their suitability to the current developments in the economic and commercial landscape. The possibility of hybrid regulation frameworks for Internet-based activities – able to take into account elements of private ordering and alternative dispute resolution – is examined. Particular attention is paid to the elements contained in the bodies of law regulating sea and outer space that can be useful for the model.[3]
The fourth section draws upon the lessons learned in the previous sections to discuss how the Internet's very structure and underlying vision contribute to the solution, or at least the simplification, of some of the same challenges they are posing to the field of dispute resolution – and to what extent Online Dispute Resolution methods are an example of this. It finally suggests some possible developments of the ODR field according to this perspective, before drawing some concluding remarks on the future of dispute resolution "for the Internet, via the Internet", with the view that the best way to improve dispute settlement for Internet-related activities is the quantitatively and qualitatively increased use of online technologies in dispute settlement proceedings.

3 See Perritt Jr. H.H., *The Internet is Changing the Public International Legal System*, 88 Kentucky Law Review 885, 2000, available at URL http://www.kentlaw.edu/cyberlaw/perrittnetchg.html.

2. The Internet: Birth, Vision and Structure

The present section consists of an introduction to the birth of the Internet, the core elements of its technical architecture, as well as the main principles that inspired its creators. Although brief, this introduction is necessary to produce a meaningful legal – and at times political – analysis of the challenges and applications of the Internet in the more specific context of dispute resolution mechanisms.

2.1. Some Pioneers, a Vision, a Birth[4]

As its pioneers had conceived it, the Internet was meant to be free from any obligation to states, and in opposition to the structure of old state systems. To put it in the words of one of those pioneers:

> Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.[5]

This difference lies in the main features of the culture of the Internet, originally a product of the enthusiasm of engineers and programmers; people liking to create and modify computer software and hardware, including computer programming, administration, and security-related items, believing that "information-sharing is a powerful positive good, and that it is an ethical duty of hackers to share their expertise by writing open-source code and facilitating access to information and to computing resources wherever possible".[6]
The core features of the Internet, as it is today, gradually emerged from this vision. For example, efficiency and robustness in case of network failure were fostered by the development, throughout the Seventies, of the International Packet Switched Service (IPSS), that relied on the packet switching paradigm – which based communications upon "packets" of data, rather than a dedicated circuit established between sender and recipient (e.g., how telephone networks

4 References for this section, in addition to specific notations, have been drawn from *supra* note 1; Berners-Lee T., *The World Wide Web and the Web of Life*, W3, available at URL http://www.w3.org/People/Berners-Lee/UU.html ; IETF, *FYI on "What is the Internet?"*, 1993, available at URL http://www.ietf.org/rfc/rfc1462.txt ; Leiner B. M. *et al.*, *A Brief History of the Internet,* 2003, available at URL http://www.isoc.org/internet/history/brief.shtml.

5 Barlow J. P., A Declaration of the Independence of Cyberspace, 1996, available at URL homes.eff.org/~**barlow**/Declaration-Final.html.

6 Raymond E. S., *The Jargon File*, 2003, available at URL http://www.catb.org/~esr/jargon/html/.

work), thus allowing packets to take many different routes in order to arrive to their destination.
The Domain Name System (DNS, 1984), is another benchmark of Internet services as we nowadays conceive them, and made possible for Internet users to access servers using, instead of numbers, more easily-remembered names, fully accessible by Internet hosts on a distributed database and constructed according to a reverse-hierarchical order.[7] Complete decentralisation of Internet routing was achieved by the introduction of the Border Gateway Protocol, which realised fully (at least in networking terms) the pioneer idea of the absence of a central point in the networks forming the Internet.
The Internet community, as decentralized as the Internet itself, developed with as little structure as possible and the core belief that society can avoid being guided by a central hierarchical, bureaucratic authority, if the right set of rules for peer-to-peer interaction are found. The Internet Engineering Task Force, still the main organ for Internet regulation, was created having in mind a "cooperative, consensus-based decision-making process."
A "public face" and global reach was given to what had been, up to that moment, a primarily academic phenomenon, by the World Wide Web – the common space of communication and information sharing invented by Tim Berners-Lee at the CERN in Geneva, Switzerland. The development of the first Web pages and browsers were coupled with the opening of the Web to commercial purposes, while TCP/IP protocols, DNS and BGP for addressing and routing respectively became, and are nowadays, the foundations (now standards) of many Internet services in the world.[8]

2.2. Structure and Culture

If one has to analyse the social and cultural structure of the Internet – in order to outline a suitable legal framework for the activities that rely on it – the core elements of its technical architecture, as well as the main principles that inspired its creators, need to be always kept in mind. The Internet has its roots in, and fosters, a set of main values that are reflected both in the engineering principles that guided its design and in the culture that supports it. These values, hinted at in the previous chapter, need to be taken into consideration for the development of any Internet-related policy or law, and can be summarized as following.

7 The elements closer to the roots (top-level domains) can only be added or changed by the overall DNS administrator (i.e., what was IANA and now is ICANN); the dispute resolution system for controversies related to domain names, the UDRP, will be further analysed in 5.3.

8 E.g. the protocol HTTP that supports the World Wide Web, the file transfer protocol FTP and the email protocol SMTP.

- *Decentralisation:* distributed, peer-to-peer network intelligence, resistance to any kind of centralised imposition and monitoring;
- *Access:* bidirectional exchange of information among hosts, with no restrictions;
- *Availability:* use of instruments and protocols, made freely available, to give room to the individual user to create and diffuse information directly, with no intermediation in between;
- *Anonymity/privacy:* no embedded authentication devices, neither in the network layer nor in the application layer;
- *Absence of boundaries* when it comes to addressing and routing protocols, that are themselves a product of a cross-boundaries collaborative design;
- *Egalitarianism:* no attribution of privileges or rights to particular users or groups of users on the network;
- *Openness:* routing intelligence constructed specifically in order to avoid censorship, on the same lines of distrust of and resistance to authority that John Gilmore summed up in the early 90's: "The Net interprets censorship as damage, and routes around it."[9]

Such features of the Internet are often constrained in many ways and for many different reasons, from commercial to technical and political ones.
Architectural limitations are primarily seen when it comes to decentralisation, which was never fully achieved; the best example of deficiencies in this regard is the Domain Name System, which unlike the topology of the Internet, is hierarchical. Adding different levels of sub-domains is the prerogative of their administrators only, ending with ICANN at the top level, and domains created in alternate root domain registries are often not visible to users relying on the "official" root DNS.
The availability of tools and protocols is hampered by the capacity allowed to private entities to introduce proprietary services whose specifications, unlike Internet standards that have to be explicitly published, can be kept secret. This also reflects on the free accessibility of some parts, like source code, of the Web pages that use these proprietary formats (e.g., Macromedia Flash Player).
Many aspects of the Internet are currently posing threats to anonymity and privacy of the users:[10] the requirement of subscriptions, user names and

9 Quote attributed to, and then confirmed by John Gilmore of the Electronic Frontier Foundation (EFF). See http://cyber.law.harvard.edu/people/reagle/inet-quotations-19990709.html.

10 These types of issues, especially when connected to the *de facto* limitations posed to privacy and free choice by technical specifications themselves, have been studied extensively by Stanford Law School professor Lawrence Lessig. See Lessig L., *Law Regulating Code Regulating Law*, 35 Loyola University of Chicago Law Journal 1-14, 2003, available at URL http://www.luc.edu/law/activities/opportunities/docs/ljc2003/lessig.ps.pdf.

passwords to access web resources, digital cryptography, use of cookies.[11]
The protocols the Internet is based upon are egalitarian in themselves: however, the limitations posed by the Internet Service Providers (ISP) to access users may be relevant – and unknown. In some countries (e.g., China), a series of governmental limitations is posed on ISPs, which make content filtering mandatory. These filters also sometimes impede the network's capacity of "routing around" censorship.

While it might seem that, because of these changes and limitations, the set of values that was the basis of the Internet is no longer the dominant one, some examples can be cited that suggest, instead, that the vision of the pioneers is still to be considered the "true" nature of the Internet and requires the attention of policy- and law-makers as the basis of their actions and decisions.
Decentralisation has been achieved in many other cases and brings considerable advantages to the functioning of the network, in terms of resilience, velocity and reliability. Moreover, it sometimes has a practical purpose of protection of service operators and end users: examples of this are the landmark decisions regarding peer-to-peer file-sharing software KaZaA and Grokster, that, as opposed to Napster, were found not liable in breaches of copyright because of their fully decentralised directory of files, although they were, at a later stage, considered indirectly liable for inducing infringement by end users.[12]
The criticisms directed towards Microsoft Corporation for its policies of adding proprietary tags to Internet standards are raised and known worldwide. Despite Microsoft's prevalent position in the market as regards desktop software, however, its proprietary features are often deprecated and rejected, as well as unsupported by all Web browsers except Explorer. In some cases, Microsoft has endured actual defeats, e.g., when its Information Server has failed to gain dominance over the open source Apache Web server.
While the amount of services requesting identification is increasing, they are often very difficult and costly to enforce and users often have the possibility to move around them, thus basically maintaining privacy and anonymity. When many users were accused, in the recent past, of having violated copyright through file sharing, they turned to more recent applications such as BitTorrent, that better guarded their privacy by dividing shared files across users on the

11 Cookies are small parcels of text sent by a server to a web browser and then sent back unchanged by the browser each time it accesses that server. HTTP cookies are used for authenticating, tracking, and maintaining specific information about users, such as site preferences and the contents of their electronic shopping carts.

12 The first grade decision, MGM v Grokster (2004), was in Grokster's favour. The US Supreme Court's (2005) later decision, to be found at http://supct.law.cornell.edu/supct/html/04-480.ZS.html, came to a different conclusion on the basis of indirect liability. MGM technically won the case, but this did not prevent file-sharing networks with fully decentralised files directory to keep up and running.

network, so that it was very rare to have a complete file downloaded from only one host.[13]

The same features of expense and difficulty to enforce pertain to filtering software as well, and this leads in most cases to its ineffectiveness. Chinese users, although enduring a quite sophisticated filtering regime, have access to several bypass products.[14] Access to foreign proxy servers, although formally impeded by some countries, is however made possible by other freely available applications.

These and other examples show that the vision that was originally at the foundation of the Internet's architecture is still up and running; moreover, it will be quite difficult to make important changes to it, as it would be a "work against design", turning into low effectiveness, resistance or expensiveness. As Tim Jordan points out, there is a down side to this when universally deprecated behaviours such as spam, cyber-crime and trafficking are as difficult to fight as the ones described above, precisely because the strength of both lie in their great suitability to the Internet's architecture features;[15] however, this does not detract from the point that full consideration is to be given, in any attempt to analyse innovative regulatory frameworks for Internet-based activities, to those features of the Net that are deeply embedded in its architecture.

2.3. Conclusions: A Global Facility

As a conclusion, let us underline briefly how these features and values have found their place in what the Internet is today – as the Tunis Agenda for the Information Society acknowledges, "the Internet, a central element of the infrastructure of the Information Society, has evolved from a research and academic facility into a *global facility* available to the public".[16] What was for several years a "nerdy" toy for scientists and engineers is now the greatest arena for commercial exchanges and political debates. While it could be argued that such a global tool can have little in common with what the Internet was in the past, the core elements of its structure and the values behind it may continue to influence the contemporary vast communities of Internet users, as non-technical people as they might be.

The vast majority of scholars dealing with the culture of the Internet agree on the fact that it has a successful tendency to replicate itself, as users are forced

13 However, the first intention of BitTorrent and software alike was to provide a better technical efficiency – although it ultimately turned out into new possibilities of copyright evasion.

14 For example, the CustomizeGoogle extension for the Mozilla Firefox browser http://www.customizegoogle.com/zh-CN/.

15 Jordan T., *Cyberpower: The Culture and Politics of Cyberspace and the Internet*, London: Routledge, 1999, p. 214-217.

16 WSIS, Tunis Agenda for the Information Society, 2005, Par. 30 (my emphasis).

by its structure to adapt their behaviours to the values underlying it; this then shapes attitudes, and so on.[17] This easy replication of behaviours and attitudes is likely to be fostered precisely by the nature of the Internet as an unlimited means of information exchange, in the first place about itself: new users start knowing about the Internet via the Internet itself, and the same goes for its use.

Some scholars have also predicted a further step, stating that the culture of the Internet as a global facility is no longer constrained in the cyberspace, but is expanding in the "real world" to form a global ideology, a "world culture".[18] If brought to its full expression, it is likely to produce important changes in politics, culture and law, along with the economic and institutional globalisations that are currently taking place.

17 Marshall G., *Internet and Memetics*, 1998, available at URL http://pespmc1.vub.ac.be/Conf/MemePap/Marshall.html.

18 Heylighen F., *Evolution of Memes on the Network: from Chain-Letters to the Global Brain*, 1996, available at URL http://pespmc1.vub.ac.be/Papers/Memesis.html.

3. Jurisdiction and the Internet

The present section of the study will analyse a legal aspect worthy of particular attention in the articulate landscape of Internet governance issues: the possible inadequacy of the traditional concept of jurisdiction when it comes to Internet-based transactions and exchanges. The different scholarly approaches to this issue will be discussed, and integrated with examples from recent jurisprudence that have in some cases become landmarks. The analysis contained in this section will provide the background of questions and challenges posed by the Internet to the field of dispute resolution, for the following sections to discuss possible solutions to them.

3.1. Introduction: What Is Jurisdiction?

Jurisdiction is the power, right or authority of a legal body to adjudicate cases and implement its decisions according to a particular set of rules (these aspects are defined as procedural, enforcement and substantive respectively) within the limits of an area of responsibility, that can be defined according to different criteria. Namely, these are the territorial link (the right of the state to rule over persons and property within its territory); the personal link (the right of the state to rule over its citizens wherever they might be located); the effects link (the right of the state to rule on the economic and legal effects on its particular territory, even if such effects derive from activities conducted elsewhere).[19] Uncertainty and confusion regarding jurisdiction can lead to consequences such as a state's lack of capacity to exercise its legal authority within its own territory, and as a consequence, to unbalances or unequal social and economic relations as well as the denial of individuals' and legal entities' right to justice.

3.2. The Internet's Challenges

Gelbstein and Kurbalija qualify jurisdiction as related to the Internet as "the Internet Governance issue requiring the most urgent attention",[20] because of the steadily increasing number of Internet-related disputes. When it comes to the Internet, the identification of jurisdiction becomes ambiguous, primarily because of the fact that the territorial link is put in discussion. Jurisdiction is predominantly based on the division of the world into national territories, and each state has the right to exercise jurisdiction over its territory. This is

19 *Supra* note 1, p. 74.
20 *Id.*, p. 73.

challenged by the Internet because of its "inherently global" nature,[21] the fact that it makes cross-border exchanges easy, economic, and decentralised; i.e., difficult to oversee via traditional, state-centered mechanisms of control and regulation. The question of jurisdiction and the Internet connects to the broader Internet governance question concerning the possibility – and if yes, to what extent – to relate the Internet to traditional legal and political concepts. The issue arises at the intersection of the international and national legal systems, whenever disputes have an extra-territorial aspect (either *ratione materiae* or *loci*). (Almost) all Internet content can be accessed from (almost) everywhere, which puts all users of the Net in the position of being subject to the jurisdiction of every State. Every time that new content is uploaded on the World Wide Web, it is extremely problematic to predict whether it will violate a national law somewhere else than the country where the upload physically took place. What domestic law should be applied in particular events, and which one should be enforced? Inversely, is it possible to predict how the enforcement of a specific law in a national context will affect the rights of other users elsewhere?

In short, almost every activity based on or carried out through the Internet has an international aspect – an international law aspect. The remainder of this section will deal with it from different perspectives.

3.2.1. Locating a Jurisdiction: Conflict of Laws

One of the fundamental issues that cyberspace law scholars have been facing since the early days of the Internet concerns the kind of problems that could be raised by the lack of knowledge of a crime's location; this is the case for the overwhelming majority of legally relevant events on the Internet, while the foundation itself of national legal systems is the assumption that facts, events and actions can be located in territories. However, claims have been made, on the other hand, that these sceptics "overstate the differences between cyberspace transactions and other transnational transactions",[22] and that, although "the new communication technologies known as cyberspace *will* lead to changes in governmental regulation", the most part of jurisdiction location problems on the Internet can find their solution in the principles of private international law.

21 *Supra* note 3.

22 Goldsmith J., *Against Cyberanarchy*, in Thierer A. and C.W. Crews, Jr. (edited by), Who Rules the Net?: Internet Governance and Jurisdiction, Washington DC: Cato Institute, 2003.

Some scholars state that "private international law" is in fact a "misnomer";[23] a more appropriate term would be the one, used in the United States, of *conflict of laws*. The reason for this objection lies in the fact that private international law rules are in fact contained in national legal systems, not in international instruments, but are defined as international as they define criteria to establish jurisdictions and rights in those legal cases that encompass two or more entities in different countries. This observation, other scholars argue, is true in a strict sense; it must however be taken into account that private law rules are in themselves limitations to the sovereignty of states, as they "define the extent to which a state's authority extends to private arrangements made in the transnational arena".[24] Private law, or conflict of laws, is a set of rules that, although domestic in their application, derive from the work of intergovernmental organisations such as UNCITRAL and the Hague Conference on Private International Law.[25]

The "anti-sceptic" scholars vouching for the applicability of the conflict of laws to Internet-related activities argue that a way to locate an online action in a particular jurisdiction can usually be found:[26] often, the issue will rather lie in the fact that there is more than one. However, it is argued that the uncertainty deriving from the possibility of multiple states being able to extend their jurisdiction over a dispute can be resolved in most cases by the very parties to the controversy, that are traditionally allowed to select the jurisdiction for the agreement. This is made possible by Article 3(1) of the Convention on the Law Applicable to Contractual Obligations (Rome Convention 1980), which reads that "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."[27] The freedom of choice established in the Rome Convention is actually made even easier by the use of online tools, with the so-called clickwrap agreements

23 Kurbalija J., *Internet Governance and International Law,* in Drake W. J. (edited by) Reforming Internet Governance: Perspectives from the Working Group on Internet Governance (WGIG). New York: The United Nations Information and Communication Technologies Task Force, 2005.

24 Cutler A., *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge : Cambridge University Press, 2003, p. 40.

25 The United Nations Commission on International Trade Law http://www.uncitral.org, and the Hague Conference on Private International Law, http://www.hcch.net/index_en.php.

26 Zekos G.I., *Personal Jurisdiction and Applicable Law in Cyberspace Transactions*, The Journal of World Intellectual Property 3(6), 2000, available at URL http://www.blackwell-synergy.com/doi/abs/10.1111/j.1747-1796.2000.tb00161.x.

27 Convention on the Law Applicable to Contractual Obligations (Rome Convention 1980), 19 June 1980 (80/934/EEC), available at URL http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

(hosted on the Web site of one of the parties to the contract).[28]
The situation becomes more complicated, however, when the election of a jurisdiction has not been made consensually; ways to locate the jurisdiction can be found in these cases in regional instruments such as, in the case of the European Union, the Directive on Distance Contracts.[29]

3.2.2. "Spillover Effects"

Even the "anti-sceptic" scholars, however, acknowledge that a solution is less easy to find when the matter is not to locate an action in a particular jurisdiction, but to deal with those situations in which one jurisdiction regulates conduct on the Internet in a way that impacts heavily individual behaviour and regulatory efforts in other jurisdictions: what has been defined as *spillover effects*.
Spillover effects can determine two kinds of problems.
The regulations that prevail in practice might end up being the least stringent ones (the "least common denominator" principle);[30] this can lead to undesirable effects, for example, in the field of spam – the greatest quantities of which are sent, on behalf of entities located somewhere else, from countries whose anti-spam laws loom large.
Inversely, the prevailing regulations might be the strictest ones, and a famous example is the 2001 Yahoo! Case. This case, prosecuted in French courts, was triggered by a breach of French laws, prohibiting anyone on French soil from accessing the auctions section of a Yahoo! website displaying Nazi memorabilia, even though the website was hosted in the United States, where the display of materials related to Nazism was legal.[31] Analogously, a notable precedent had been the 1996 CompuServe case, having to do with the request by a German court to CompuServe to ban access to pornographic materials. The only way for CompuServe to comply with German law was to remove such materials from its central web server, physically based in the United States, and as a result, access was disabled even for those citizens living in countries (for example, the United States) where access to pornographic materials was not restricted by law. [32]
In both of the cited cases, the application inside the United States, vs. the

28 Kunkel J.D. and G. Richard, *Recent Developments in Shrinkwrap, Clickwrap and Browse-wrap Licenses in the United States*, 2002, available at URL http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93_text.html.

29 European Parliament and Council of the European Union, Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, available at URL http://www.spamlaws.com/docs/97-7-ec.pdf.

30 *Supra* note 1, p. 75.

31 Salis R., *A Look at How U.S. Based Yahoo! Was Condemned by French Law*, Juriscom.net, 2000, available at URL http://www.juriscom.net/txt/jurisfr/cti/yauctions.htm.

32 *Supra* note 1, p. 75.

failed application outside of it, of the First Amendment of the United States Constitution,[33] is a good example of the serious problems that may raise whenever a more strictly regulated country's legal system *spills over* into the one of a more loosely regulated country.
Anti-sceptic scholars, however, warn not to overstate spillover effects. Goldsmith writes,

> The problem is pervasive. It is also inevitable, because the price of eliminating these spillovers - abolishing national or subnational lawmaking entities, or eliminating transnational activity - is prohibitively high. Most of the dizzying array of modern choice-of-law methodologies are devoted to minimizing these spillovers while at the same time preserving the sovereign prerogative to regulate effects within national borders.[34]

For Goldsmith and Wu, spillover effects are not a novelty introduced by the Internet, as national legal systems have always contained laws with extraterritorial effects, in all sorts of fields. The Internet has just contributed to making them more common. Moreover, now as it has been in the past, there is the possibility of addressing them indirectly, as regulations can be applied to many of the practices that imply spillover effects (e.g., making the use of offshore hosting facilities a crime).[35]
In contrast to this position, that basically suggests a substantial convergence between the choice-of-law problems implicated by cyberspace and those of non-cyberspace conflicts, David Post defines himself an "unrepentant Exceptionalist". There are enough reasons, he states, "why the jurisdictional and choice-of-law dilemmas posed by cyberspace activity cannot be adequately resolved by applying the settled principles and traditional legal tools developed for analogous problems in real space".[36] New ways need to be found, when factors such as scale (the way in which, in a system like Usenet, millions of messages are distributed automatically through thousands of servers around the world, which would cause irresolvable problems in case of copyright issues), and pervasiveness of border-crossing effects, come into the picture.
Attempts at reform, aimed at softening spillover effects and mostly technical in

33 http://caselaw.lp.findlaw.com/data/constitution/amendment01/.

34 *Supra* note 22.

35 Goldsmith J. L. and T. Wu, *Who Controls the Internet?: Illusions of a Borderless World*, Oxford: Oxford University Press, 2006, p. 72.

36 Post D. G., *Against "Against Cyberanarchy"*, in Thierer A. and C.W. Crews, Jr. (edited by), Who Rules the Net?: Internet Governance and Jurisdiction, Washington DC: Cato Institute, 2003.

nature, have been created – such as filtering (that prevents content, unwanted in a particular jurisdiction, from entering it through the Internet) and geo-location (that prevents generally accessible content from being accessed from a particular jurisdiction). However, several studies have unveiled the serious flaws of such technologies[37] – and their effectiveness is unlikely to improve, as they both tamper with the very nature of the Internet's architecture in its dimensions of decentralisation and openness.
Some attempts of reform through law have seen the light, too. In the United States of the late 90s, a scale ranging from passive to active Web sites was established to determine if local regulations could be applied to internationally-accessible sites.[38] This can be considered as the first time in which the judicial system took into consideration the "new" reality of the Internet as an arena of supra-national commercial transactions; however, it has proved to be of limited effectiveness.

3.3. Possible Solutions

The issue of jurisdiction and the Internet is international in nature; thus, it seems likely that, if the eventual solution of spillover effects is to come out of law reform, it will be through an international/transnational approach.
Possible attempts include the harmonisation of national choice-of-law systems; the imposition of a regulatory regime peculiar of the Internet, to be developed as a set of model laws and applicable in national courts under appropriate circumstances; the creation of a specific "Internet jurisdiction", dedicated exclusively to Internet legal issues (the approach fostered by the "exceptionalist" Post, framing the Internet as a peculiar entity, foreign to any concept of territoriality).[39] These approaches will be briefly discussed in turn.

3.3.1. Modernisation of Existing Private Law

The modernisation of private international law would lead to lowering the costs and increasing the rapidity of the procedures under which Internet cases are assigned to a particular jurisdiction. Such improvements might range from the simplification of procedures under which to identify appropriate jurisdictions,

37 See e.g. Kaiser Family Foundation. *See No Evil: How Internet Filters Affect the Search for Online Health Information*, 2002, available at URL http://www.kff.org/entmedia/20021210a-index.cfm, that shows how filtering products set at their most restrictive levels block a large amount of safe sex/health information sites along with pornographic ones.

38 Zippo Manufacturing v Zippo Dot Com, Inc. 952 F. Supp. 1119 (W.D. Pa. 1997), available at URL http://cyber.law.harvard.edu/property00/jurisdiction/zipposum.html.

39 Post D. G. and D. R. Johnson, *Law and Borders: the Rise of Law in Cyberspace*, 48 Stanford Law Review 1367, 1996, available at URL http://www.cli.org/X0025_LBFIN.html.

the possibility to make use of online deliberation, and flexible arrangements for legal counselling.

Taking, once more, the European Union as an example for agreements at the regional level, the Brussels Convention has been in force in the EU since 1968, simplifying the process of reaching decisions on jurisdiction and outlining provisions for the protection of customers in the case of e-commerce.[40]

At the global level, the main arena for the development and update of private international law has been since 1893 the Hague Conference. The relatively recent introduction of topics such as choice-of-court and e-commerce was a consequence of the need to harmonise national sets of rules regarding conflict of laws, to better determine rights and liabilities in international commercial transactions, after the spread of the Internet and the diffusion of globalisation.[41]

In 1992, the negotiations at the Conference started, and it was quite clear that they were bound to take into account the interests of the United States, whose negotiators came to the Conference with the main objective of strengthening the protection of intellectual property rights through the enforcement of decisions issued by U.S. courts.[42] The first draft of the Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters was released seven years later.[43] Some of its provisions were limited to codifying rules that most of the national legal systems already had in common (Part II). But another chapter (III) – that basically allowed judgements by the courts of one party of the convention to be applied in the courts of the other(s) – created great controversy. The acknowledgement by the Conference that there were cases in which "recognition or enforcement would be manifestly incompatible with the public policy of the State addressed", and had to be exempted from this rule,[44] was not enough to reassure some countries with "lighter" legal systems. In particular, the shift in negotiations caused by the growth, since 1992, in numbers and variety of Internet-based exchanges posed a considerable challenge to the United States legal system, because

40 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), available at URL http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm.

41 See http://www.hcch.net/index_en.php?act=text.display&tid=10#litigation for relevant Conventions.

42 *Supra* note 1, p. 77.

43 Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, 1999, available at URL http://www.state.gov/www/global/legal_affairs/991030_forjudg.html.

44 Hague Conference on Private International Law. *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, 2002, available at URL http://www.cptech.org/ecom/hague/hague16feb2002-bureaurefects.rtf.

of the increasing risks for United States companies operating in a multiple jurisdictions environment (shown by the CompuServe and Yahoo! cases). The adoption of the Hague Convention in its initial form would have led United States courts to enforce foreign court judgements, including those related to content on United States-hosted websites, and this would challenge the freedom of speech established by the First Amendment of the United States Constitution. This scenario notably reduced the ambitions of reform and modernisation of the international private law system.[45]
In 2005, a "tempered" Hague Convention on Choice of Court Agreements was concluded,[46] but is still waiting to enter into force. It covers international agreements from business to business only, and gives room for the parties to choose the courts of a particular country to settle their dispute, whose decisions can then be enforced in the courts of other parties.

3.3.2. Unification of Internet-related Law

The harmonisation, or unification of national, Internet-related law, would *de facto* lead to the creation of a sui generis Internet law regime. It should result in the establishment of an equivalent set of rules at the global level, and enabling identical rules to be applicable in different jurisdictions should lead to the question of jurisdiction becoming less important. However, the hopes for achieving harmonisation are not equally high in all areas of Internet-related matters; while it can realistically be achieved in areas where a high level of global consensus already exists (e.g. child pornography, piracy, slavery, terrorism, and cybercrime), and is possible in areas where views are increasingly converging (e.g. spam and Internet security), it is much more unlikely in areas such as content policy and regulation. The most notable effort to achieve unification of Internet-related law to date are probably the Model Laws on Electronic Commerce and on Electronic Signatures, issued by the United Nations Commission on International Trade Law (UNCITRAL), that foster a "technology-neutral" model considering contracts and signatures carried out through electronic means as being the legal equivalent of the ones on paper.[47]

45 *Supra* note 1, p. 77.

46 http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98.

47 UNCITRAL, Model Law on Electronic Commerce, 1996, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html and UNCITRAL Model Law on Electronic Signatures, 2001, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signature.html.

3.3.3. Specialized Internet Jurisdiction

A third possible solution is the recognition of Internet-related legal questions as not referable to previous bodies of law, either national or international, and consequently their relocation into a specialised, exclusive jurisdiction. As mentioned above, this is the approach of "exceptionalist" scholars like Johnson and Post, whose main thesis is that the application of domestic laws in their current form would inevitably lead to jurisdictional issues, and thus cyberspace should be treated in a way that goes beyond territory-based regulation, to develop its own structures of self-regulation. This thesis, first expressed by Johnson and Post in 1996 regarding the Internet generally,[48] has recently been reprised by the same authors concerning virtual spaces. Their "updated" argument states:

> Thinking about cyberspace communities as potentially separate law-making and law-enforcing places will help clarify the profound jurisdictional muddle that cyberspace presents. The alternative – that the answer to the question "whose law must I obey" will continue to be "All of the 140 or so different legal regimes promulgated by the 140 or so different sovereigns that have a plausible claim to make the rules for the people with whom you might be interacting" — is unsatisfactory, providing neither guidance nor order nor predictability [...] to the individuals to whom that answer is given (and on whom, ultimately, the responsibility for law–making must rest). As online interaction becomes increasingly globalized, it will make increasing sense to talk of the (unitary) law of the "place" instead.[49]

A practical example of such a model can be found in the Uniform Domain Name Dispute Resolution Policy (UDRP), that seems to indicate, although in a specific realm, that effective global dispute resolution can be achieved under a cyberspace–specific regime.[50]

3.4. Conclusions

The analysis contained in this section has provided the background of questions and challenges posed by the Internet to the field of dispute resolution. As Katsh points out, the debate on jurisdiction and the Internet carries in itself very basic questions, such as the impact of new technologies on the authority

48 *Supra* note 39.

49 Post D. G. and D. R. Johnson, *The Great Debate: Law in the Virtual World*, First Monday 11(2), 2006, available at URL http://firstmonday.org/Issues/issue11_2/post/index.html.

50 http://www.icann.org/udrp/udrp.htm. See 2.1 and 5.3.

and power of states to make and enforce law, what law is and how it emerges and evolves.[51] These issues have a long history, but no clear answers yet. All the alternatives discussed above, while not even close to be fully developed, are represented in the current landscape of cyberlaw. The Hague Convention on Choice of Law Agreements has been finalized, although it is at present of very limited usefulness; the UNCITRAL model law on electronic commerce is an example of unification of Internet-related law, although it covers only a specific field within it; the Uniform Domain Name Dispute Resolution Policy (UDRP) may be regarded as the first instance of a true cyberspace-specific legal regime,[52] although it does not extend to a comprehensive legal system. Effective dispute resolution for Internet-related activities will likely develop from these beginnings... and maybe more, as the next section intends to show.

51 Katsh E., *Dispute Resolution Without Borders: Some Implications for the Emergence of Law in Cyberspace*, First Monday 11(2), 2006, available at URL http://firstmonday.org/Issues/issue11_2/katsh/index.html.

52 *Supra* note 39.

4. The Internet, ADR and Private Ordering

The third chapter of the study analyses how the social and legal landscape outlined up to this point determine the need – that can no longer be delayed – to find dynamic (but binding) solutions to disputes and controversies, especially in fields like Internet-mediated commercial exchange. It examines how this has led to the diffusion of alternative systems and institutions such as arbitration, mediation and conciliation (methods known as Alternative Dispute Resolution) that are now the subject of renewed interest because of their suitability to the current developments in the economic and commercial landscape. The possibility of hybrid regulation frameworks for Internet-based activities – able to take into account elements of private ordering and alternative dispute resolution – will be examined. Particular attention will be paid to the elements contained in the bodies of law regulating sea and outer space that can be useful for the model.[53]

4.1. New Forms of Regulation

The social, cultural and legal landscape shaped by the Internet that has been examined up to this point has shown the extent to which the widespread adoption of new tools of communication and exchange can change to the core times and modalities of relationships, economic and commercial in the first place.

The reasons for the deep changes that have facilitated the diffusion of the Net, as observed in Chapter 1, are several. Thinking about exchanges, to these should be added others, namely the rapidity of data transmission, the readiness in obtaining access to the Web, the interactivity, its transnational nature (the Internet is *de facto* a place/non-place, where individuals meet without any physical interaction),[54] and, last but not least, a cost that enables its use on a global scale. This has not only given rise to new habits, in a general sense, for the public of end users, but has made possible and developed new forms of juridical and economic relationships to which law needs to, and is, paying the necessary attention.

The phenomenon at hand is properly explained by this simple example: the conclusion, carried out on the Internet, of a contract of purchase of a good such as a ringing tone for a mobile phone. Because of the features of immediateness and simultaneity of the operation, it is not possible to make a distinction between the phase of conclusion and that of the execution of the

53 *Supra* note 3.

54 Nasi A., *Online Dispute Resolution*, Filodiritto, 2006, available at URL http://www.filodiritto.com/index.php?azione=visualizza&iddoc=414.

telematic contract that supports the buying act.

It is thus interesting – and the main point of this study – to note how the Net, the engine of the development of commercial interactions on a planetary scale and of all its challenges, can become at the same time the main ally of those, academics and practitioners, that are in search of a uniform system of regulation for commercial interactions, and for the related dispute resolution mechanisms.

Indeed, just as the Internet fosters the creation and the multiplication of interactions, the use of such a tool can shed new light, as will be further discussed, on the management of the main "pathologies" of judicial proceedings – namely the overly long periods of time allotted to the resolution of disputes, and the excessive complexity of the judicial *iter*. These issues, that have gone so far as being defined as the "crisis of ordinary justice",[55] determines the judiciary system's incapacity to provide effective remedies in situations that are very much in need of a prompt and rapid solution, and tamper with the primary and ultimate goal of justice itself.

This situation, in the new reality of the Net, as an unbounded space where the development of the global market finds its way with no limits, may take dimensions that are very difficult to define quantitatively, considering the degree to which the user-as-consumer becomes exposed to an increasing number of potential transactions, and the consequent rising of "transnational" controversies, between subjects belonging to different jurisdictions.

These are the main reasons that have directed the attention of law scholars and practitioners to research and develop innovative frameworks for dispute resolution, able to include alternative dispute resolution mechanisms and elements of private ordering and self-regulation.

4.2. ADR: Reasons for a Renewed Interest

The answer to the need, that cannot be any longer delayed, to design dynamic and rapid, but binding and enforceable, solutions, in fast-pacing realities such as Internet-mediated commercial exchanges, has given room for the diffusion of systems and institutions alternative to ordinary justice. Alternative Dispute Resolution (ADR) mechanisms such as arbitration, mediation and conciliation have recently shown their suitability to the evolution of the field of economic and commercial exchanges.[56]

Alternative Dispute Resolution mechanisms are particularly suitable as a substitute of juridical procedures that are usually slow and complex. This especially applies to arbitration – the mechanism according to which decisions

55 *Supra* note 54.

56 *Supra* note 1, p. 79.

are made by one or more independent individuals, chosen by the disputants. The use of international arbitration within the business sector was not initiated with the introduction of the Internet – in fact, it has a long-standing tradition. An arbitration mechanism is usually set out in a private contract with parties agreeing to settle any future disputes through such means. There is a wide variety of different arbitration contracts available, and within them can be found such issues as the eventual venue for the procedures to take place, the procedures that are to be followed, and choice of law.

However, the features of arbitration are allowing it to be the subject of a renewed interest in the Internet era: the reasons for this are to be found in the previous chapter. One of the main advantages of arbitration is that it overcomes the problem of selecting both procedural and substantive jurisdictions, as these are selected in advance by the disputants.[57]

Another advantage in the use of arbitration is that, among the ADR mechanisms, it is the one that holds more promise *vis-à-vis* the possibility of enforcement of the decisions; and as Perritt emphasizes, "to be credible, private self-regulatory schemes have to produce enforceable decisions."[58] The enforcement of arbitration awards is regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the majority of the countries are parties. According to this convention, national courts are obliged to enforce arbitration awards. Article III reads:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[59]

As counter-intuitive as it may seem, a number of existing treaties makes it simpler, in fact, to enforce arbitration awards than foreign court judgments, and this is mostly because of the fact that the parties have had greater control over the procedures and selection of the third-party decision maker.[60]

57 *Supra* note 1, p. 80.

58 *Supra* note 3, V(A).

59 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at URL www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

60 Ponte L. M. and T. D. Cavenagh, *Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce,* Upper Saddle River, NJ: Prentice Hall, 2004, p. 28.

ADR mechanisms and institutions, and arbitration especially, are seen as the best remedy in order to fill the gap caused by the inability of current international private law to deal with Internet-related cases: a "faster, simpler, and cheaper way of settling disputes".[61]

The European Union will once more be taken as an example to outline how the interest in alternative methods has recently made its way through the international community. The EU took inspiration from the Guidelines for Consumer Protection in the Context of Electronic Commerce, issued by the Organisation for Economic Cooperation and Development (OECD) in 1999, to issue the Directive on Electronic Commerce, whose article 17, entitled "Out-of-court dispute settlement", gives a precise idea of Community policy in this regard.[62] The directive locates electronic commerce in the wider scenario of the Information Society, with the objective to delineate a coherent juridical landscape at the European level, in order to protect the right to justice to a degree that consumers will feel comfortable in carrying out transactions through electronic means.

In addition to encouraging member States to develop "codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation" of the directive,[63] the directive provides for member States to implement out-of-court schemes for dispute settlement, including appropriate electronic means[64] (a hint at Online Dispute Resolution mechanisms, that will be discussed in the following and last chapter).

At a later stage, increasingly aware of the limits and gaps in the current normative system as well as the strength of the Net as a catalyser of commercial exchanges, the EU issued Recommendation 2001/310/EC, with the aim of implementing a number of initiatives to "institutionalize" a system that facilitates the development of commerce within the Community, with particular emphasis on electronic commerce, citing as an integral part of such objective the need to provide users-as-consumers with a simple, prompt, effective and inexpensive system for the settlement of eventual disputes.[65] In the same time

61 *Supra* note 1, p. 90.

62 European Parliament and Council of the European Union, Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), available at URL http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML , Art.17.

63 *Id.*, Art. 16.1(a).

64 *Id.*, Art. 17.1.

65 European Commission, Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016), available at URL http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001H0310:EN:NOT , Arts. 5, 6 and 8.

frame, the EU has promoted a project of research and experimentation on arbitration for Internet-related controversies.[66]
A notable step has been the creation of the European Extra-Judicial Network EEJ-NET, a project designed to be an important tool for the resolution of cross-border European consumer complaints. The project has developed a clearinghouse in each EU Member state, aimed at routing consumer complaints to a relevant ADR body to assist in the speedy resolution of the complaint. The stated aim of the project is "to allow EU citizens fair, cheap and efficient access to justice in relation to their cross-border consumer dispute using appropriate ADR schemes and bodies in the relevant EU state."[67] Finally and taking stock of the network's positive evolution, the institutions of the Community have published a Green Paper (related to "alternative dispute resolution techniques in civil and commercial matters"), with the aim of starting a wide consultation process among stakeholders in a number of relevant juridical questions pertaining to the ADR field.[68]
What has been said up to this point regarding ADR mechanisms shows its suitability to the needs of electronic commerce; in conclusion, it seems appropriate to recall that the interest in conciliatory instruments that prevent or resolve controversies in Internet-related matters favours the very development of commerce on the Internet.

4.3. A Hybrid Regulation System?

Considering what has been said in this and the previous chapters about the embedded features of the Internet, as well as the challenges that they pose to traditional concepts of jurisdiction and enforcement, discussions have unfolded in recent times about the possibility of establishing hybrid regulation frameworks for Internet-based activities – able to take into account elements of private ordering and alternative dispute resolution mechanisms.

Henry Perritt argues that both regulator and commercial concerns can be addressed by a form of international regulation in which "public law provides an umbrella or framework within which private self regulation and dispute

66 Barreca L. *All' avvio il progetto di ricerca finanziato dalla CEE sull'arbitrato elettronico via internet*, Diritto & Diritti, 2001, available at URL http://www.diritto.it/materiali/tecnologie/barreca.html.

67 http://www.citizensadvice.org.uk/index/campaigns/social_policy/evidence_reports/er_consumerandebt/bf_eejnet.

68 Commission of the European Communities, Green Paper on Alternative Dispute Resolution Techniques in Civil and Commercial Matters (19.04.2002, COM(2002) 196), available at URL http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf.

resolution works out the details."[69]

This is where the previous debate on jurisdiction comes in handy, as it helps understanding why the Internet encourages greater reliance on private ordering as part of the international legal system. As has been discussed, the unique features of the Internet, even with respect to the introduction of previous technologies, have triggered a debate on whether traditional jurisdictional rules are adequate for the Internet or whether new approaches are necessary, because of the fact that the Internet's "inherently global"[70] character makes it difficult to localize conduct and effects – while localization is the main concept according to which private international law principles determine prescriptive and adjudicative jurisdiction. The Internet challenges all three kinds of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. The introduction of private ordering and ADR elements can help in solving the challenges to all three types of jurisdiction, not really because it helps identifying the jurisdiction, but because it makes the localization of a particular behaviour less relevant. Perritt examines in further detail how this happens.[71]

If a private entity agrees on what constitutes its code of good practice, this is a form of prescription in itself, and is as transnational as the membership of the entity. Moreover, private/alternative dispute resolution mechanisms are transnational by nature, and they are not limited to international commercial arbitration discussed above, but are currently being experimented in a variety of forms such as credit card charge-back mechanisms and systems for the settlement (or prevention) of disputes adopted unilaterally by private Internet intermediaries.[72]

In addition, Perritt argues that private ordering is credible and adoptable to the extent that it produces enforceable decisions.[73] This is why alternative dispute resolution mechanisms, although relying heavily on private ordering, cannot be islands; "self-regulation works only to the extent that governments permit it to work", and this can only happen if private ordering is not seen as anti-trust violation or defamation. The creation of hybrid international or transnational

69 Perritt Jr. H. H., *Hybrid International Institutions for Regulating Electronic Commerce and Political Discourse on the Internet*, Multimedia Und Recht at 1, 2000, available at URL http://www.kentlaw.edu/perritt/publications/Holznage.htm.

70 *Supra* note 3, Introduction(A).

71 *Id.*, V(A).

72 E.g. the Security and Resolution Center of eBay, http://pages.ebay.com/securitycenter/rules_policies.html. The Center includes an insurance system, a dispute resolution system (mediation-based), and a mechanism for the protection of feedback as a key indicator of sellers' reputation.

73 *Supra* note 1, V(A).

institutions, where alternative dispute resolution systems are linked to public law and institutions, gives room to a valid alternative to ordinary justice that provides real protection in its own right, allowing private bodies to choose the mechanism of dispute settlement that they deem appropriate, and then work with already-existent national and international institutions for the decisions to be implemented.[74]
A few years ago, observing that they all have to do with situations in which localization of activity within a state is difficult or impossible, Henry Perritt conducted a comparative analysis between the systems for dispute resolution included in the bodies of international law regulating the sea and outer space, and hypothetical hybrid systems for the settlement of disputes concerning Internet-based activities.[75] This analysis will be reprised and integrated in the following two sections, as an example of the opportunities offered by an ADR-inclusive, hybrid regulation system in the field.

4.3.1. Lessons from the Law of the Sea

For a long time, the most important controversies in the field of the law of the sea related to the extent to which a coastal state could exercise jurisdiction with respect to foreign vessels off its shores, including their rights to harvest the natural resources.[76] These controversies continued until the entry into force and general acceptance of the United Nations Convention on the Law of the Sea (UNCLOS),[77] with, *inter alia,* the recognition of a 12-mile territorial sea, a contiguous zone extending up to 24 miles from the coast and an exclusive economic zone extending up to 200 miles from the coast.[78]

Outside territorial waters, contiguous zones and exclusive economic zones, the "high seas" are open to all States, which should exercise their freedom in these areas "with due regard for the interests of other States in their exercise of the freedom of the high seas".[79]
For the scope of this section, the deep seabed regulation is noteworthy.[80] In addition to the Assembly, Council and Secretariat that constitute the Authority in charge of the international seabed, the Convention also creates an Enterprise,

74 *Supra* note 54.

75 *Supra* note 3, V(B).

76 See the Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116 (Judgment of 18 December 1951).

77 United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), available at URL http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm , Art. 2.

78 *Id.*, Parts II and V respectively.

79 *Id.*, Art. 87.

80 *Id.*, Part XI.

an international organisation empowered to "carry out activities in the Area directly [...] as well as the transporting, processing and marketing of minerals recovered from the Area".[81]

In the dedicated section, the Convention states the importance of its mechanism for the settlement of international disputes. States are first required to settle such disputes by peaceful means, as indicated in the UN Charter.[82] However, if parties fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to compulsory dispute settlement procedures ("Any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section").[83]
The innovative feature of this system is the choice given to States between four alternative venues for dispute settlement: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention. The choice is made by means of a written declaration, to be made under Article 287 of the Convention and deposited with the UN Secretary-General. If the parties to a dispute have not accepted the same settlement procedure, the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties agree otherwise.[84] The dispute resolution procedures allow the involvement of parties other than States, albeit with different powers.[85]
Perritt underlines how the system for settlement of disputes that arise in the specific field of the deep seabed regulation extends standing to non-state entities:[86] the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) is extended to "natural or juridical persons" that have the nationality of UNCLOS signatories, if these are willing to sponsor them.[87] The same sponsoring states are awarded the right to participate in the proceedings concerning natural or juridical persons they are sponsoring.[88]
Finally, it is worth mentioning for the purpose of the final chapter that the ITLOS makes an extensive use of online tools, by requesting the submission of

81 *Id.*, Art. 170.
82 *Id.* Part XV, Section 1.
83 *Id.*, Art. 286.
84 *Id.*, Art. 287.
85 *Id.*, Art. 289 ("Experts").
86 *Supra* note 3, V(B1).
87 *Supra* note 77, Art. 187(c).
88 *Id.*, Art. 190.

the complaints in electronic form – a format that can be selected through the proceedings as well – and publishes the judgments online.[89]

4.3.2. Lessons from Space Law

The law regulating outer space activities (examples are the law of international communications and, more specifically, the regulation of satellites), can provide useful lessons for the regulation of Internet-related activities inasmuch as space and Internet are both considered "an international resource [...] to be used for all of mankind, and a scarce resource [...] to be preserved."[90]
Despite some relevant differences, notably in the economic barriers to entry associated with the two fields, some of the issues that are dealt with by space law are similar to those faced by cyberspace law and related dispute resolution mechanisms. Both are mostly technical in nature, have to do with optimal use of available resources, and foster the prevention of disputes by minimizing interference. They both recognize the inherent transnational character of the entity to be regulated, and seek to ensure the balance between the need to keep the technology accessible and the need to take into account national sovereignty.[91]
The Outer Space Treaty, still the most relevant instrument in space law despite its forty years of age, contains statements such as "The exploration and use of outer space [...] shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. [...] Outer space [...] shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law.".[92] Interestingly,

89 International Tribunal for the Law of the Sea, Guidelines Concerning the Preparation and Presentation of Cases Before the Tribunal, 1997, available at URL http://www.itlos.org/documents_publications/documents/Itlos.9.E.14.11.06.pdf

90 *Supra* note 3.

91 See s*upra* note 3 and the Constitution of the International Telecommunication Union, Article 1, to get an idea of the similarities between the aims of ITU (the United Nations agency for the regulation of international communications) and a hypothetical model of Internet regulation/ dispute prevention and resolution: "The purposes of the Union are: [...] to maintain and extend international cooperation among all its Member States; [...] to harmonize the actions of Member States and promote fruitful and constructive cooperation and partnership between Member States and Sector Members in the attainment of those ends; [...] to promote, at the international level, the adoption of a broader approach to the issues of telecommunications in the global information economy and society."

92 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies ('Outer Space Treaty'), 27 January 1967, available at URL http://www.unoosa.org/oosa/en/SpaceLaw/gares/html/gares_21_2222.html , Art. 1.

such principles closely recall a much more recent document, the Declaration of Principles of the World Summit on the Information Society, that speaks of universal opportunity to participate and be included in the benefits of the Society's development.[93] Article VI, stating the duty for state parties to "bear international responsibility for national activities in outer space", including those carried out by non-governmental entities, has fostered proposals made for resolving Internet-related jurisdictional ambiguities, such as Menthe's theory of international spaces.[94]

For the specific aspect of dispute resolution, the Treaty and the subsequent Liability Convention establish the conditions of compensation for damage caused to another party by an object launched into outer space,[95] interesting as it includes the rights of non-state actors under international law (albeit indirect – compensation is awarded to their state on their behalf). According to the Convention, compensation is to be determined "in accordance with international law and the principles of equity and justice".[96] If the compensation is not agreed upon through diplomatic means, a Claims Commission is to be formed, that includes one member appointed by each party to the dispute and a Chairman appointed jointly.[97] This system is an "ancestor" of the Universal Domain Name Dispute Resolution Policy, UDRP (that will be examined as a case study in the conclusive chapter), and might serve as a model in the future for an alternative dispute resolution system to be established for Internet-related controversies.

4.4. Conclusions

While useful elements can be drawn from the bodies of law regulating sea and outer space, as this analysis has shown, they do not necessarily represent the extent to which traditional intergovernmental organisations will be involved in a future dispute resolution system for Internet-based activities. For the Internet, it is conceivable and maybe desirable to imagine a hybrid system where a "relatively thin" intergovernmental framework gives room for private ordering "to do most of the rule-making, adjudication, enforcement, and operational work."[98] The reliance on a hybrid model able to emphasize private self-regulation and alternative dispute resolution mechanisms, comprising not

93 WSIS, Geneva Declaration of Principles, 2003.

94 Menthe D. C., *Jurisdiction In Cyberspace: A Theory of International Spaces*, 4 Mich. Telecomm. Tech. L. Rev. 69, 1998, available at URL http://www.mttlr.org/volfour/menthe.pdf.

95 See Outer Space Treaty, Art. 7 and Convention on International Liability for Damage Caused by Space Objects ('Liability Convention'), 29 November 1971, available at URL http://www.unoosa.org/oosa/en/SpaceLaw/gares/html/gares_26_2777.html.

96 Liability Convention, Art. XII.

97 *Id.*, Arts. XIV-XIX.

98 *Supra* note 69.

only arbitration and mediation but also a wider range of alternatives,[99] helps respond to the Internet's challenges in two ways. Firstly, ADR can be designed in order to be much more inexpensive than traditional procedures. Secondly, it also holds an inherently transnational character, for every case when the participants in the ADR process are in different countries. If appropriately designed, such mechanisms offer lower costs, reassure participants, and solve the jurisdictional problem because the very use of them manifests consent to the proceedings.

It is now the time to turn to the next and conclusive step of this study, which will analyse how the use of the Internet itself as an instrument helps solving, in the settlement of disputes phase, the same challenges that it elicits. The issue raised by the dispute resolution systems discussed in this section is the spatial barrier they raise, as in order to use them, it is necessary for the parties to meet in front of a third party in order to analyse the controversial question until a common understanding is reached. The solution to this limit of ADR is offered by the very Internet, by bringing the parties to the conflict and the procedures for dispute resolution entirely or partially on the Web. The application of electronic technology to traditional ADR has resulted in Online Dispute Resolution (ODR) mechanisms, aimed at further increasing inexpensiveness and facility of access by end users. Such mechanisms will be the subject of the last chapter of this study.

99 E.g. credit card chargebacks, escrow arrangements, complaint bulletin boards.

5. Online Dispute Resolution

The present and conclusive chapter draws upon the lessons learned in the previous sections to discuss how the Internet's very structure and underlying vision contribute to the solution, or at least the simplification, of some of the same challenges they are posing to the field of dispute resolution – and to what extent the online equivalent of the ADR methods, called Online Dispute Resolution (ODR), are an example of this. It finally suggests some possible developments of the ODR field according to this perspective.

5.1. What Is Online Dispute Resolution?

The field of Online Dispute Resolution is comprised of a number of methods for conflict resolution that make use of online technologies as a supportive tool for settlement of disputes. This may vary from the employment of a secure chat room to post messages in a negotiation dialogue, to the work of a mediator carried on primarily through live online exchanges between the parties to a dispute. Or again, it may consist of a more formal mechanism involving an online arbitrator or panel, to whom the information is presented via a video-conference. Online mechanisms can also be mixed with the use of more traditional forms of communication such as fax or telephone; analogously, they can be used to solve disputes whose subject matter has in fact happened, or is situated, offline.[100]

The field of Alternative Dispute Resolution embraces the evolving field of ODR, as the principles and practice of ADR are also at the foundations of ODR's rationale and mechanisms. ODR is the answer to the need by online businesses and their customers, because of the emergence and steady development of e-commerce, to develop options for dispute settlement that can reflect the velocity and convenience of the Web.[101] And, most of all, able to overcome the logistical and jurisdictional barriers posed by the use of traditional ADR when it comes to international business. Mediator Gini Nelson writes:

> For business leaders, alternative dispute resolution rather than litigation has no doubt become the preferred process for handling problems, thanks to its efficiency, cost-effectiveness, and flexibility. As businesses become more global, however, the traditional methods of face-to-face mediation, arbitration or other dispute resolution processes pose

100 Katsh E. and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. San Francisco, CA: Jossey-Bass, 2001, p. 13.

101 *Supra* notes 54 and 100, p. 25.

> significant logistical barriers to parties separated by oceans or continents, calling into question traditional ADR's value in these circumstances.[102]

Nelson further argues that the limitations of traditional ADR methods might actually turn into such a relevant material obstacle for the parties that they might be forced to seek a neutral location, thereby undergoing additional important expenses, or select by default the option they were trying to avoid by engaging in ADR, i.e. ending up in a court in the jurisdiction that one of the two parties belongs to.[103]

It is recognized by most scholars and practitioners of the field that (as it happens for ADR) there is no single mechanism that will work for solving every kind of dispute. There are different types of ODR mechanisms, drawn from their offline correspondents in ADR, the most common of them being negotiation, mediation, arbitration, and sometimes a blend of two or more of them.[104]

For the first two, the primary drive behind the parties' engagement in an attempt to resolve the dispute is to settle it, emphasizing collaborative decision-making. These methods help the parties in focusing on their own needs while recognizing the other party's needs, and figuring what could be the balance between them that might lead to a successful resolution of the dispute. This is usually the method selected by online business partners that wish to maintain a business relationship with each other, and is often found to be helpful for future communication and conflict management between the same parties at a later stage. Online arbitration, similarly to its offline equivalent, is the ODR system that more closely resembles referring the matter to a court, because of the presence of a neutral third party that decides the outcome of the conflict. In this adjudicatory process, the aim sought by the parties is rather to have a clear determination of their rights and responsibilities, in a quick and inexpensive way; parties are likely to be in a business relationship that has involved a one-time transaction or purchase, and not willing to maintain their relationship for the future.[105]

The emerging field of ODR provides new elements to the debate, outlined in 4.4, concerning regulatory frameworks for Internet-based activities. This will be examined in further detail in 5.4; before such discussion, the next section will delve into the solutions provided by the application of ODR methods to the challenges posed by the Internet to commercial transactions, as well as the new challenges it raises for practitioners and end users.

102 Nelson G. and V. K. Vandaveer, *Four Questions About International Online Dispute Resolution*, EngagingConflicts.com, 2008, available at URL http://engagingconflicts.com/index.php/archives/458

103 *Id*.

104 *Supra* note 60, p. 19.

105 *Id*., p. 20.

5.2. New Solutions, New Challenges

ODR determines a number of advantages in dispute resolution processes that benefit not only the disputing parties, but also society as a whole. At the same time, from these benefits derive also new challenges, both substantive and procedural; the two sides need to be analyzed and balanced in an assessment of the field in the present, before delving into some reflections on its future.

Firstly, the use of ODR encourages parties to talk to each other about their dispute, unlike what usually happens in lawsuits (before and during which attorneys advise their clients to restrain from discussing the issue at stake with the adversary to protect the case) in the United States' and other legal systems. ADR and ODR are about favouring communication as a means to find out a constructive and balanced way to resolve the conflict.[106] Peculiar to the online setting, in addition, is that as the communication is not face-to-face, the parties can perceive to be in a less directly adversarial situation, and feel more open and talkative about their criticisms or negative perceptions, with a chance of pointing out quicker what are the most problematic elements of the case.[107]
Secondly, the confidentiality and private setting of the process, that is usually not the case for cases brought before a court, allows a trustworthy relationship to develop and the focus on settlement to increase.[108] There are, however, a few relevant cases in which ODR proceedings and outcomes are made publicly available, subject to prior agreement by the parties, in order to keep a specific community informed on the latest developments in their field (an example is UDRP; see 5.3).
Thirdly, ODR is very appealing a method time-wise and cost-wise, if compared to the very expensive and time-consuming proceedings faced by a legal action in the global environment if it is submitted to a court in a nation that is foreign for one or more of the parties.[109] It is not uncommon in these cases that the financial and temporal costs necessary to uphold the proceedings overcome the damage caused by the dispute in the first place, and this is even truer given the great number of "small" transactions elicited by the Internet's low economic barriers to entry. Perritt notes:

> When dispute resolution costs are high, as they are for traditional administrative and judicial procedures, the transaction costs of dispute resolution threaten to swamp the value of the underlying

106 Goodman J. W., *The Pros And Cons of Online Dispute Resolution*, 2003 Duke Law & Technology Review 0004, 2003, available at URL http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html

107 *Supra* note 60, p. 25.

108 *Supra* note 100, p. 22.

109 *Supra* note 54.

> transaction, meaning on the one hand that victims are less likely to seek vindication of their rights and, on the other hand, that actors and alleged wrongdoers may face litigation costs that outweigh the advantages of their offering goods and services in the new electronic markets. To realize the potential of participation by small entities and individuals and of small transactions, it is necessary to reduce the costs of dispute resolution.[110]

This is particularly evident in the author's country of nationality. Recognized as a "systematic violation" of the Italian people's right to justice by the European Court of Human Rights,[111] the unreasonable length of formal judicial proceedings in national courts – up to decades and decades in many instances – is the plague of the Italian judicial system.[112] Analogous situations are noted in different legal systems, as in the United States, where heavy court backlogs cause many cases to wait for years before they even appear in front of a court.[113]

The reduction of time and costs through the use of ODR can happen on several levels. The time or money that would be spent to travel to a physical venue, not only for traditional litigation but also for traditional ADR, are no longer necessary. Parties are also empowered to construct their own schedule of ODR sessions, avoiding the passive waiting characteristic of overloaded courts. The legal fees for an ODR process are much lower than in traditional litigation, because of the more limited assistance required by a lawyer and by the presence of expert witnesses.[114]

Fourthly, as they are empowered to programme their own time schedule, parties are also given room to exercise a greater control over both the process and the result of the proceedings. ODR procedures is almost never imposed on unwilling parties; the parties can therefore decide what types of ODR methods will be used, who the third party will be – and are as a consequence more willingly proactive in determining what is the solution that best fits their needs at a practical level. In the case of e-commerce disputes, for example, strictly legal arguments might be left aside in favour of the renegotiation of a contract or the extension of a warranty: solutions that work in the "real world

110 Perritt Jr. H. H., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. Journal on Dispute Resolution 675, 2000, available at URL http://www.kentlaw.edu/perritt/publications/15_OHIOST.J.ONDISP.RESOL.675(2000).htm.

111 See e.g. European Court of Human Rights, Bottazzi v. Italy, n. 34884/97 (Judgment of 28 July 1999).

112 De Stefano M., *La lunghezza della durata dei processi in Italia condannata dalla Corte Europea dei Diritti dell'Uomo*, 2005, available at URL http://www.dirittiuomo.it/Bibliografia/2005/DurataImpresa.htm.

113 *Supra* note 60, p. 26.

114 *Supra* note 100, p. 29.

of business".[115]

The benefits provided by ODR methods, as noted by Ponte and Cavenagh, go beyond those of the parties and extend to the general public.[116] The first has to do with the debate considered in Chapter 2: the absence of a uniform court system and uniform set of laws in the world of Internet-based activities, that may cause disputants to look for courts and realizing that jurisdictional concerns and conflicting legal authorities impede their efficiency and effectiveness to the point where they remain unresponsive to the citizens/ end users' right to justice. Flexibility, responsiveness, speed and efficiency that constitute the backbone of the structure and culture of the Internet, have the potential to channel and implement this right to justice.[117] This right is fostered not only by of the efficiency of ODR methods in themselves, but also because they help reduce court caseloads and backlogs by freeing the time of judges for cases that are not suitable to be solved through alternative methods. This, in turn, leads to a more efficient use of court resources.

At the same time, while through ODR methods the Internet helps solving the challenges it raises, some of these solutions "hide a double-edged sword",[118] shortcomings that derive from the same features that make them innovative and useful. It is important to consider these as well, in order to have a complete picture of ODR and subsequently assess its future developments and success.
The first limitation consists in the need, both for ADR and ODR methods, to obtain the parties' previous consent to participate in the process.[119] The greater control by participants over the process and outcome of the dispute presupposes both parties' will to cooperate, something that in a new and emerging field as ODR might be denied, despite the suitability of the situation to the use of such methods, because of the lack of familiarity with online tools or with the nature of the process. Similar issues concern the enforcement of the outcomes of ODR proceedings: as mentioned, arbitration awards are relatively easy to enforce because of the presence of a public law framework that regulates this, but it is less the case for other ODR outcomes (and their ADR equivalents), that basically rely on "good faith compliance with the agreed-upon set of solutions."[120]

115 *Supra* note 60, p. 28.
116 *Id.*, p. 24.
117 See 2.3.
118 *Supra* note 60, p. 31.
119 *Supra* note 100, p. 73.
120 *Supra* note 60, p. 34.

Another issue can derive from the potentially very beneficial property of online tools, i.e. to put in contact physically distant parties. The distance between the parties can raise some problems as well as advantages. While on one hand the lack of face-to-face communication can elicit more sincere comments and criticisms and a more open way to address the subject of the dispute, the reverse can also be true.[121] For some individuals, it is the body language and nonverbal communication that give precious information about the other party's concern and possible solutions. It is also easier, in an online situation, to "hide" behind the online medium of communication and create situations of abuse such as flaming or inappropriate language use.[122] However, some online technologies such as video stream or video-conference are helping to fill the gap caused by lack of personal interaction and can be privileged over more "private" methods if so desired; the role of the neutral third party in avoiding abuse or uneasiness can also be crucial, as noted by practitioners.[123]

A third relevant issue has a more global ethical relevance, and has to do with the confidentiality of ODR proceedings and outcomes (the UDRP, examined in the next section, is one of the few but relevant exceptions in this regard). While the guarantee of confidentiality can be instrumental for an effective outcome of the dispute, the prevalence of private ordering might lead to lack of public exposure for a number of unfair business practices, discriminatory behaviours and violations of contracts, whose knowledge by the general public would result in their empowerment and better protection as citizens, customers and end users.[124] Strictly linked to this issue is the absence, as of today, of standards related to ODR practice: expertise in ODR is not clearly defined in terms of professional requirements, nor are ODR practitioners established as a professional order – something that might be, if implemented, a significant step towards not only the acknowledgment of a "category" as such, but also a "marketing campaign" *vis-à-vis* citizens, and increase the opportunities for potential users to actually become aware of the different possibilities at their disposal.

The subjects of confidentiality and trustworthiness are currently debated, and the answer to the confidentiality vs. protection dilemma is likely to derive from the paradigm of Internet regulation that will ultimately prevail.[125]

The next section will provide a practical example of what has been said above, by analyzing one of the best known, developed and controversial ODR

121 *Supra* note 100, p. 83.

122 Paccagnella L., *La comunicazione al computer: Sociologia delle reti telematiche*, Il Mulino: Bologna, 2000, p. 111.

123 *Supra* note 106.

124 *Supra* note 60, p. 33.

125 See 4.3 and 5.4.

bodies, emblematic in some respects and unique in others: the Universal Domain Name Dispute Resolution Policy (UDRP).

5.3. The UDRP: A Case Study

The UDRP is considered, as of today, the paramount example of ODR use in Internet-related issues.[126] The body was developed by the World Intellectual Property Organization (WIPO) and implemented by the Internet Corporation for Assigned Names and Numbers (ICANN) as its main dispute resolution organ. UDRP is stipulated in advance as a dispute resolution mechanism in all contracts concerning the registration of generic top-level domains (gTLDs - .com, .edu, .org, .net). Its unique feature consists in the fact that arbitration awards are applied directly through changes in the Domain Name System without resorting to enforcement through national courts.

More in detail, the functioning of UDRP is as follows. Complainants usually wish to have a registered domain name cancelled or transferred to them, because it is their belief that the domain name in question "is identical or confusingly similar to a trademark or service mark" they have rights on, or that the domain name "has been registered and is being used in bad faith."[127]

The complainant has the right to choose the members of one of four ICANN-accredited provider organisations to adjudicate the dispute, as well as to determine the composition of the panel that ranges from one to three members. The panel can decide on such remedies as the cancellation or the transfer of the domain name. UDRP hearings are mandatory proceedings once initiated, but they are not exclusive inasmuch as the dispute can nonetheless be brought in a court of competent jurisdiction. ICANN has to eventually respect the decision made in such venue.

The failure to respond to a complaint within twenty days, determines the success by default of the complaint, something that happens in most cases – a ten-day time span is allowed to give the respondents the opportunity to appeal to a court.

Panels are not clearly directed as to what procedural rules they should apply. Instead, they are authorised to adopt "any rules and principles of law that [they deem] applicable."[128] Hancock notes that several panelists have tended to apply the procedural rules of their home jurisdiction, whether or not it is

126 *Supra* note 60, p. 25.

127 ICANN, Rules for Uniform Domain Name Dispute Resolution Policy, 1999, available at URL http://www.icann.org/udrp/udrp-rules-24oct99.htm.

128 *Id.*, 15(a).

also the home jurisdiction of the parties.[129]
Unlike what happens for many ODR proceedings and results, the decisions of the UDRP's Panels are posted on their website regularly and often, with a view to keeping the community interested in domain names disputes informed on the latest developments in the field. The decisions are made public because of a prior agreement between domain names registrars and the UDRP, which is activated at the moment of registration.[130]

The UDRP has been alternatively praised and criticized by academics, both content- and procedure-wise.[131] While the debate on substance goes beyond the scope of this study,[132] let us examine the debate on procedures in more detail.
While recognizing the presence of shortcomings (that will be discussed further below), Hancock points out that the UDRP was designed to provide an effective solution, cost- and time-wise, to one of the Internet's "hot issues", the battle for domain names – and argues that its effectiveness has been proved by facts as of today. He also emphasizes the voluntariness of the process:

> Parties are free to litigate if they so chose. Thus if the battle is between competing proprietary interests, it behooves the complainant to litigate, rather than proceed under the UDRP. If damages are an important issue, then a complainant will also likely chose to litigate as the UDRP does not allow for an award of damages.[133]

The main criticism is the presence of differing statistical trends among the arbitration centers. In the UDRP, complainants are granted the right to choose which dispute resolution provider should hear their complaint, and

129 Hancock D., *An Assessment of ICANN's Mandatory Uniform Dispute Resolution Policy in Resolving Disputes Over Domain Names*, 2001(3) The Journal of Information, Law and Technology (JILT), 2001, available at URL http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_3/hancock/.

130 *Supra* note 60, p. 25.

131 While Hancock describes the UDRP as "a tremendous achievement in a key aspect of Internet Governance" (2001, cit.), Milton Mueller goes as far as saying that "Until the selection of UDRP panelists and the interpretation of bad faith is altered [...] the UDRP will represent a small but significant threat to free and robust expression on the Internet." See Mueller M., *Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP*, 2002, available at URL http://dcc.syr.edu/markle/markle-report-final.pdf , p. 27.

132 It is however interesting to note briefly the main criticism, i.e. that domain names, that were once just an identifier for IP addresses more discernible for the general public, have turned into the expression of trademarks and personal names of their owners, and these are, save a few exceptions, heavily protected. Mueller argues that this happens because the panelists are mostly intellectual property lawyers with strong professional links to trademarks owners (*Id.*, p. 23).

133 *Supra* note 129.

this arguably produces inappropriate incentives for providers to pronounce themselves in favour of complainants. Mueller notes that out of the four independent arbitration services that ICANN has accredited to handle UDRP cases, (WIPO's Domain Name Dispute Resolution Service - DNDRS, the CPR Institute for Dispute Resolution, the National Arbitration Forum and eResolutions), the providers with the greatest propensity to decide for complainants, WIPO and NAF, were assigned the majority of cases, while the service less likely to decide for complainants, eResolutions, was assigned the lowest proportion of cases.[134] Further research suggests a systemic bias of the principal arbitration services (WIPO and NAF) towards panellists that are the most complainant-friendly.[135] The "forum-shopping" issue is recognized by UDRP praisers as the main shortcoming of the body, as well; however, it is pointed out that, given a free market to select among the four arbitration centers, all will undoubtedly work towards the obliteration of any bias, to maintain or augment their share of cases. The possibility for a losing party to appeal a decision under the UDRP, that causes the transfer of the domain name to be put on hold, is also cited as a possible remedy.[136]

Proposals for reform of the UDRP have been put on the table to eliminate problems such as the systemic bias and the overwhelming amount of respondent defaults (the failure of a defendant in a dispute to file any response to the complaint in the two-week time span, that leads to a case been decided based exclusively on the complainant's assertions).[137] These include the pre-payment by complainants of a bond to be received by the other party if the complaint is deemed unfounded; a more "random" selection of panellists; a selection of panellists operated by domain name registrars; the institution of a three-member panel by default.[138] ICANN has, as of today, failed to take into consideration any of such proposals; waiting for further developments, the UDRP remains the controversial body that, despite its limitations and shortcomings, is nonetheless deserving of interest as an effective solution, through an ODR, alternative and voluntary process, to one of the Internet's most problematic issues – and, likely, on its way to create a body of case law that will prove useful in the future, and for the eventual establishment of other similar bodies.

134 Mueller M., *Rough Justice: An Analysis of ICANN's Dispute Resolution Policy* (Version 2.1), 2000, available at URL http://dcc.syr.edu/miscarticles/roughjustice.pdf.

135 *Id.*, p. 23.

136 *Supra* note 129.

137 *Supra* note 134, p. 14.

138 *Supra* note 129.

5.4. Conclusions: ODR in the Future

The field of Online Dispute Resolution has only very recently emerged, and the institution of ODR mechanisms is rapidly spreading. It is a response to the, equally recent and equally rapid, spreading of an entity that did not exist in our lives fifteen years ago, but is now an essential part of them, from business to leisure. It is a "natural" response, inasmuch as it makes use of the Internet as a tool to resolve issues and disputes that mostly derive from the unique and deeply embedded features of the Internet itself. It is a response that holds great potential, that needs to be appropriately acknowledged, understood and used for the maximum possible benefit of direct users and of the community at large. This conclusive section will examine some of the main issues the field is facing, and suggest some possible developments.

5.4.1. Developing Awareness

In many countries worldwide (Italy is once again a very appropriate example), traditional jurisprudence and the court-based judicial systems have a long-standing tradition. The perception by the general public is that there is little or no alternative to formal court proceedings in order to resolve their disputes, and parties seeking a method to resolve their dispute will likely go to the venue that they know best and consider legitimate, despite the many shortcomings of a traditional judicial system for disputes concerning international Internet-based activities.

The purpose and nature of ODR are certainly known to many in the fields of IT law and ADR, and is becoming a field in its own right with notable rapidity; however, it is still very recent and unknown to many that could potentially benefit from it, either businesses or consumers.[139] It is very important that all potential parties be aware of their possibility to make the ODR choice, and this would benefit not only the diffusion of such methods in themselves, but would also foster a further spread of e-commerce.[140]

The increase of awareness about ODR is in the hands of both the public sector (governmental and judicial authorities) and the private sector (online businesses, e-commerce organizations, trust-mark bodies),[141] through educational programmes, public forums and advertising, and online promotions such as videos, banners, and resource links.

E-businesses themselves, in particular, can play a defining role in increasing the awareness and education of their online customers about ODR, because

139 *Supra* note 106.

140 *Supra* note 54.

141 *Supra* note 60, p. 148.

of the fact that online businesses are in fact "the primary customer interface on the Web."[142] By providing detailed and reliable information on the ODR methods they have available, e-businesses can demonstrate their attention to good business practice while at the same time, providing themselves and their customers with a flexible, speedy and effective means of solving disputes. The American Bar Association, in its Recommended Best Practices for Online Dispute Resolution Service Providers, has also noted the key role that online businesses can play in the increase of understanding of ODR issues by the public.[143]

Last but not least, the academic community can also play a role by introducing in pertinent courses (in the fields of business, law, and social studies of technology), the rationale behind ODR, its main principles and fields of application.

5.4.2. Back to Regulation: What's With ODR?

Throughout this study, it has been highlighted several times that Internet-based activities and transactions raise a number of legal dilemmas, because of the new possibilities and modalities of interaction offered by developments in technology. The conclusions to the previous chapter have suggested the creation of a private-public hybrid model for the future dispute resolution mechanism for Internet-based activities, but also outlined the number of questions that remain open, among which: how much should a component prevail over the other? To what extent should the existing public law framework and intergovernmental organizations play a role in this system? These questions, and others posed in Chapter 3, will be revisited in this section in light of what has been said about ODR, in order to reframe the question in this way: if ODR is to become the dispute resolution mechanism for Internet-based activities in the future, how should it be regulated?

Obviously enough, no definite answer is provided by facts as of today. Some governments, such as the United States, have issued a few documents providing guidance for best practices in specific aspects of ODR (e.g. privacy), or stating the applicability of the equivalent ADR methods, to practitioners within the country.[144] While providing useful starting points, these documents are however inadequate to address the matter at a global level, and it is at this level, for reasons that have been explained extensively, that the most

142 *Id.*, p. 148.

143 American Bar Association Task Force on E-Commerce and ADR, Recommended Best Practices for Online Dispute Resolution Service Providers (II, Transparency and Adequate Means of Providing Information and Disclosure), 2002, available at URL http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf.

144 Such as the cited Recommended Best Practices issued by the ABA.

urgent attention is required. It is likely that citizens-users-customers' trust in, and familiarity with, ODR methods will greatly increase if a series of standards is agreed upon internationally and some kind of structure is set up to ensure compliance. How this structure should be, and the field of ODR ultimately regulated at the global level, is likely to depend on the dominant approach to Internet regulation in general.[145] Light-weight or heavy-weight? Relying on national governments, on traditional intergovernmental bodies or on the development of new ones? Emphasizing private ordering as much as possible or developing an enforcement structure?

As it has been clear in other moments throughout this study, reliance on national legal systems does not seem to be the way. If national laws are given preference as the main way to regulate online dispute resolution systems, this will benefit ODR practitioners and participants within the country, but will complicate the use of ODR in every situation in which participants come from different nations – already identified as the main drive behind the selection of ODR over other dispute settlement mechanisms.[146]

At the other side of the spectrum is a model that outlines a minimal or non-existent role for governments, focusing exclusively on the self-regulatory potential of alternative dispute resolution mechanisms. In this vision, each private marketplace the Internet is composed of issues its own Terms of Use, and violations of the obligations entailed by them will be examined and decided by dispute resolution structures established by the same entity.[147] Analogously, separate ODR service providers can self-certify their compliance with standards decided by either the provider itself or by a government.[148] While it is argued that this approach will ultimately select the best methods, as "private market owners will compete with one another to provide the most reliable business partners with the best conflict resolution methods in order to attract business",[149] this model would also minimize uniform guidance for parties, and might lead to a variety of quality standards and levels of compliance, thus potentially decreasing the public's level of trust in the field and its usefulness.

Different roles for public and private sectors, appearing to be more suitable for a global issue as the one at stake, is expressed by those scholars that suggest a co-regulation system, as a way to reconcile the preservation of national sovereignty and the need for uniformity in and simplification of business practices. Co-

145 *Supra* note 60, p. 136.

146 *Id.*, p. 137.

147 See e.g. eBay's User Agreement, Resolution of Disputes section, available at URL http://pages.ebay.com/help/policies/user-agreement.html.

148 This is the approach of the ABA in its Recommended Best Practices (IX, Accountability for ODR Providers and Neutrals).

149 *Supra* note 60, p. 137.

regulation is outlined as a collaboration between governments at the global level to determine the main trends of ODR regulation, followed by a multi-stakeholder (consumers, legal practitioners, private sector) implementation at the national levels of more tailor-made, specific provisions.[150] This approach is interesting inasmuch as intergovernmental organizations are likely to play a large role in the initial phase, but the focus is nonetheless on the private ordering part, derived from the practical needs of the actors in the commercial arena – and is as a consequence more likely to encounter their satisfaction, while an "umbrella" of legitimacy is provided by the intergovernmental system. It seems that, at least in an initial phase when ODR methods are still emerging, this might be the approach that ensures that an increasingly large number of individuals come into touch and get familiar with the field. However, with time and practice, a major emphasis on the private component of ODR methods might be envisaged.

5.4.3. "Human Factor" and Technological Development

A final word is deserved by the main character of this study: the Internet, and its future development between technical and human factors in relation to ODR. The range of possibilities that are available for communication during ODR proceedings is already broad. Both scholars and practitioners identify as the "next step" in ODR the search for new ways to replicate more accurately the face-to-face experience. Beal argues that ODR will not reach its full potential until

> videoconferencing becomes commonplace and the following apply: (1) video cameras and microphones are built into computers; (2) videoconferencing software is bundled with computers; and (3) modems are fast enough (i.e., 'broadband' or 412 kilobytes per second and greater) to accommodate videoconferencing.[151]

Ponte and Cavenagh reinforce this perception by pointing out that in the coming years, greater interactivity in software programs supporting ODR and more effective and rapid web conferencing needs to be built, "to mimic the human elements of an in-person meeting."[152]
While it will certainly be interesting to have the possibility of an interaction that reproduces more faithfully a real-life, face-to-face interaction, this argument by

150 Patrikios A., *The Role of Transnational Online Arbitration in Regulating Cross-Border E-Business – Part I*, Computer Law and Security Report 24(1), 2008, pp. 66-76.

151 Beal B. L., *Online Mediation: Has Its Time Come?* 15 Ohio St. J. on Disp. Resol. 735, 2000, cited in *supra* note 106.

152 *Supra* note 60, p. 149.

Hang should also be kept in mind:

> the problem with face-to-face contact is that it does not take into account the fact that anonymity is highly valued over the Internet. If there must be face-to-face contact for each dispute resolution, [ODR] is more likely to fail because anonymity is part of the Internet culture. The advantage of [ODR] is that [it] may preserve anonymity and resolve the dispute at the same time.[153]

An overall lesson can be drawn from this debate: future ODR mechanisms will likely need to reach the appropriate balance between, on one hand, the "human factor" that will make them more similar to their predecessors and, on the other hand, the possibilities offered by rapidly developing technology, that will push ODR development along unique and unprecedented directions. The more both of these components will be acknowledged and implemented in the development of ODR, the more it will be able to reach the widest possible number of users – and enable them to make use of its benefits.

153 Hang L. Q., *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837, 2001, cited in *supra* note 106.

6. Concluding Remarks

This article, issued by Reuters, appeared in several online news centers on 15 June 2008:

Scots family embroiled in Narnia Internet dispute
Sun Jun 15, 2008
By John Joseph

LONDON (Reuters) - A Scottish family have become embroiled in an intellectual property dispute with the estate of the author C.S. Lewis after buying a Narnia Internet domain name for their 10-year-old son as a birthday present.
Richard and Gillian Saville-Smith, who live in Edinburgh, paid 70 pounds to purchase the domain name Narnia.mobi from the internet registration company Fasthosts in 2006 so their son could have it as an email address.
They were asked to return the domain name to the C.S. Lewis company, owner of the author's estate, but refused. The family then received a 128-page legal complaint filed with the World Intellectual Property Organisation (WIPO) in Switzerland.
"We'd been saving it as a surprise for our little boy's birthday, to coincide with the release of the Narnia film," said Mrs Saville-Smith, referring to the British release of Walt Disney Co's "The Chronicles of Narnia: Prince Caspian".
No one was available for comment from Baker & McKenzie, the law firm that represents the C.S. Lewis estate.
"Prince Caspian", the second in a series of films based on Lewis's "Narnia" books, will have its British premiere on June 19. It follows 2005's "The Lion, the Witch and the Wardrobe".
"Our whole family are great admirers of C.S. Lewis and he must be turning in his grave about all this," added Mrs Saville-Smith, who is an award-winning Scottish poet.
The family must reply to WIPO by June 23, with the organisation expected to make its decision within a month.
"We've never made any money out of this domain and have no interest in doing so," Mr Saville-Smith, who is an accountant, told Reuters in an interview.
"We don't have the money to hire intellectual property lawyers, so we're saying 'help'. One thing for sure is that our response won't be 128 pages long, it will be more like 10 pages -- we're looking at quality rather than quantity.
"Even after WIPO makes its decision that's not the end of it because either party can appeal that verdict." he added.
"If the WIPO decides in favour of the C.S. Lewis estate, that would be the end of it for us. However, I don't expect they will, because their case is flimsy and we've done nothing wrong."

Hundreds of disputes arise every day. For the Internet, via the Internet... and for which the best resolution lies in the use of Internet-based tools, within a legal framework that takes into account the unique features and challenges of the Internet. The case of the Saville-Smith family is only the most recent, prominent and newsworthy as of the day I am concluding this study, but by the time this is printed and read, a lot more will have appeared, each with its specificities and a common ground to build solutions on.
The need to find innovative solutions in the field of dispute settlement, following the worldwide spreading of Internet-based transactions and activities is acknowledged by both practitioners and scholars in the field of IT law. Both categories often fail, however, to address it in an integrated way, being either overly practical (focusing on the Internet as a practical tool in dispute resolution proceedings) or overly theoretical (studying the Internet as a juridical entity, and the effects it has on juridical persons). This study has meant to provide a contribution towards this integration, in a journey that started with a discussion of the Internet and its unique structural and cultural features; continued with a discussion of jurisdictional issues arising out of Internet-based activities; turned to analyse the suitability of alternative dispute resolution mechanisms to regulate such activities, and how these mechanisms might be incorporated in a private-public hybrid regulation system; examined how the physical barriers of traditional ADR can be overcome by the use of online technologies during dispute resolution proceedings, thus called Online Dispute Resolution; and finally assessed the main critical issues faced by ODR as an emerging field in a phase of steady development. This study as a whole has hopefully done enough to show that the best way to improve dispute settlement for Internet-related activities is the quantitatively and qualitatively increased use of online technologies in dispute settlement proceedings.

This evolution cannot, however, happen in isolation – but must take into account a very complex past, present and future. The stakeholders in the process of determining appropriate means of regulation for Internet-based transactions and activities are many, and their needs often conflicting. Governments sell to citizens the application of content filtering mechanisms of dubious effectiveness and legitimacy as a "necessary evil" to preserve their sovereignty and fight international crime; activists challenge every restriction as a free speech violation and censorship; online consumers seek products that are "just a click away" while wondering about data protection in the online world; e-businesses craft customized marketing campaigns based on previous, digitally recorded, online purchases of their customers. In such an articulate landscape, it is a very difficult process to figure out the solution to the numerous challenges faced by – and posed by – the Internet, at the ethical, legal, economic and purely technical levels. And yet, the necessity to keep

looking is increasing every time a human being gets online for the first time, and uses the Web as a means of interaction, transaction, and engagement.
In this scenario, however, some benchmarks can be identified. And one of them is the recognition by all the different parties engaged in Internet-based activities that traditional methods of dispute resolution, court-based litigation in the first place, do not respond to the needs of most online disputes, because of the transnational nature of most of them. In contrast, ODR's rapid, effective, impartial treatment of controversies in the global commercial arena is seen as holding great promise and potential. Several UN agencies from OECD to WIPO, supra-national organisations such as the EU, governments such as the United States, private sector-led initiatives like the Global Business Dialogue on Electronic Commerce: all have expressed support to ODR as the future means of solving transnational disputes, and many have elaborated model codes of conduct to improve their efficiency and transparency, for them to be more widely known and trusted by the public in their triple capacity as citizens, consumers, and users of the Internet.
Clearly, many questions remain open in the emerging field of ODR, and addressing them will be of primary importance for its future development. Is the international legal system in fact going in the direction of an "update", changing from a state-dominated body of law to a system taking into account the presence of other stakeholders such as the private sector? What will be, if any, the view of the Internet as an entity and a tool that will prevail in the future, and as a consequence, what will be its prevailing model of regulation? Will the future dispute resolution system for Internet-based activities consist of a hybrid between public and private ordering, and how will alternative dispute resolution mechanisms, and their online equivalents, be taken into account? Will ODR be standardized, and to what extent?
Throughout this study, these questions have been hinted at, and some possible developments suggested. It is also clear that much work still needs to be done, that will require the participation of all involved stakeholders – and their constant awareness that the entity they are trying to regulate possesses some deeply embedded features, that pose a number of challenges to the international legal and political system, but can also become the key to solve these challenges, if understood, respected and properly promoted.

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The steadily increasing quantity and variety of Internet-based commercial activities worldwide calls for the development of innovative tools, codes and practices of dispute resolution. This work supplies the missing link between two visions of the Internet, as a venue for commercial transactions and as a tool in alternative dispute resolution proceedings, to suggest that the Internet's very features that are challenges the field of dispute settlement can become the primary key to solve, or at least simplify, these challenges. A special attention to the legal and social dimensions of the European space is paid as the study discusses the present and near future of dispute resolution mechanisms "for the Internet, via the Internet".